

1 Graham Rex (AZ Bar # 041061)
2 CENTER FOR BIOLOGICAL DIVERSITY
3 P.O. Box 710
4 Tucson, AZ 85702-0710
5 (928) 519-3318
6 grex@biologicaldiversity.org

7 Roger Flynn (CO Bar # 21078)
8 WESTERN MINING ACTION PROJECT
9 P.O. Box 349; 440 Main Street, #2
10 Lyons, CO 80540
11 (303) 823-5738
12 roger@wmaplaw.org
13 *Pro Hac Vice*

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

Patagonia Area Resource Alliance; Center for
Biological Diversity,

Plaintiffs,

v.

United States Forest Service; United States
Fish and Wildlife Service,

Defendants.

Case No. 4:26-cv-00496-RCC

**MOTION FOR
PRELIMINARY
INJUNCTION AND
MEMORANDUM IN
SUPPORT**

1 This case involves the federal government’s approval of the expansion of
2 Australian company South32 Hermosa’s mining operations within 52,438 acres of public
3 land in the Coronado National Forest. This sprawling industrial compound will include
4 the company’s 38-million-ton waste dump, an unnecessary new 7.6-mile “primary”
5 access road (duplicating the already-existing access road), six additional groundwater
6 wells, two new “outfalls” where two million gallons of treated “mine water” will be
7 discharged per day for 83 years, and more than a hundred “exploratory” and
8 “geotechnical” drill holes (many drilling up to 6,800 feet deep into the aquifer). The
9 approved Project also includes a 7.3-mile overhead power transmission line and related
10 access roads and 47 associated towers, proposed by Tucson Electric Power (“TEP,” a
11 subsidiary of UNS Energy Corporation, “UNSE”). This maze of industrial facilities will
12 scar what is now a largely undeveloped natural landscape on public National Forest
13 lands, and includes lands a mile and a half north of the last place where jaguars and
14 ocelots can cross the international border for more than 120 miles.

15 The Project Area also contains federally-designated critical habitat, established
16 pursuant to the Endangered Species Act (“ESA”) for the conservation of threatened and
17 endangered species, including jaguars, Mexican spotted owls, western yellow-billed
18 cuckoos, beardless chinchweed, and northern Mexican gartersnakes. Rare plants
19 including Bartram’s stonecrop likewise call the Project Area home. For many of these
20 imperiled species, the populations found in the Project Area are among the most
21 important populations anywhere on Earth—these unique populations are vital to the
22 species’ survival and recovery. Both the Forest Service and FWS concluded that the
23 Hermosa Project is likely to adversely affect each of these species.¹

24 Despite the destruction this Project will unleash on this extraordinary wildlife
25 hotspot, the Project was rushed through environmental review “in record time” via the

26 ¹ See U.S. Forest Serv., *Final Biological Assessment: Hermosa Critical Minerals Project*
27 (July 2025) (“BA”) (excerpts), at 1-5 (Ex. 3); U.S. Fish & Wildlife Serv., *Final*
28 *Biological Opinion: Hermosa Critical Minerals Project* (Feb. 26, 2026) (“BiOp”) (Ex.
2), at 2–3.

1 Fixing America’s Surface Transportation Act (also known as “FAST-41”) process.² The
2 U.S. Forest Service approved the Project via its Record of Decision (“ROD”) (Ex. 1),
3 which relied on the U.S. Fish and Wildlife Service’s (“FWS”) Biological Opinion
4 (“BiOp”) (Ex. 2).³ Unsurprisingly, the agencies’ review of the Project’s environmental
5 impacts is riddled with inconsistencies, incomplete analysis, ambiguities, and legal
6 violations.

7 As discussed below, the agencies’ review of the Project’s impacts on ESA-
8 protected critical habitat was premised on a regulatory definition of “destruction or
9 adverse modification” that a federal court has ruled illegal and vacated. Moreover, FWS’s
10 BiOp inexplicably authorizes an *unlimited* amount of harassment to jaguars—in violation
11 of the ESA and the Administrative Procedure Act (“APA”). The Forest Service also
12 violated its Organic Act by ignoring these significant impacts on wildlife.

13 In addition, the agencies approved the bulldozing of a new secondary access road
14 based on an illegal assumption that federal mining laws provide a statutory right to
15 construct the road, despite admitting that the road is not necessary, as the mine site is
16 currently accessed by an existing road South32’s mining operations have used for years.
17 This tactic violated the Federal Land Management and Policy Act (“FLPMA”) and the
18 Forest Service Organic Act by improperly exempting the secondary access road—
19 misleading labeled “Primary Access Road” or “PAR”—and two new pipelines from the
20 strict federal laws governing such discretionary rights-of-way across public land.

21 Lastly, the Forest Service violated the National Environmental Policy Act
22 (“NEPA”) by failing to analyze the baseline conditions of public resources, especially
23 groundwater and its dependent environments that will be seriously impacted.

24 Notwithstanding Plaintiffs’ Complaint detailing these and numerous other legal

25 ² U.S. Dep’t of Agric. & U.S. Forest Serv., *USDA Advances Trump Administration Effort*
26 *to Boost U.S. Mineral Energy Production* (July 7, 2026), [https://www.usda.gov/about-](https://www.usda.gov/about-usda/news/press-releases/2026/07/07/usda-advances-trump-administration-effort-boost-us-mineral-energy-production)
27 [usda/news/press-releases/2026/07/07/usda-advances-trump-administration-effort-boost-](https://www.usda.gov/about-usda/news/press-releases/2026/07/07/usda-advances-trump-administration-effort-boost-us-mineral-energy-production)
28 [us-mineral-energy-production](https://www.usda.gov/about-usda/news/press-releases/2026/07/07/usda-advances-trump-administration-effort-boost-us-mineral-energy-production) (Ex. 4).

³ The Forest Service selected a combination of Alternatives 2 and 3. ROD (Ex. 1) at 2-2.

1 violations, drilling operations and construction of the transmission line and project roads
2 recently began. However, as described in the parties' Joint Motion and Proposed
3 Schedule (ECF Doc. 14), in order to avoid Plaintiffs having to request a temporary
4 restraining order, South32 and TEP/UNSE have agreed to forestall further new ground
5 disturbance on undisturbed public lands while this Court considers the instant motion.
6 These commitments to forestall new ground disturbance are temporary, and expire
7 November 6, 2026. Absent injunctive relief from this Court, starting on November 7,
8 2026, Project activities will resume.

9 This imminent destruction will include roads blasted and bulldozed across the
10 National Forest, removing vegetation and razing trees in Mexican spotted owl critical
11 habitat. Roads, drill pads, and excavators will carve through a key habitat corridor upon
12 which "the conservation of both ocelots and jaguars is dependent,"⁴ "significantly,"⁵
13 permanently, and "irreversibl[y]"⁶ altering that corridor. More exploratory drill rigs will
14 bore into the earth, bringing industrial noise, light, pollution, and equipment into these
15 remote wildlife sanctuaries. In addition, electrical transmission lines, and their associated
16 roads, towers, and other infrastructure will further destroy and fragment habitat. This
17 harm cannot be undone through subsequent judicial relief and, if not enjoined by
18 November 6, will occur before the Court can adjudicate the merits of Plaintiffs' claims.

19 Plaintiffs move this Court for a preliminary injunction to maintain the status quo
20 and prevent further imminent, irreparable harm to threatened and endangered wildlife,
21 designated critical habitat, and Plaintiffs' members interests until this Court can issue a
22 final decision on the merits of this case. Specifically, Plaintiffs request an order

23
24 ⁴ BiOp (Ex. 2) at 226; *see also id.* at 94, 227, 230 (stating that the Hermosa Project area
25 lies just a mile and half north of the final remaining place where jaguars and ocelots can
26 cross the U.S.-Mexico for 120 miles); *id.* at 205-06, 220, 226 (explaining that cross-
27 border habitat connectivity is essential for jaguar and ocelot conservation).

28 ⁵ *Id.* at 247 (concluding that the Hermosa Project "is expected to significantly alter
connectivity to Mexico").

⁶ U.S. Forest Serv., *Final Environmental Impact Statement: Hermosa Critical Minerals
Project* (Mar. 2026) ("FEIS") (excerpts) (Ex. 5), at 3.20-4.

1 preliminarily enjoining all South32 and TEP/UNSE operations approved in the ROD and
2 analyzed in the BiOp until the merits of Plaintiffs' claims have been adjudicated.

3 **PROCEDURAL BACKGROUND**

4 The Forest Service approved all Project activities on July 7, 2026, in its ROD
5 which relied on a BiOp issued by FWS on February 26, 2026, and a Final Environmental
6 Impact Statement ("FEIS") issued by the Forest Service in March 2026. The Forest
7 Service formally authorized Project operations by signing South32's Plan of Operations
8 in September 2026, and Project implementation began shortly thereafter.⁷

9 On September 29, Plaintiffs filed their Complaint for Vacatur, Declaratory, and
10 Injunctive Relief, challenging the agencies' violations of the ESA, APA, FLPMA, the
11 Forest Service Organic Act, and NEPA. ECF Doc. 1. South32 filed its unopposed motion
12 to intervene on October 6, which this Court granted on October 8. ECF Docs. 7, 10.
13 TEP/UNSE filed its unopposed motion to intervene on October 9. ECF Doc. 12.

14 **STANDARD OF REVIEW**

15 In general, a plaintiff seeking a preliminary injunction must establish (1) it is
16 likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of
17 preliminary relief, (2) the balance of equities tips in its favor, and (4) an injunction is in
18 the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a
19 sliding scale test to these factors and if the plaintiff can at least raise "serious questions
20 going to the merits," and demonstrate "a balance of hardships that tips sharply towards
21 the plaintiff," the plaintiff is entitled to injunctive relief "so long as [they] also show that
22 there is a likelihood of irreparable injury and that the injunction is in the public interest."
23 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

24 However, in enacting the ESA, "Congress established an unparalleled public
25 interest in the 'incalculable' value of preserving endangered species." *Cottonwood Env't*

26 ⁷ Plaintiffs, and Plaintiffs' counsel, have repeatedly requested that the Forest Service and
27 South32 provide the approved Plan of Operations, including an August 25, 2026 Freedom
28 of Information Act request to the Forest Service, but the agencies and companies have yet
to disclose the final Plan of Operations.

1 *L. Ctr. v. USFS*, 789 F.3d 1075, 1090 (9th Cir. 2015) (citing *Tenn. Valley Auth. v. Hill*,
 2 437 U.S. 153, 187–88 (1978)). Accordingly, when a party seeks injunctive relief based on
 3 harm to ESA-listed species, “courts do not have discretion to balance the parties’
 4 competing interests.” *Id.* Because “the equities and public interest factors always tip in
 5 favor of the protected species,” Plaintiffs need only show serious questions on the merits
 6 and a likelihood of irreparable harm in order to receive injunctive relief. *Id.* at 1091.

7 **ARGUMENT**

8 Because Plaintiffs easily demonstrate serious questions on the merits and a
 9 likelihood of irreparable harm, Plaintiffs are entitled to an injunction. *See id.* at 1090–91.
 10 But even if the Court addresses the balance of the equities and the public interest factors
 11 under other federal claims, injunctive relief is warranted. The federal agencies and
 12 South32 admit that even if the federal approval is vacated entirely (as if never issued),
 13 South32 can continue mining as usual for 10 years on its private lands. Relatedly, the
 14 new transmission line cutting across ESA-designated critical habitat to serve future
 15 mining is also not needed while this case is adjudicated.

16 **I. Plaintiffs raise serious questions on the merits.**

17 “Serious questions on the merits” are those that present a “fair ground for
 18 litigation and thus for more deliberative investigation.” *Republic of the Philippines v.*
 19 *Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). “Serious questions need not promise a
 20 certainty of success, nor even present a probability of success, but must involve a ‘fair
 21 chance of success on the merits.’” *Id.* (citation omitted).

22 Each of the following claims independently raise serious questions on the merits:⁸
 23 (1) FWS’s BiOp applied an unlawful interpretation of the ESA’s critical habitat
 24 protections; (2) FWS’s BiOp failed to provide an ESA consultation reinitiation trigger for
 25 jaguar based on harassment, despite concluding that harassment will occur; (3) the Forest

26 ⁸ Plaintiffs need only show that one claim raises serious questions on the merits. *All. for*
 27 *the Wild Rockies*, 632 F.3d at 1139. While each of Plaintiffs’ claims for relief raise
 28 serious questions on the merits, for brevity’s sake, this motion only addresses a subset of
 Plaintiffs’ claims.

1 Service failed to protect wildlife, in violation of its Organic Act and Federal Land and
 2 Policy Management Act (“FLPMA”) duties; (4) the Forest Service approved the PAR and
 3 two water pipelines based on an illegal assumption that federal mining laws provide a
 4 statutory right to construct the road and pipelines; and (5) the Forest Service failed to
 5 analyze the baseline conditions of public resources, especially with respect to
 6 groundwater.

7 *A. FWS applied an unlawful interpretation of the ESA’s critical habitat*
 8 *protections.*

9 In determining that the Project would not adversely modify any ESA-listed
 10 species’ designated critical habitat, FWS applied an unlawful interpretation of the ESA.
 11 See Compl. ¶¶ 186–89 (Fourth Claim for Relief).

12 The APA requires federal courts to “hold unlawful and set aside” final agency
 13 actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in
 14 accordance with law,” including the ESA. 5 U.S.C. § 706(2); *see also Bennett v. Spear*,
 15 520 U.S. 154, 178 (1997). The issuance of a Biological Opinion is a final agency action
 16 reviewable under the APA. *Bennett*, 520 U.S. at 178 (1997) (holding that a BiOp is a
 17 final agency action because it has “direct and appreciable legal consequences”).

18 The ESA is “the most comprehensive legislation for the preservation of
 19 endangered species ever enacted by any nation.” *Hill*, 437 U.S. at 180. It is designed to
 20 conserve the ecosystems upon which endangered and threatened species depend and to
 21 provide a program to conserve listed species. 16 U.S.C. § 1531(b). “[T]he plain intent of
 22 Congress in enacting the [ESA] was to halt and reverse the trend toward species
 23 extinction, whatever the cost.” *Hill*, 437 U.S. at 184.

24 ESA Section 7(a)(2) requires federal agencies, in consultation with a federal
 25 wildlife agency (FWS here), to ensure that their actions are not likely to jeopardize the
 26 continued existence of a listed species or destroy or adversely modify its critical habitat.
 27 16 U.S.C. § 1536(a)(2); *see generally Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*
 28 *Serv.*, 273 F.3d 1229, 1238 (9th Cir. 2001) (describing ESA Section 7(a)(2) consultation

process). Formal ESA Section 7(a)(2) consultation culminates in FWS’s issuance of a Biological Opinion, which must “[a]dd the effects of the action and cumulative effects to the environmental baseline and[,] in light of the status of the [potentially affected] species and critical habitat, formulate [FWS’s] opinion as to whether the action is likely to jeopardize the continued existence of [the] listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g)(4); *see also* 16 U.S.C. § 1536(b)(3)(A). In its analysis, FWS must utilize the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

In its BiOp for the Hermosa Project, FWS found the Project not likely to destroy or adversely modify designated critical habitat for the jaguar, Mexican spotted owl, western yellow-billed cuckoo, or northern Mexican gartersnake, despite recognizing that the Project is likely to adversely affect these ESA-protected species’ critical habitat. *See* BiOp (Ex. 2) at 3. In making these conclusions, FWS applied an unlawful interpretation of the ESA.

At the time the Project BiOp was issued, FWS’s regulations defined “destruction or adverse modification” as a “direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species.” 50 C.F.R. § 402.02 (2024) (emphasis added). The U.S. District Court for the Northern District of California vacated this definition in March 2026, finding the definition inconsistent with the ESA. *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, No. 24-CV-04651, 2026 WL 898264, at *18 (N.D. Cal. Mar. 30, 2026) (finding the regulation contrary to the plain terms of the ESA because the ESA’s “prohibition on adverse modification is absolute, rather than limited to modifications affecting the habitat ‘as a whole’”).⁹

⁹ Although typically courts apply the regulations in place at the time a BiOp was issued, where a regulation is vacated as contrary to the applicable statute, the regulation is void ab initio and any application of the regulation is thus unlawful. *United Nat. Bank v. U.S. Dep’t of Interior*, 54 F. Supp. 2d 1309, 1312 (S.D. Fla. 1998) (“It is well settled that a regulation that is not in harmony with the statute is void ab initio and cannot be relied upon by the agency.” (citing *United States v. Larionoff*, 431 U.S. 864, 873 (1977))); *Pac. Gas & Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981) (“[A] regulation

1 The Project BiOp’s critical habitat conclusions all rely heavily upon this unlawful
 2 “as a whole” standard. FWS repeatedly concludes that the Project will have significant
 3 impacts on critical habitat within the Project Area, but reaches a no-adverse-modification
 4 conclusion based on purportedly limited impacts to the *entire* critical habitat designation
 5 “as a whole.” *See, e.g.*, BiOp at 72–73 (relying on the vacated regulation and outlining
 6 framework for the BiOp’s destruction or adverse modification determinations: FWS
 7 assesses whether the Project is “likely to impair or preclude the capacity of critical habitat
 8 *as a whole* to serve its intended function for the conservation of the listed species”
 9 (emphasis added)).

10 For example, despite acknowledging (1) habitat connectivity with Mexico is
 11 essential for the survival and recovery of the jaguar, (2) the Project Area lies in the
 12 jaguar’s final remaining connectivity corridor for 120 miles, and (3) the Project will
 13 “significantly alter connectivity to Mexico,” FWS concludes that the Project is not likely
 14 adversely modify the jaguar’s critical habitat, based on its assertion that these
 15 “substantial” impacts “do not scale up across the whole of designated critical habitat.” *Id.*
 16 at 248–49 (finding the Project “not likely to reduce appreciably the role of critical habitat
 17 *as a whole* for the conservation of the jaguar” (emphasis added)); *see also Klamath*
 18 *Forest All. v. U.S. Fish & Wildlife Serv.*, No. 2:24-cv-02347, 2025 WL 2753167 (E.D.
 19 Cal. Sept. 26, 2025) (finding a “serious question on the merits” as to whether the Forest
 20 Service’s reliance on “analysis at recovery unit scale” arbitrarily masked impacts to an
 21 important source population for imperiled spotted owls). FWS’s reasoning for its other
 22 critical habitat conclusions follow this same pattern applying the unlawful and now-
 23 vacated regulatory definition. *See* BiOp (Ex. 2) at 290 (concluding that the Project’s
 24 impacts, “including loss of habitat due to ground disturbance, are not likely to
 25 appreciably diminish the value of critical habitat *as a whole* for the conservation of the
 26

27 which operates to create a rule out of harmony with the statute[] is a mere nullity.”).
 28 Thus, although the unlawful regulatory definition was vacated after the BiOp was issued,
 the BiOp’s application of the regulation is unlawful.

1 Mexican spotted owl” (emphasis added)); *id.* at 332 (finding the Project not likely to
 2 adversely modify yellow-billed cuckoo critical habitat “as a whole”); *id.* at 381 (same,
 3 northern Mexican gartersnake).

4 FWS’s application of a standard of destruction or adverse modification of critical
 5 habitat that has been vacated as violative of the ESA renders the BiOp’s critical habitat
 6 determinations arbitrary, capricious, an abuse of discretion, and contrary to law, in
 7 violation of the APA. 5 U.S.C. § 706(2). This violation alone warrants maintenance of the
 8 status quo pending resolution of this case.

9 *B. FWS violated the ESA by adopting an unlawful incidental take statement for*
 10 *jaguar and ocelot.*

11 If FWS concludes in a BiOp that an action is not likely to jeopardize listed species
 12 or result in the destruction or adverse modification of critical habitat but will result in
 13 incidental take, it must provide the action agency with a written Incidental Take
 14 Statement (“ITS”). The ITS must specify the “impact of such incidental taking on the
 15 species,” specify “those reasonable and prudent measures that [FWS] considers necessary
 16 or appropriate to minimize” those impacts, and set forth “terms and conditions” that the
 17 action agency must follow to implement those measures. 16 U.S.C. § 1536(b)(4); 50
 18 C.F.R. § 402.14(i)(1)(i); *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1107–08
 19 (9th Cir. 2012). Courts find take thresholds unlawful when they are too vague. *See Wild*
 20 *Fish Conservancy v. Salazar*, 628 F.3d 513, 531 (9th Cir. 2010).

21 FWS’s Hermosa BiOp includes a joint ITS for jaguars and ocelots. *See* BiOp (Ex.
 22 2) at 249–54. This ITS is arbitrary and inconsistent with the ESA. *See* Compl. ¶¶ 193–97,
 23 216.

24 Habitat connectivity is essential for jaguars and ocelots, and localized disturbances
 25 can significantly impact the species when such harm occurs in key habitat corridors like
 26 the Patagonia Mountains. *See* BiOp (Ex. 2) at 220 (“The conservation role or value of
 27 jaguar critical habitat is to provide areas to support [jaguar movement and population
 28 expansion]. To realize these values, cross-border connectivity with Mexico is essential.”);

1 *id.* at 226 (“[T]he conservation of both ocelots and jaguars is dependent on habitat
 2 connectivity and the opportunity to move between the Patagonia and Huachuca
 3 mountains and Mexico.”); *see also* Decl. of Christopher D. Bugbee (Ex. 6) ¶ 19
 4 (explaining that the San Rafael Valley and its surrounding mountain ranges are “the
 5 single most important wildlife corridor that remains for jaguars and ocelots” to cross the
 6 border”). FWS acknowledges that the Project will impede this key habitat corridor. *See,*
 7 *e.g.*, BiOp (Ex. 2) at 247 (stating the Project “is expected to significantly alter
 8 connectivity to Mexico”); *see also* Bugbee Decl. (Ex. 6) at ¶ 23 (stating that in Mr.
 9 Bugbee’s professional opinion, construction of the Project’s transmission line and related
 10 roads and infrastructure “represents a significant barrier for jaguar travel in the best
 11 remaining corridor of the Patagonia Mountains”).

12 Due to these significant impacts on jaguars and ocelots, FWS anticipates that any
 13 ocelot or jaguar that enters the Project Area during the Project will experience incidental
 14 take in the form of harassment. BiOp (Ex. 2) at 251.¹⁰

15 Despite expecting that take in the form of harassment will occur, FWS’s
 16 jaguar/ocelot ITS provides that reinitiation of consultation will only occur “*if harm in the*
 17 *form of injury or fatality* of any individual ocelot or jaguar occurs.” *Id.* at 252 (emphasis
 18 added). FWS does not explain why its consultation reinitiation trigger—which is based
 19 on “harm in the form of injury or fatality”—is completely unrelated to the form of take
 20 FWS anticipates will occur—take via harassment. *See Ctr. for Biological Diversity v.*
 21 *Bernhardt*, 982 F.3d 723, 749 (9th Cir. 2020) (“Take under the ESA can occur via injury
 22 or death, as the BiOp recognizes, but it can also occur via nonlethal harassment.”).

23
 24 ¹⁰ The ESA prohibits “take” of listed species. 16 U.S.C. § 1538(a)(1)(B). “Take” means
 25 “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt
 26 to engage in any such conduct.” *Id.* § 1532(19). “Harass” means “an intentional or
 27 negligent act or omission which creates the likelihood of injury to wildlife by annoying it
 28 to such an extent as to significantly disrupt normal behavioral patterns which include, but
 are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Incidental take”
 refers to “any taking otherwise prohibited, if such taking is incidental to, and not the
 purpose of, the carrying out of an otherwise lawful activity.” *Id.*

1 Without a consultation reinitiation trigger that addresses harassment, FWS’s ITS
2 allows an unlimited amount of harassment to jaguars and ocelots. This result is
3 particularly concerning given that FWS expects—and authorizes—take in the form of
4 harassment.

5 Under essentially identical facts, this Court (Judge Rosemary Márquez) recently
6 found a jaguar ITS arbitrary and capricious. *See Ctr. for Biological Diversity v. U.S.*
7 *Forest Serv.*, No. CV-24-00405, 2026 WL 2935762, at *10–12 (D. Ariz. Sept. 30, 2026).
8 In that case, FWS issued a BiOp addressing the impacts of a road construction project on
9 the jaguar in the Chiricahua Mountains of southeastern Arizona, about 80 miles east of
10 the Hermosa Mine. *Id.* at *2. The BiOp included an ITS for the jaguar, which stated that
11 FWS “anticipates that any jaguar” that may be present in the action area “will be taken in
12 the form of harassment.” *Id.* at *11. Despite expecting take in the form of harassment,
13 FWS required reinitiation of consultation only when a “jaguar [is] found injured or killed
14 within the action area due to the proposed action.” *Id.* This Court found the ITS arbitrary
15 and capricious because FWS failed to articulate a “rational connection between when
16 consultation must be reinitiated—injury or death to the jaguar—and the only authorized
17 take—harassment of the jaguar.” *Id.* (citing *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at
18 1251).

19 The same defect exists here; the Hermosa jaguar/ocelot ITS is effectively identical
20 to the jaguar ITS Judge Márquez struck down. Both ITSs anticipate harm in the form of
21 harassment yet only require reinitiation of consultation if injury or fatality occurred. As
22 Judge Márquez explained, “Defendants’ failure to include a trigger for reinitiation of
23 consultation that is causally connected to the anticipated take was arbitrary and
24 capricious.” *Id.*

25 Moreover, FWS’s jaguar/ocelot ITS is further arbitrary because FWS’s take limit
26 for harm in the form of injury or fatality will only be exceeded if FWS determines that
27 the harm is “attributable to the Proposed Federal Action.” BiOp (Ex. 2) at 252; *see also*
28 Compl. ¶ 197. FWS provides no standard whatsoever for determining whether an action

1 is “attributable” to the Project. This unenforceable ambiguity renders the take trigger
 2 arbitrary and violates the ESA. *See Ctr. for Biological Diversity v. Moore*, No. CV-23-
 3 00354, 2026 WL 2409453, at *8 (D. Ariz. Aug. 18, 2026) (finding that an ITS violated
 4 the ESA because its requirement that effects be directly attributable the agency action
 5 failed to specify “which agency will make this determination, what metrics it will use to
 6 measure causation, and what amount of causation is sufficient to trigger reinitiated
 7 consultation”); *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1250–51 (finding arbitrary and
 8 capricious an ITS that failed to “provide a clear standard for determining when the
 9 authorized level of take ha[d] been exceeded” reasoning it left “unfettered discretion” to
 10 the agency); *see also Ctr. for Biological Diversity*, 2026 WL 2935762 at *11 (finding a
 11 jaguar ITS arbitrary and capricious because it was “not clear as to whether consultation
 12 must be reinitiated only when a jaguar is injured or killed from a vehicular strike, or
 13 whether other causes of injury or death that may be ‘due to the proposed action,’ such as
 14 interaction with hunters and/or their dogs, would trigger consultation”).

15 *C. The Forest Service Failed to Meet Its Duties Under the Organic Act and*
 16 *FLPMA to Protect Public Resources, Especially Wildlife.*

17 In addition to the Forest Service’s wildlife protection duties under the ESA and
 18 APA, the agency failed to meet its wildlife and environmental protection duties under its
 19 Organic Act of 1897, which mandates that the Forest Service “regulate [the] occupancy
 20 and use [of national forests] and to preserve the forests thereon from destruction.” 16
 21 U.S.C. § 551; *see also id.* § 475 (regarding protecting water flows on public land). The
 22 agency’s mining regulations further require that it ensure that all mining operations “shall
 23 take all practicable measures to maintain and protect fisheries and wildlife habitat which
 24 may be affected by the operations.” 36 C.F.R. § 228.8(e). These regulations further
 25 require that the agency “minimize” adverse impacts from mining operations. *Id.* § 228.1.
 26 “[T]here can be no doubt that the Department of Agriculture possesses statutory
 27 authority to regulate activities related to mining—even in non-wilderness areas—in order
 28 to preserve the national forests.” *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994).

1 “The operator also has a separate regulatory obligation to ‘take all practicable measures
2 to maintain and protect fisheries and wildlife habitat which may be affected by the
3 operations.’ 36 C.F.R. § 228.8(e).” *Rock Creek All. v. Forest Serv.*, 703 F. Supp. 2d 1152,
4 1164 (D. Mont. 2010) (Forest Service Plan of Operations approval violated Organic Act
5 and Part 228 regulations by failing to protect water quality and fisheries). “The Forest
6 Service can prohibit the initiation or continuation of mining operations for failure to
7 abide by applicable environmental requirements.” *Siskiyou Reg’l Educ. Project v. Rose*,
8 87 F. Supp. 2d 1074, 1086 (D. Or. 1999) (citation omitted).

9 Relatedly, as detailed herein regarding the Forest Service’s duties with respect to
10 the PAR and transmission line, FLPMA requires the agency, in considering rights-of-
11 way, to ensure that the road “will do no unnecessary damage to the environment.” 43
12 U.S.C. § 1764(a); *see also County of Okanogan v. Nat’l Marine Fisheries Serv.*, 347 F.3d
13 1081, 1085–86 (9th Cir. 2003) (affirming the imposition of mandatory minimum stream
14 flows as a condition of granting a right-of-way for a water pipeline). Forest Service
15 regulations implementing FLPMA Title V, at 36 C.F.R. Part 251 (the “Part 251” rules),
16 require protecting the environment and public interest. *See, e.g.*, 36 C.F.R. § 251.56(a)
17 (requiring conditions that “minimize damage to scenic and esthetic values and fish and
18 wildlife habitat,” “require siting to cause the least damage to the environment,” and
19 “otherwise protect the public interest”). In approving the Plan of Operations, the Forest
20 Service violated these duties. *See, e.g.*, Compl. ¶¶ 151, 154, 233.

21 *D. The Secondary Access Route (“PAR”) and Water Pipelines Were Reviewed*
22 *and Approved as a Statutory Right Under the 1872 Mining Law, Contrary to*
23 *District of Arizona and Ninth Circuit Precedent.*

24 **1. Applicable Law.**

25 The 1872 Mining Law, 30 U.S.C. §§ 21–54, confers upon U.S. citizens and
26 companies rights to mine “valuable minerals” they discover on federal lands. Upon
27 locating a “valuable mineral deposit,” citizens may validate, occupy, and develop a
28 mining claim. *Id.* §§ 22, 26. “However, validity of a mining claim is a necessary

prerequisite to post-exploration occupancy of a claim. A claim is valid only if valuable minerals have been found on the claim.” *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1217–18 (9th Cir. 2022) (hereinafter “*Rosemont*”). Forest Service regulations at 36 C.F.R. Part 228, Subpart A (§§ 228.1–228.15) (the “Part 228A” rules) cover “operations authorized by the United States mining laws.” *Id.* § 228.1. For such operations, the agency disclaims discretion to deny or significantly curtail mining plans and focuses only on efforts to “minimize adverse impacts” while respecting the applicant’s economic aims. *Id.* By contrast, activities not covered by valid mining rights are not governed by mining laws, as the “mere location of the mining claim ‘confers no right in the absence of discovery.’” *Rosemont*, 33 F.4th at 1210 (quoting *Cole v. Ralph*, 252 U.S. 286, 296 (1920)).

In regulating mining, the Forest Service must comply with numerous statutes protecting public lands. These include the Forest Service Organic Act, which requires the agency “to regulate [the] occupancy and use [of national forests] and to preserve the forests thereon from destruction.” 16 U.S.C. § 551. That Act requires that persons “prospecting, locating, and developing the mineral resources [on a national forest] . . . must comply with the rules and regulations covering such national forests.” *Id.* § 478.

The Forest Service must also comply with FLPMA, which requires public lands to be managed to protect “ecological, environmental, air and atmospheric, water resource” values, and that the lands be preserved “where appropriate . . . in their natural condition.” 43 U.S.C. § 1701(a)(8). Particularly relevant here, FLPMA Title V governs the issuance of rights-of-way and special use permits for infrastructure like access roads and powerlines crossing federal land. *Id.* §§ 1761–1771. The federal government may grant a right-of-way for such infrastructure only if it “will do no unnecessary damage to the environment,” *id.* § 1764(a), and includes environmentally-protective conditions, *id.* § 1765(a)–(b). “Damage” is not limited to the land within the right-of-way corridor—the prohibition applies to all lands and resources that may be affected by the right-of-way. *See County of Okanogan*, 347 F.3d at 1085–86 (affirming the imposition of mandatory

1 minimum stream flows as a condition of granting a right-of-way for a water pipeline).
2 Lastly, the right-of-way holder must pay fair market value for this use of public lands and
3 resources. 43 U.S.C. § 1764(g).

4 Forest Service regulations implementing FLPMA Title V, the Part 251 rules,
5 establish processes and requirements for authorizing special uses (like rights-of-way).
6 These rules require protecting the environment and public interest. *See, e.g.*, 36 C.F.R.
7 § 251.56(a) (requiring conditions that “minimize damage to scenic and esthetic values
8 and fish and wildlife habitat,” “require siting to cause the least damage to the
9 environment,” and “otherwise protect the public interest”). To develop infrastructure
10 across federal land to access non-federal property, the Part 251 rules require that “the
11 landowner must apply for and receive a special-use or road-use authorization.” *Id.*
12 § 251.110(d). The agency has “no obligation to grant additional access” if there is
13 existing access “that is adequate or that can be made adequate.” *Id.* § 251.110(g).

14 **2. Approving the Secondary Road and Water Pipelines Under the** 15 **1872 Mining Law Contradicts *Rosemont* and Is Unlawful.**

16 The Forest Service failed to apply these FLPMA requirements to the off-site PAR
17 and water pipelines. It makes a critical difference whether the Forest Service reviews a
18 proposed use of public lands through the lens of the 1872 Mining Law and the Part 228A
19 rules or instead through its other statutory obligations such as under FLPMA and the Part
20 251 rules. The agency approaches its Part 228A rules from the perspective that the
21 activities covered are a “statutory right” over which the agency lacks significant
22 discretion, whereas it retains significant discretionary authority—and significant
23 obligations to the public and the environment—under FLPMA.

24 The Forest Service erroneously believed that the off-site secondary PAR and water
25 pipelines were regulated under its mining-law rules at 36 C.F.R. Part 228A, which are
26 limited to “operations authorized by the United States mining laws (30 U.S.C. [§] 21-
27 54).” 36 C.F.R. § 228.1, instead of the agency’s discretionary right-of-way authority and
28

1 regulations under FLPMA, 43 U.S.C. §§ 1761–1771, and its implementing regulations at
2 43 C.F.R. Part 251.

3 The Forest Service therefore reviewed and approved these activities under its view
4 that it had little, if any, discretion over such off-site ancillary operations, assuming that
5 they were governed by statutory rights under the 1872 Mining Law, simply because these
6 facilities were related to the distant mining operation. As stated by the Forest Service,
7 “[t]he proposed Primary Access Road was submitted as part of South32 Hermosa’s MPO
8 [Mining Plan of Operations] and is being reviewed as a component of mining activities
9 under the Mining Law, not as a standalone access route requiring a Title V ROW [right-
10 of-way] under FLPMA.” U.S. Forest Serv., *Comment Analysis and Response Report*
11 (Mar. 2026) (“DEIS Comment Response”) (Ex. 7) at 22.

12 USFS approved the Primary Access Road as a statutory right under the mining
13 laws because, the agency asserted, it is “reasonably incident” to mining at the distant
14 private lands site. “The Forest Service may authorize surface use of [National Forest]
15 lands for operations reasonably incident to mining claims under the 1872 Mining Law,
16 including access routes.” *Id.* The agency reasoned that this was required because the
17 Primary Access Road was “necessary” for the Hermosa Project to proceed. *Id.*

18 The Forest Service thus did not require South32 to apply for any FLPMA right-of-
19 way or special use permit approvals for the Primary Access Road or water pipelines. “[I]t
20 would be arbitrary for the Forest Service to apply its 36 CFR Part 251 special use
21 regulations.” *Id.* at 21. But the “Part 251 regulations apply to uses of National Forest land
22 that is not encumbered by mining claims.” *Rosemont*, 33 F.4th at 1211. It is undisputed
23 that the route of the Primary Access Road is *not* encumbered by mining claims, let alone
24 claims that have been shown to be valid and subject to rights under the mining laws. The
25 same is true for the two off-site water pipelines, delivering mine discharge water to
26 Goldbaum Canyon and Mowry Wash.

27 The agency’s assumption of statutory rights for such off-site activities contradicts
28 the precedent in this District, affirmed by the Ninth Circuit in the *Rosemont* decision,

1 which hold that the Forest Service cannot use its Part 228A mining regulations, which
2 can only be applied to “operations authorized by the mining laws,” without evidence in
3 the record that such activities were indeed covered by statutory mining rights. In doing
4 so, the Forest Service bypassed FLPMA and the Part 251 rules governing rights-of-way
5 in National Forests and erroneously assumed South 32 had the right to the PAR and water
6 pipelines under the 1872 Mining Law and Part 228A rules.

7 As here, the Forest Service in *Rosemont* had unlawfully relied on the broad
8 definition of “operations” in its 36 C.F.R. Part 228A mining regulations to authorize the
9 mine’s waste dump on neighboring public lands. But critically, the Part 228A regulations
10 reach only activities “authorized by the United States mining laws.” 36 C.F.R. § 228.1.
11 As Judge Soto held, “the Forest Service’s application of its regulations to mining
12 operations cannot grant rights outside the bounds of the Mining Law of 1872.” *Ctr. for*
13 *Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738, 763 (D. Ariz.
14 2019).

15 In upholding the district court, the Ninth Circuit expressed concern about the
16 Forest Service assuming Mining Law rights where none existed because this would give
17 away, “essentially free of charge,” rights over public lands. *Rosemont*, 33 F.4th at 1218.
18 The Ninth Circuit held that by overextending assumptions about the company’s Mining
19 Law-based rights, the agency “de facto amended the . . . Mining Law to give [the
20 company] what it wants.” *Id.* at 1224.

21 That is what happened here. The Forest Service cannot identify any 1872 Mining
22 Law provision that authorizes off-site ancillary facilities like a second access road or
23 water pipelines. As *Rosemont* held, the agency needs to have a “statutory basis to support
24 the application of Part 228A regulations.” *Id.* at 1223. Otherwise, the “Part 251
25 regulations apply to uses of National Forest land that is not encumbered by mining
26 claims.” *Id.* at 1211. That is the situation here, as the PAR and water pipelines are not
27 covered by valid mining claims, and the agency lacks any statutory basis in the 1872
28 Mining Law for approval under the Part 228A regulations.

1 Regarding the water pipelines, federal land agencies have long held that approval
2 of water pipelines is not governed by, or subject to, statutory rights under the Mining
3 Law. “FLPMA repealed or amended previous acts and Title V now requires that BLM
4 approve a right-of-way application prior to the transportation of water across public land
5 for mining purposes.” *Desert Survivors*, 96 IBLA 193, 1987 IBLA LEXIS 81, at 196
6 (1987) (citing FLPMA, 43 U.S.C. § 1761). Because the Forest Service failed to require a
7 right-of-way for the water pipelines under FLPMA Title V and the agency’s 43 C.F.R.
8 Part 251 regulations, its approval of the Project thus violates FLPMA.

9 Simply because the off-site PAR and water pipelines are related to the distant
10 mine does not provide the required “statutory basis” to assume these incursions onto
11 public lands are governed by the 1872 Mining Law. Indeed, Judge Soto and the Ninth
12 Circuit rejected that very same rationale that any “related” or “reasonably incident”
13 activities to mining have a statutory right to use other federal lands away from the mine
14 site. *Rosemont*, 33 F.4th at 1215.

15 The “reasonably incident” phrase from the Forest Service’s regulatory description
16 of “operations” does not appear in the 1872 Mining Law. It comes from the Surface
17 Resources-Multiple Use Act of 1955, 30 U.S.C. § 612(a), which “does not grant rights
18 beyond those granted by the Mining Law.” *Id.* at 1218. The “reasonably incident”
19 statutory provision was enacted to *limit* mining activities on claim sites (to reign in abuse
20 of claims to serve non-mining activities), and certainly not to *expand* mining entitlements
21 off-site. *See Ctr. for Biological Diversity*, 409 F. Supp. 3d at 749.

22 Indeed, in its unsuccessful *Rosemont* appeal, the Forest Service “abandoned” its
23 reliance on the “reasonably incident” language, as the agency had “improperly relied” on
24 it. *Rosemont*, 33 F.4th at 1215–17. Because “Section 612 gave no rights beyond those
25 conferred by the Mining Law,” the agency needed “some other statutory basis” for
26 applying Part 228A. *Id.* at 1223. Here, the agency impermissibly relied on the Part 228A
27 regulations to authorize the PAR and water pipelines under assumed statutory rights that
28 do not exist.

1 In fact, the PAR is not even “necessary” for the Hermosa Project to proceed. As
 2 the agency admitted in its response to Plaintiffs’ administrative Objections, the PAR is an
 3 “preferred access option.” U.S. Forest Serv., *App’x A to FEIS, Summarized Objection*
 4 *Contentions and Responses* (“Objection Response”) (Ex. 8) (emphasis added), at 22. The
 5 FEIS acknowledges that the existing “access using Harshaw Road and the Cross Creek
 6 Connector,” which has been used for longstanding access the mine site, meets the
 7 “Purpose and Need” for the Hermosa Project. FEIS (Ex. 5) at 2-37. “This is a reasonable
 8 option under Alternative 3 – Modified Proposed Action, with a mine life of 70 years,
 9 because it has been developed separately as part of Alternative 1 – No Action, with a
 10 mine life of 50 years.” U.S. Forest Serv., *Hermosa Critical Minerals Project Alternatives*
 11 *Evaluation Report* (Nov. 2024) (Ex. 9), at 34. Indeed, under the agency’s assumption that
 12 South32 could conduct mining for 50+ years, without any new expansion onto/under
 13 public lands, the existing Harshaw Road route would be the access route onto the site
 14 throughout. *See* FEIS (Ex. 5) at 2-49.

15 In sum, although the PAR is the agency’s, and South32’s, “preferred option” over
 16 the existing Harshaw Road route (with modifications), that does not translate into a
 17 statutory right of access under the Mining Law.

18 *E. The Forest Service Failed to Obtain and Analyze Baseline Conditions as*
 19 *Required by NEPA.*

20 **1. Applicable Law.**

21 NEPA has twin aims. First, it requires federal agencies “to consider every
 22 significant aspect of the environmental impact of a proposed action. Second, it ensures
 23 that the agency will inform the public that it has indeed considered environmental
 24 concerns in its decision-making process.” *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir.
 25 2002) (citation omitted). For “major Federal actions significantly affecting the quality of
 26 the human environment,” NEPA requires “a detailed statement” describing, among other
 27 things, the “reasonably foreseeable environmental effects of the proposed agency action,”
 28 and “a reasonable range of alternatives to the proposed agency action.” 42 U.S.C.

1 § 4332(2)(C). This “detailed statement” is known as an “Environmental Impact
2 Statement” or “EIS,” which the Forest Service prepared for the Hermosa Project.

3 The agency must “ensure the professional integrity, including scientific integrity,
4 of the discussion and analysis in an environmental document,” make use of reliable data
5 and resources, and “study, develop, and describe technically and economically feasible
6 alternatives.” *Id.* §§ 4332(2)(D), 4332(2)(E), 4332(2)(F).

7 As part of its required review of alternatives to proposed projects, the agency’s
8 review of the “no-action alternative” necessarily includes the analysis of the affected
9 area’s current, baseline, conditions. The establishment of the baseline conditions is a
10 fundamental requirement of the NEPA process, because an inadequate baseline precludes
11 an accurate assessment of an action’s environmental impacts. *N. Plains Res. Council v.*
12 *Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011); *see also Great Basin Res.*
13 *Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“Without
14 establishing the baseline conditions which exist before a project begins, there is simply
15 no way to determine what effect the project will have on the environment and,
16 consequently, no way to comply with NEPA.” (cleaned up)). Baseline analysis “must be
17 based on accurate information and defensible reasoning.” *Or. Nat. Desert Ass’n v. Jewell*,
18 840 F.3d 562, 570 (9th Cir. 2016). An “unsupported assumption” is insufficient. *Id.*

19 Courts within the Ninth Circuit have repeatedly rejected Forest Service approvals
20 of mineral operations for failing to undertake the required detailed baseline data and
21 analysis of groundwater resources that would be affected by mineral operations. *See*
22 *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424, 2021 WL 641614, at *17–
23 20 (D. Or. Feb. 15, 2021); *Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810,
24 2014 WL 3019165, at *25–33 (D. Or. July 3, 2014); *Idaho Conservation League v. U.S.*
25 *Forest Serv.*, No. 1:11-cv-00341, 2012 WL 3758161, at *14–17 (D. Idaho Aug. 29,
26 2012); *Idaho Conservation League v. U.S. Forest Serv.*, 429 F. Supp. 3d 719, 732 (D.
27 Idaho 2019). The duty to ascertain and analyze baseline conditions extends to all
28 resources affected by the mineral operations. *See, e.g., Idaho Conservation League*, 2012

1 WL 3758161 at *16 (groundwater hydrology); *Great Basin Res. Watch.*, 844 F.3d at
2 1101 (air pollution).

3 **2. The FEIS Failed to Obtain and Analyze Baseline Conditions.**

4 The Forest Service failed to analyze the critical baseline conditions of public
5 resources, especially groundwater and its dependent environments. For example, despite
6 approving an extensive network of deep exploration drilling (up to 6,800 feet deep), as
7 well as voluminous discharges of pumped groundwater into nearby watersheds, the
8 agency failed to analyze the current baseline conditions of these water resources—in
9 violation of the long-standing federal law requirements detailed above. The Project would
10 pump and remove massive amounts of groundwater from the area, causing a “cone of
11 depression” spanning 55.8 square miles at its peak. FEIS (Ex. 5) at 3.17-38. The new
12 discharges of pumped groundwater will require up to 4,500 gallons per minute “directly
13 discharged into Harshaw Creek, Mowry Wash South, and Goldbaum Canyon.” ROD
14 (Ex. 1) at 2-5. “Direct discharge of water . . . into Goldbaum Canyon will require an
15 above-ground 0.5-mile pipeline.” *Id.* “Direct discharge of water . . . into Mowry Wash
16 South will require a pipeline that will be located within the road prism of Harshaw Road
17 South.” *Id.* That pipeline would be roughly 5 miles long. ROD (Ex. 1) at 2-9 (Figure 2).

18 Regarding the exploration drilling, the Forest Service provides no baseline data or
19 analysis of groundwater quality that will be directly affected by the extensive network of
20 exploratory drilling. The agency anticipates 260 exploration drill holes at 26 drill pad
21 locations, in addition to 17 locations within the footprint of the new tailings facility,
22 TSF2, and “an additional 48 geotechnical pads with boreholes and test pits,” drilling up
23 to 6,800 feet deep into the regional aquifer, with direct environmental impacts. FEIS (Ex.
24 5) at 3.17-33; BiOp (Ex. 2) at 21, 24–26. This “[d]rilling introduces potential for
25 contamination of groundwater by drilling mud, drilling additives, or other drilling
26 products.” FEIS (Ex. 5) at 3.17-33. These contamination issues are in addition to the
27 disruption of the regional aquifer system that will result from the hundreds of wells
28 drilled into the aquifer.

1 These operations will be away from the actual mine site, and include a network of
2 new “temporary” roads needed to reach these new sites. *See* FEIS (Ex. 5) at 2-8 (Figure
3 2-3, alternative 2), 2-16 (Figure 2-6, alternative 3). Under the ROD, most of the drilling is
4 focused to the south of the mine site, although some drilling is also proposed north of the
5 site. ROD (Ex. 1) at 2-9 (Figure 2).

6 In addition, there is no analysis of the baseline groundwater conditions on Forest
7 Service lands that will experience significant hydrological impacts from the Project. For
8 example, there is no baseline data for the Mowry Wash and Goldbaum Canyon areas that
9 will receive the Project’s re-routed water discharges (substantially affecting the local and
10 regional hydrology). In addition, even if the baseline conditions were analyzed (which
11 they were not), the agency does not know the “[s]pecific constituents that might
12 experience a concentration increase above baseline water quality . . . because leaching
13 tests have not been performed on sediment samples from these tributaries.” FEIS (Ex. 5)
14 at 3.17-39.

15 Plaintiffs raised these concerns to the agency during the public comment period. In
16 response, the Forest Service and its FEIS pointed to South32’s consultant reports:

17 The Final EIS includes a comprehensive evaluation of groundwater
18 conditions and potential impacts. Baseline groundwater conditions were
19 characterized through the Groundwater Baseline Characterization Report [PR 2335], Spring and Seep Baseline Characterization Report [PR 1843],
20 Groundwater modeling studies [PR 503; PR 1878], and, Water quality
21 baseline investigations [PR 1843], which describe existing groundwater
22 levels, flow, hydrogeology, groundwater-dependent features, and baseline
23 chemistry. These studies provide the basis for evaluating groundwater levels
24 and water quality changes during mining and after closure.

25 Objection Response (Ex. 8) at 74.

26 Yet none of these reports contain baseline data or analysis of the groundwater that
27 will be affected by the project. For example, South32’s consultant’s report, “Groundwater
28 Baseline Characterization Report,” (PR 2335) focused only on groundwater well data
from the company’s current private land mining operations, not the groundwater that will

1 be affected by the various drill sites and discharge locations on Forest Service lands miles
2 away from the private lands.¹¹

3 The FEIS relies on that Report as the basis for the Forest Service’s groundwater
4 baseline analysis to satisfy its NEPA obligations. But neither the agency nor South32 has
5 any groundwater data for Project operations on public lands (except two wells far
6 downstream in lower Harshaw Creek). *See* FEIS (Ex. 5) at 3.17-8; *id.* at 3.17-9 (Figure
7 3.17-4, showing well locations from which the limited data was gathered).

8 The agency’s reliance on South32’s “Seep and Spring Baseline Characterization
9 Report” (Public Record 1843) also does not contain baseline groundwater information.¹²
10 Instead, this report just discusses surface water springs and seeps in the local area, with
11 no groundwater analysis. Similarly, South32’s “Groundwater Modeling Study” (PR
12 1878) is just a plan for *future* modeling of groundwater impacts, with no data or analysis
13 of *current* groundwater conditions.¹³

14 Nor does the Forest Service provide any evidence that the groundwater data from
15 private-land wells in the South32 Baseline Report accurately depicts the situation miles
16 away on public lands, across different watershed drainages. Notably, the Forest Service
17 acknowledges that there are numerous groundwater wells in the area that could have been
18 analyzed for water quality data. *See* FEIS (Ex. 5) at 3.17-4 (Figure 3.17-2, showing
19 location of state-registered groundwater wells in the area). But the agency does not

20 ¹¹ *See* South32 Hermosa, *Groundwater Baseline Characterization Report* (Jan. 2024),
21 available at [https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/
22 file/2155293008477](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155293008477). Due to the file size limitations of the Court’s ECF filing system, the
23 documents cited in this footnote and in the two subsequent footnotes cannot be attached
24 to the motion as exhibits. Plaintiffs will provide the Court with .pdf copies of these
25 documents upon request. Because the agency relied on these documents in approving the
26 Project, these documents are a part of the administrative record.

25 ¹² *See* South32 Hermosa, *Spring and Seep Baseline Characterization Report* (May 1,
26 2024), available at [https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgd
27 cso/file/2155290988534](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155290988534).

27 ¹³ *See* South32 Hermosa, *Monitoring and Mitigation Plan for Groundwater-dependent*
28 *Ecosystems and Water Wells* (Jan. 9, 2026), available at [https://usfs-
public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155292577253](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155292577253).

1 explain why it never checked these obvious sources of information for water quality, at a
 2 minimum. *See Cascade Forest Conservancy*, 2021 WL 641614, at *20 (agency reliance
 3 on distant well data failed to establish baseline conditions “reflective of groundwater
 4 conditions at other sections of the Project Area. Without more, the Court cannot conclude
 5 on this administrative record that the method utilized for establishing baseline conditions
 6 was ‘based on accurate information and defensible reasoning.’ *Great Basin Res. Watch*,
 7 844 F.3d at 1101.”).

8 **II. Irreparable harm is certain in the absence of preliminary relief.**

9 A preliminary injunction is necessary to prevent irreparable harm to Plaintiffs, the
 10 environment, and threatened and endangered species and their critical habitat.
 11 Demonstrating a likelihood of irreparable harm “is generally not at issue in
 12 environmental cases.” *Cottonwood*, 789 F.3d at 1090. This is because “[e]nvironmental
 13 injury, by its nature, can seldom be adequately remedied by money damages and is often
 14 permanent or at least of long duration, *i.e.*, irreparable.” *Amoco Prod. Co. v. Village of*
 15 *Gambell*, 480 U.S. 531, 545 (1987). Numerous Ninth Circuit cases have described the
 16 ways in which “the resource destruction that attends development . . . is bound to have
 17 permanent repercussions.” *E.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094,
 18 1125 (9th Cir. 2002); *see also Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1124 (9th
 19 Cir. 2005) (“[O]nce the desert is disturbed, it can never be restored.”). Additionally,
 20 “potential harm to endangered species satisfies the requirement of showing irreparable
 21 injury.” *Pac. Rivers Council v. Thomas*, 873 F. Supp. 365, 371 (D. Idaho 1995).

22 Here, irreparable harm to the environment, to imperiled wildlife, and to Plaintiffs
 23 and their members is not only likely to occur in the absence of an injunction—it has
 24 already started and will resume on November 7 unless enjoined. As the attached
 25 declarations show, ground-disturbing actions that occurred before this filing, and that are
 26 being held in abeyance only until November 6, have caused and will cause irreparable
 27 harm, including: bulldozing mature trees and vegetation for miles of new electric
 28 transmission access roads; scraping dozens of exploration and geotechnical drilling pads

1 and access roads for the tailings storage facility; exploratory and geotechnical drilling;
 2 plowing vegetation for staging areas; and bulldozing and blasting for construction of a
 3 7.6-mile “Primary Access Road.” The vast majority of these destructive activities will
 4 occur in designated critical habitat for jaguars and Mexican spotted owls, and many will
 5 occur in designated yellow-billed cuckoo critical habitat. *See* BA (Ex. 3) at 4-30 (Figure
 6 4-6, jaguar critical habitat map), 4-46 (Figure 4-7, Mexican spotted owl critical habitat
 7 map), 4-62 (Figure 4-10, yellow-billed cuckoo critical habitat map).

8 Three major components of the Project will have particularly damaging impacts.
 9 First, construction of the 7.3-mile electricity transmission line will occur across a 100-
 10 foot right of way (88.5 acres of public National Forest land), and will include installation
 11 of 47 towers on pads scraped to bare dirt, which “can be as large as 100 by 100 ft,” in
 12 addition to “four pulling and four tensioning sites,” which require “typically 60 by 120ft”
 13 of vegetation clearing. BiOp (Ex. 2) at 32. The remoteness of the transmission line
 14 corridor also requires helicopter delivery of “equipment and infrastructure,” which will
 15 require clearing of a 2.5-acre helicopter staging area on National Forest land. *Id.* at 33.
 16 Construction of this extensive infrastructure will require bulldozing undisturbed forest
 17 land for new access roads across another 16 acres of National Forest. *Id.* at 34. Plaintiffs’
 18 members have already been harmed by the beginning of this construction; additional
 19 destruction if transmission line access road and related bulldozing is not enjoined will
 20 cause further harm to their enjoyment of the wildlife habitat and scenery here. *See* Darian
 21 Decl. (Ex. 10) ¶¶ 9–11; McSpadden Decl. (Ex. 11) ¶¶ 13–15, 18, 28–32; Bugbee Decl.
 22 (Ex. 6) ¶¶ 23; Gardner Decl. (Ex. 12) ¶¶ 7–15.

23 All of this transmission-line-associated construction, which begun late last month,
 24 and which will resume after November 6 absent an injunction, “is planned to take place at
 25 the very start of the construction phase.” BiOp (Ex. 2) at 32; *see also id.* at 33 (stating
 26 “[c]ivil work (roads, pads, and laydown sites), geotechnical drilling,¹⁴ pier foundation

27 ¹⁴ *See* BiOp (Ex. 2) at 33 (“As many as 22 locations throughout the transmission line
 28 corridor would be drilled,” requiring clearing of “30 ft by 30 ft” areas and “leveling” of

1 preparations, and gas pipeline road and crossings improvements” will occur in months 1-
 2 3). A Forest Service order, signed October 2, closed off public roads to facilitate
 3 transmission line and exploratory drilling construction authorized by the agency for the
 4 Mine project in the Flux Canyon area through November 30, promising further
 5 impending damage. *See* U.S. Forest Serv., *Road Closure: Order No. 03-05-03-26-012*
 6 (Oct. 2, 2026) (Ex. 13) (Flux Canyon Road closure and attached map). This destruction
 7 of critical habitat is irreparable; “[t]here is no plan to decommission the 138-kV
 8 Transmission Line or reclaim the corridor.” BiOp (Ex. 2) at 34.

9 Second, miles of jaguar and Mexican spotted owl critical habitat will soon be
 10 permanently bulldozed and “surfaced” for the new 7.6-mile “Primary Access Road,” or
 11 “PAR,” which will be constructed over three years beginning in 2026. *Id.* at 16.
 12 Construction of the PAR is “a permanent disturbance because it would not be
 13 revegetated.” *Id.* at 231. The 7.6-mile Primary Access Road, with its 68-foot “average cut
 14 and fill width,” *id.* at 16, will result in significant elimination of vegetation; “100.3 acres
 15 [of] permanent vegetation removal” will occur to build the road. FEIS (Ex. 5) at 3.15-19,
 16 3.15-38. Construction of the road may involve blasting, “would take approximately two
 17 years to complete and would occur 24 hours per day, seven days per week.” BiOp (Ex. 2)
 18 at 30. Plowing the PAR will require bulldozing 4.7 miles of new road in undisturbed
 19 areas, “essentially reconstruct[ing]” 2.9 miles of existing double-track, and erecting a
 20 new bridge across the remote Flux Canyon. *Id.* at 29. This construction will threaten
 21 water sources, scenery, and wildlife habitat that Plaintiffs’ members now enjoy. *See*
 22 Darian Decl. (Ex. 10) ¶¶ 9–11; McSpadden Decl. (Ex. 11) ¶¶ 15, 18–19, 28–32; Bugbee
 23 Decl. (Ex. 6) ¶¶ 24–26; Gardner Decl. (Ex. 12) ¶¶ 7–14. The Forest Service admits that
 24 road construction and operation “could directly and indirectly impact special status
 25 species, including via increased potential for wildlife injury.” FEIS (Ex. 5) at 2-46. FWS
 26 “steep grounds . . . Where the drill rig cannot be truck or track-mounted, it would be
 27 slung in by helicopter (i.e., in the steeper, remote parts of Flux Canyon). . . . The noise
 28 level from the drill rig is estimated to be maximally 85 dBA at 50 ft (15 m) (BA p. 2-
 37).”).

1 also states that PAR construction will require permanent vegetation removal within and
 2 adjacent to an occupied Mexican spotted owl Protected Activity Center,¹⁵ which will
 3 “result in adverse effects to Mexican spotted owl habitat within the Upper Humboldt
 4 PAC and recovery habitat.” BiOp (Ex. 2) at 272–73.

5 Third, construction of “Tailings Storage Facility 2,” or “TSF2,” has already begun,
 6 and involves extensive road construction, drilling, vegetation removal, and habitat
 7 destruction crisscrossing a 237-acre area of National Forest, to prepare the forest to be
 8 buried by up to 38 million of tons of mining waste. *Id.* at 15. Prior to Project approval,
 9 the area was traversed by a few rough trails, but was generally undisturbed forest. *See*
 10 Darian Decl. (Ex. 10) ¶¶ 13–15; McSpadden Decl. (Ex. 11) ¶¶ 20–21. Construction of
 11 this waste dump involves “[c]learing and grubbing, as well as subgrade preparation . . .
 12 using heavy machinery, such as loaders, dozers, graders, [and] excavators Blasting
 13 is anticipated to be needed along the western portion of TSF2 During the 3-year
 14 construction phase [2026-2029] of the Starter stage clearing, grubbing and subgrade
 15 preparation would occur continuously for 18 months. . . . [S]ubgrade preparation
 16 (including blasting) would occur 24 hours a day, seven days a week.” BiOp (Ex. 2) at 19–
 17 20. A several-mile perimeter road will be bulldozed to encircle the area, along with 2.9
 18 miles of restriction fencing. *Id.* at 20–21. Initially, access roads will be built to facilitate
 19 65 boreholes drilled in the area. *Id.* at 21, 24. This web of habitat destruction would be
 20 permanent as “drill pads in the TSF2 footprint and access roads would *not* be reclaimed,”
 21 given the Project’s plans to bury these hundreds of acres in mining waste forever. *Id.* at
 22 24 (emphasis added). Ultimately, 230 acres of forest will be removed for the tailings
 23 facility. FEIS (Ex. 5) at 3.15-38. Road and pad clearing will thus destroy forever
 24

25 ¹⁵ FWS designates Protected Activity Centers, or “PACs,” “at owl sites to sustain and
 26 enhance areas that Mexican spotted owls presently, recently, or historically occupy.”
 27 BiOp (Ex. 2) at 263. The purpose of PAC designation is to “protect activity centers used
 28 by owls rather than entire home ranges.” *Id.* The Upper Humboldt PAC, which will be
 partially plowed for the PAR, is known to be occupied by a pair of Mexican spotted owls.
Id. at 270.

1 hundreds of acres of designated jaguar and Mexican spotted owl critical habitat, scenic
2 beauty, and a sense of remoteness that Plaintiffs’ members enjoy. *See* Darian Decl. (Ex.
3 10) ¶¶ 13–15; McSpadden Decl. (Ex. 11) ¶¶ 20–21; Bugbee Decl. (Ex. 6) ¶ 14; Gardner
4 Decl. (Ex. 12) ¶ 16.

5 Courts throughout the Ninth Circuit have recognized that this sort of destruction—
6 road construction, bulldozing mature trees and vegetation, and threats to ESA-listed
7 species—constitutes irreparable harm. *See, e.g., Se. Alaska Conservation Council v. U.S.*
8 *Forest Serv.*, 413 F. Supp. 3d 973, 981 (D. Alaska 2019) (“[R]oad construction is an
9 irreversible action because of the time it takes for a constructed road to revert to natural
10 conditions.”); *see also Kootenai Tribe*, 313 F.3d at 1121 (describing the “ease” with
11 which “roadless lands” can be “irretrievably damaged”); *League of Wilderness Defs. v.*
12 *Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (explaining that when mature trees are
13 unlawfully cut down, “[n]either the planting of new seedlings nor the paying of money
14 damages can normally remedy such damage,” and the harm is thus “irreparable for the
15 purposes of the preliminary injunction analysis”); *Pac. Rivers Council*, 873 F. Supp. at
16 371 (“[P]otential harm to endangered species satisfies the requirement of showing
17 irreparable injury.”).

18 In addition, Center member Christopher D. Bugbee, who has a long career
19 studying and tracking jaguars in southern Arizona, opines in his declaration that the San
20 Rafael Valley and its surrounding mountain ranges, including the Patagonia Mountains,
21 constitute the “single most important wildlife corridor that remains for jaguars and
22 ocelots” to travel between Mexico and the United States. Bugbee Decl. (Ex. 6) ¶ 19. Mr.
23 Bugbee states that these species’ “continued existence in Arizona depends on this area
24 remaining intact, unfragmented and undisturbed.” *Id.* Mr. Bugbee also states that
25 construction of the Project’s transmission line and related roads and infrastructure
26 “represents a significant barrier for jaguar travel in the best remaining corridor of the
27 Patagonia Mountains.” *Id.* ¶ 23. The Forest Service similarly concluded that “due to the
28 permanent nature of the transmission line and its access roads,” those impacts

1 “represent[] an irretrievable and irreversible loss of unfragmented habitat for” jaguar.
 2 FEIS (Ex. 5) at 3.20-4. Accordingly, this construction will cause “irreparable damage to
 3 designated jaguar critical habitat as it eliminates or degrades certain physical and
 4 biological features required by jaguars for their recovery.” Bugbee Decl. (Ex. 6) ¶ 23.

5 Absent an injunction enjoining the Project, the imminent, unlawful destruction of
 6 critical habitat and the natural landscape will irreparably harm Plaintiffs and their
 7 members. Plaintiffs’ members visit and use the Patagonia Mountains, including the
 8 Project Area, to seek out and observe the imperiled species and habitat there, hike, camp,
 9 learn, and otherwise enjoy the Project Area’s natural character.¹⁶ See, e.g., *Rockies v.*
 10 *Marten*, No. CV-15-99, 2016 WL 6901264, at *6 (D. Mont. Nov. 22, 2016) (finding
 11 irreparable harm where plaintiffs asserted injury to members’ “interests in looking for,
 12 viewing, studying, and enjoying” lynx); *Or. Nat. Desert Ass’n*, 780 F. Supp. 3d at 1104
 13 (“[T]he loss of the ability to view, experience, and use natural areas in their undisturbed
 14 state is a cognizable, irreparable injury.”); cf. *Patagonia Area Res. All. v. U.S. Forest*
 15 *Serv.*, No. CV-23-00280-TUC-JGZ, 2023 WL 5723395, at *7 (D. Ariz. Sept. 5, 2023),
 16 *aff’d in part, appeal dismissed in part*, No. 23-16167, 2024 WL 2180192 (9th Cir. May
 17 15, 2024) (in the context of a NEPA claim, finding irreparable harm to Mexican spotted
 18 owls unlikely because the project at issue only “encompass[e]d less than 0.001 percent of
 19 the owl’s designated critical habitat”—unlike the “larger Hermosa Critical Minerals
 20 Project and Hermosa Project, which could change the cumulative effects on the owl”).

21 Indeed, the agencies themselves have acknowledged that the Project, including the
 22 specific activities that will occur in the early stages of the 113-year Project, will
 23 irreparably harm ESA-listed species and designated critical habitat.

24 For example, regarding the yellow-billed cuckoo, FWS repeatedly acknowledges
 25 that irreparable harm will occur, and that the most significant harm will occur in the early

26 ¹⁶ Because of these interests and harms, Plaintiffs also have standing. See *Students for*
 27 *Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 199 (2023)
 28 (stating standing test); see also Darian Decl. (Ex. 10); McSpadden Decl. (Ex. 11);
 Bugbee Decl. (Ex. 6); Gardner Decl. (Ex. 12).

1 stages of the Project. *See* BiOp (Ex. 2) at 311 (citing the Forest Service’s BA in
 2 acknowledging that vegetation removal for the PAR, TSF2, transmission line, and
 3 associated roads and infrastructure is anticipated to permanently remove “40.2 ac (16.3
 4 ha) of medium-probability cuckoo habitat and 264 ac (106.8 ha) of high probability
 5 cuckoo habitat”; this habitat “will be lost in perpetuity, and will adversely affect cuckoos’
 6 breeding, foraging, and sheltering success”); *id.* at 320 (“Noise effects on cuckoos will
 7 vary in extent, type, duration, and frequency but are anticipated to be highest during the
 8 first three years of implementation during construction of the Primary Access Road,
 9 TSF2, and the 138-kV Transmission Line (BA p. 5-183).”); *id.* at 326–27 (“Increased
 10 vehicle traffic associated with the Proposed Federal Action is anticipated along the North
 11 and South Harshaw roads during the construction phase of the Hermosa Project. . . . In
 12 areas of cuckoo critical habitat where an increase in vehicle traffic is anticipated, a
 13 greater level of invertebrate mortality due to vehicle strikes is likely to adversely affect
 14 PBF2^[17] (prey base) for the cuckoo, particularly with respect to nocturnally active
 15 invertebrate species subjected to traffic levels well-above baseline.”).

16 As for the endangered Bartram’s stonecrop, FWS states that “construction and
 17 operation of the Primary Access Road and 138-kV Transmission Line in Flux Canyon
 18 will result in impacts to individual Bartram’s stonecrop plants in the Flux Canyon
 19 population through direct exposure to Project activities and via their habitat.” *Id.* at 138;
 20 *see also id.* at 127–28 (stating that 16% of all known remaining Bartram’s stonecrops live
 21 in Flux Canyon; this population is “the taxonomic anchor” for the species).

22 With respect to early Project impacts on the Mexican spotted owl, FWS states:

23 Ground disturbance would result in the loss of critical habitat through the
 24 direct removal of vegetation for the Primary Access Road and other access
 25 roads, the 138-kV Transmission Line, TSF2, and monitoring wells.

26 Approximately 287 ac (116 ha) of critical habitat would be affected. . . .

27 ¹⁷ PBFs, or Principal Biological Features, are habitat features “essential to the
 28 conservation of the species” “that occur in specific areas and that are essential to support
 the life-history needs of the species.” 50 C.F.R. § 424.02.

PCEs¹⁸] related to forest structure, maintenance of adequate prey species, and canyon habitat in these areas *would be permanently adversely affected*.

Id. at 282 (emphasis added); *see also id.* at 277 (concluding that noise pollution from “construction of the Primary Access Road and the 138 kV transmission line, blasting and use of mechanized equipment, including helicopters” is “likely to adversely affect Mexican spotted owls”); *id.* at 292 (concluding that incidental “take” of Mexican spotted owls, in the form of harassment, is anticipated to “occur within the Upper Humboldt PAC during the construction phase of the Hermosa Project over approximately three years”); FEIS (Ex. 5) at 3.20-4 (“Construction of project elements . . . would fragment designated critical habitat for the jaguar and Mexican Spotted Owl and impact critical habitat primary constituent elements for these species. These impacts are likely to persist in perpetuity due to the permanent nature of the transmission line and its access roads, representing an irretrievable and irreversible loss of unfragmented habitat for these species.”).

FWS also states that construction of the 38-million-ton waste pit—TSF2—will have numerous adverse effects on the beardless chinchweed. Ground disturbance associated with TSF2 construction “is anticipated to create dust, vibration, and light, and, of great concern for the beardless chinchweed, increase spreading of aggressive, invasive vegetation species, which can subsequently spread into other nearby habitats.” BiOp (Ex. 2) at 165; *see also id.* (“Another threat to beardless chinchweed from all the initial construction activities, is trampling or crushing by human or offroad vehicular traffic.”). This damage threatens what the BiOp acknowledges is one of only nine populations remaining, a population that “plays a key conservation role because of its location and the

¹⁸ PCEs, or Primary Constituent Elements, was a term used in some critical habitat designations that is synonymous with the phrase “Physical or biological features essential to the conservation of the species” as defined in FWS’s ESA regulations. 81 Fed. Reg. 7214, 7220 (Feb. 11, 2016). The latter phrase means “[t]he features that occur in specific areas and that are essential to support the life-history needs of the species.” 50 C.F.R. § 424.02.

1 low number of populations of beardless chinchweed overall.” *Id.* at 162–63.

2 In addition to acknowledging that the Project’s construction phase will irreparably
3 harm these ESA-listed species and critical habitat, the agencies also acknowledge that
4 early Project activities will irreparably harm soil health, ecosystem structures, and
5 recreational and aesthetic interests. *See* FEIS (Ex. 5) at 3.12-2–3 (“Surface-disturbing
6 activities—such as clearing vegetation, grading, and stockpiling soils—further accelerate
7 erosion and diminish soil productivity. . . . Given the nonrenewable nature of soils, their
8 loss can lead to an irreversible decline in soil productivity, physical structure, and
9 ecological function.”); *id.* at 3.20-3 (“The irreversible loss of natural-appearing scenic
10 character due to localized scenic integrity reductions from the transmission line . . .
11 would also be an irreversible loss for recreation in terms of driving pleasure along SR 82,
12 a state-designated scenic byway.”).

13 Absent an injunction preventing the imminent destruction of this unique and
14 irreplaceable landscape, Plaintiffs and their members will suffer irreparable harm.

15 **III. The Balance of Harms and Equities Tip Sharply in Plaintiffs’ Favor.**

16 Because this case involves irreparable harm to ESA-listed species and their critical
17 habitat, the Court need not address the “balance of the equities” and “public interest”
18 factors. *See Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir.
19 1994) (explaining that the “language, history, and structure” of the ESA show Congress’s
20 “determination that the balance of hardships and the public interest tips heavily in favor
21 of protected species”). But even if the Court addresses these factors, they weigh in
22 Plaintiffs’ favor.

23 The “balance of equities” and “public interest” factors “merge” when a federal
24 agency is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As shown, Project
25 construction will immediately and irreparably harm Plaintiffs and their members. In
26 contrast, there will be no irreparable harm to the agencies, South32, or TEP/UNSE, if the
27 Project is stayed until this Court is able to resolve this case on the merits.

1 The public interest weighs in favor of “careful consideration of environmental
 2 impacts,” and suspension of such projects “until that consideration occurs comports with
 3 the public interest.” *All. for the Wild Rockies*, 632 F.3d at 1138 (cleaned up). Where
 4 environmental injury is “sufficiently likely, the balance of harms will usually favor” an
 5 injunction. *Save Our Sonoran*, 408 F.3d at 1125 (citation omitted); *see also League of*
 6 *Wilderness Defs.*, 752 F.3d at 765–66 (describing delay in moving revenues and jobs to
 7 future year as “marginal harm” and concluding irreparable injury to plaintiffs outweighs
 8 temporary delay in achieving economic benefits of project).

9 Defendants may argue that the immediate bulldozing, clearcutting wildlife habitat,
 10 and construction of the industrial transmission line and the PAR, exploratory drilling, and
 11 other Project activities is imperative to extract “critical” minerals. But any such
 12 contention ignores the agencies’ and South32’s admission that even without any federal
 13 approval, the mine will continue on South32’s private lands, including access via the
 14 existing Harshaw Route, *for over 50 years*. FEIS (Ex. 5) at 2-1–26 (discussing “No
 15 Action Alternative”). Thus, the mine can still extract critical minerals even if the agencies
 16 had denied the proposed expansion onto public lands—and even if the Project is
 17 enjoined.

18 At a minimum, the mine will continue for up to 10 years, when the existing
 19 Tailings Storage Facility, TSF1, will reach capacity:

20 There is an existing lined dry-stack TSF on South32 Hermosa private land
 21 (known as TSF1) that was voluntarily constructed by the company to
 22 remediate legacy mine tailing deposition and drainage impacting water
 23 quality (more detail on TSF1 can be found in Section 2.2.3). TSF1 will be
 expanded to receive production tailings. TSF1 has capacity for less than 10
 years of placement of waste rock and tailings

24 South32 Hermosa Inc., *Critical Minerals Exploration and Mine Plan of Operations* (Apr.
 25 8, 2025) (excerpts) (Ex. 14), at 1-4; *see also* BiOp (Ex. 2) at 18 (explaining that South32
 26 does not need to store tailings on federal land until “approximately Year 10”); FEIS (Ex.
 27 5) at 2-5 (“Under the Alternative 1 [no-federal-action] mine plan, mining would occur for
 28

up to approximately 10 years . . .”).

Thus, because the mine would continue even if the Forest Service denied the proposed expansion and transmission line, neither South32 nor UNSE can assert that any irreparable inequity or harm would result if the expansion onto public lands is stayed while this Court considers the merits.

IV. The First-Ever Major Mine Approved Under FAST-41 Warrants This Court’s Detailed Review.

Despite the destruction this Project will unleash on this sensitive biodiversity hotspot, the Project was rushed through environmental review “in record time”¹⁹ via the Fixing America’s Surface Transportation Act (also known as FAST-41) process. FAST-41 provides:

In addition to considering any other applicable equitable factors, in any action seeking a temporary restraining order or preliminary injunction against an agency or a project sponsor in connection with review or authorization of a covered project, the court shall—

- (1) consider the potential effects on *public health, safety, and the environment*, and the potential for significant negative effects on jobs resulting from an order or injunction; and
- (2) not presume that the harms described in paragraph (1) are reparable.

42 U.S.C. § 4370m-6(b) (emphasis added).

Here, because as the Forest Service and South32 admit, the current private-lands mining will continue unabated for over 50 years (at least for 10 more years), the economic benefits are not dependent on the Forest Service’s approval. Thus, any preliminary injunction staying the expansion onto public lands—including the construction of the transmission line and PAR, extensive exploration drilling, clearcutting and bulldozing federal forest lands, and other destruction of public lands—will not preclude the company from reaping significant economic benefits. In any case, any short-term and temporary economic considerations cannot outweigh the significant and

¹⁹ U.S. Dep’t of Agric. & U.S. Forest Serv., *USDA Advances Trump Administration Effort to Boost U.S. Mineral Energy Production* (July 7, 2026) (Ex. 4).

1 permanent environmental damage, including to critical habitat of endangered and
 2 threatened species, caused by the mine's imminent destruction of public lands.

3 **V. A Bond is Not Appropriate in this Public Interest Environmental Case.**

4 The Court should not require a bond in issuing the requested injunctive relief. *See*
 5 Fed. R. Civ. Pro. 65(c). Courts routinely waive the bond requirement or impose a
 6 nominal bond in cases involving nonprofits who would otherwise effectively be denied
 7 access to judicial review:

8 It is well established that in public interest environmental cases the plaintiff
 9 need not post bonds because of the potential chilling effect on litigation to
 10 protect the environment and the public interest. Federal courts have
 11 consistently waived the bond requirement in public interest environmental
 12 litigation, or required only a nominal bond.

12 *Hualapai Tribe v. Haaland*, No. CV-24-08154, 2024 WL 4678059, at *21 (D. Ariz. Nov.
 13 5, 2024) (citations omitted) (waiving bond in issuing preliminary injunction against
 14 federally-approved mineral exploration); *see also Ctr. for Biological Diversity v. Stahn*,
 15 No. CV-08-8031, 2008 WL 1701374, at *2 (D. Ariz. Apr. 10, 2008) (imposing a nominal
 16 bond in enjoining Forest Service approval of mineral exploration); Decl. of Brendan
 17 Cummings (Ex. 15) ¶ 9 (attesting that a substantial bond “would have a chilling effect on
 18 the Center’s ability to bring lawsuits such as this one to advance the public interest”);
 19 Darian Decl. (Ex. 10) ¶ 16 (similar statement with respect to PARA).

20 **CONCLUSION**

21 For the foregoing reasons, Plaintiffs request that this Court enter an order
 22 preliminarily enjoining all South32 and TEP/UNSE operations approved in the ROD and
 23 analyzed in the BiOp until the merits of Plaintiffs’ claims have been adjudicated.

24 Respectfully submitted this 9th day of October, 2026,

26 

27 Graham Rex (AZ Bar # 041061)
 28 Center for Biological Diversity

1 P.O. Box 710
2 Tucson, AZ 85702-0710
3 (928) 519-3318
4 grex@biologicaldiversity.org

5 /s/ Roger Flynn
6 Roger Flynn (CO Bar # 21078)
7 Western Mining Action Project
8 P.O. Box 349; 440 Main Street, #2
9 Lyons, CO 80540
10 (303) 823-5738
11 roger@wmaplaw.org
12 *Pro Hac Vice*
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28