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**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.

**COMPLAINT FOR
VACATUR,
DECLARATORY, AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the federal government's review and approval of the Hermosa Project, a major expansion onto public lands of industrial mining in the heart of one of the nation's most biologically diverse mountain ranges.

2. Nestled just north of one of the final unwalled stretches of the U.S.-Mexico border, the Patagonia Mountains are a critical haven for numerous threatened and endangered species. Jaguars and ocelots roam the sky islands in and around the Project Area, with an ocelot detected in the Project Area as recently as July 2025. The Project

1 Area also contains designated critical habitat for jaguars, Mexican spotted owls, western
2 yellow-billed cuckoos, beardless chinchweed, and northern Mexican gartersnakes.
3 Sonoran tiger salamanders, Gila topminnow, and Bartram’s stonecrop likewise call the
4 Project Area home.

5 3. For many of these imperiled species, the populations found in the Project
6 Area are among the most important populations anywhere on Earth—these unique
7 populations are vital to the species’ survival and recovery. For example, the Project Area
8 contains 16% of all known remaining Bartram’s stonecrops; this population of the
9 threatened plant is “the taxonomic anchor” for the species. USFWS, Final Biological
10 Opinion for the South32 Hermosa Minerals Project (Feb. 26, 2026) (BiOp) at 127–28.
11 The Project Area also contains one of nine remaining populations of the endangered
12 beardless chinchweed, “an important population of breeding [yellow-billed] cuckoos,”
13 and a Gila topminnow population that plays “an important conservation role in terms of
14 genetic representation for the entire species.” *Id.* at 153, 328, 428. Likewise, the Project
15 will impact an “area [that] is considered uniquely important for conservation and
16 recovery of the northern Mexican gartersnake in the United States,” and will impede the
17 final place where jaguars and ocelots can cross the U.S.-Mexico border for 120 miles. *Id.*
18 at 366, 94.

19 4. In the heart of this extraordinary wildlife sanctuary, the U.S. Forest
20 Service (USFS), in consultation with the U.S. Fish and Wildlife Service (FWS), approved
21 the expansion of Australian company South32 Hermosa’s mineral extraction operations
22 onto 52,438 acres (81 square miles) of public Coronado National Forest land. The Forest
23 Service’s decision, and the FWS BiOp on which it relies, authorize a 113-year timeline of
24 construction, operation, and closure of the mining project, complete with the excavation
25 of a 237-acre tailings storage facility to contain up to 38 million tons of mining waste;
26 blasting and paving of a permanent 7.6-mile Primary Access Road (including 4.7 miles of
27 new road in undisturbed areas and “essentially reconstruct[ing]” 2.9 miles of existing
28 double-track); drilling of potentially hundreds of drill holes up to 6,800 feet deep into the

1 regional aquifer; drilling of six new wells to extract an undisclosed amount of
2 groundwater for 83 years (in addition to the eight wells on private land supporting the
3 mining operation); construction of two new outfalls at which more than two million
4 gallons of treated “mine water” will be discharged per day for 83 years; installation of a
5 new 138-kV power transmission line across 7.3 miles of National Forest land; and
6 construction of a sprawling network of “[t]emporary access roads, power distribution
7 lines, fences, and other features” to support construction and operation of the mine. *Id.* at
8 15–16.

9 5. The Project will also affect the municipal water source for nearby
10 communities, including the town of Patagonia, Arizona, as well as the vibrant recreation
11 economy based on the use of these public lands for birdwatching, hiking, and high-
12 elevation respite from Arizona’s oppressive heat.

13 6. Despite the destruction this Project will unleash on this sensitive
14 biodiversity hotspot, the Project was rushed through environmental review “in record
15 time”¹ via the Fixing America’s Surface Transportation Act (also known as FAST-41)
16 process. Unsurprisingly, the agencies’ review of the Project’s environmental impacts is
17 riddled with inconsistencies, incomplete analysis, ambiguities, and legal violations.

18 7. Defendant USFS approved the Project on July 7, 2026, in a Record of
19 Decision (ROD) relying on a BiOp issued by Defendant FWS on February 26, 2026, and
20 a Final Environmental Impact Statement (FEIS) issued by USFS in March 2026.

21 8. But in reviewing and approving the Project, the agencies failed to meet
22 their Congressionally-mandated duties to protect species as required by the Endangered
23 Species Act (ESA). At the outset, regarding the Project’s destruction of designated
24 “critical habitat,” the agencies relied on a regulatory definition of “critical habitat” under
25 the ESA that has been ruled illegal and vacated by the federal courts. Further, for each

26 ¹ U.S. Dep’t of Agric. & U.S. Forest Serv., *USDA Advances Trump Administration*
27 *Effort to Boost U.S. Mineral Energy Production* (July 7, 2026),
28 [https://www.usda.gov/about-usda/news/press-releases/2026/07/07/usda-advances-trump-
administration-effort-boost-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).

1 ESA-listed species, the agencies either downplayed the Project’s impacts, or relied on
2 vague and unsupported future “monitoring” or other “mitigation” measures that fail to
3 survive basic scrutiny, among other ESA violations.

4 9. Compounding these errors, the agencies approved a secondary and new
5 road through essentially pristine public lands and wildlife habitat based on its illegal
6 assumption that the road was covered under a statutory right under federal mining laws,
7 when it admits that the road is not necessary, as the mine site is currently accessed by an
8 existing road that has been used by previous private-lands mining operations for years.
9 This tactic improperly exempted the new “Primary Access Road” from the strict
10 requirements of federal law governing such discretionary rights-of-ways across public
11 land. The same is true for two water-discharge pipelines (one roughly 5 miles long) that
12 were approved under an assumed statutory right under the mining laws.

13 10. In addition, the FEIS and ROD were based on the fundamentally-wrong
14 position that expansion of mining and waste dumping onto public lands was immediately
15 needed, pursuant to the federal government’s acceptance of the Project as a “FAST 41”
16 project. But this contradicts the agencies’ position, and entire environmental review,
17 which assumed that the mine would continue for another 50+ years on South32’s limited
18 private lands at the site, regardless of the new operations onto/under public lands – the
19 agency’s “No-Action Alternative.” FEIS at 2-1 to 2-26 (discussing “No Action
20 Alternative”). Thus, the FEIS was based on the erroneous view that the impacts to public
21 lands from the ROD would not appreciably degrade public resources, as they would
22 continue for 50+ years anyway. But the record shows otherwise.

23 11. The company’s own mining plan admits that without the new public lands
24 mining and waste dumping facility (Tailings Facility 2), currently approved operations
25 would cease within 10 years (not continue for 50 years), as the existing TSF1 (Tailings
26 Facility 1) would reach capacity.

27 12. Despite this acknowledged finite and limited capacity of the waste dump
28 facility, the agency’s review and approval were based on accepting South32’s assertion

1 that it could mine for another 50+ years on its private lands, based on a vague plan to
2 truck all of the millions of tons of ore across federal land to be processed and dumped at a
3 speculative and unknown location somewhere in Arizona. In addition to baselessly
4 assuming that the USFS and local and state governments would approve such heavy
5 industrial ore haulage, and that these distant waste facilities would be approved, the FEIS
6 and South32 admit that such future operations have not been planned.

7 13. “South32 Hermosa plans to construct the oxide ore beneficiation plant on
8 private land distal from the mine site. The crushed oxide ore would be transported in
9 sealed containers across NFS land to the beneficiation facility. Once oxide ore leaves
10 NFS land, it would not again enter NFS land either before or after beneficiation. Tailings
11 associated with the oxide ore would be produced and placed in a facility at or near the
12 distal beneficiation facility, not on NFS land. The distal oxide ore beneficiation facility
13 has not yet been sited.” FEIS at 1-11. The FEIS failed to disclose or analyze any
14 environmental impacts from shipping and processing the ore via these speculative
15 operations.

16 14. The FEIS’s assumption that a future, off-site processing plant would be
17 built, and that 50+ years of additional mining of the mine’s private land was a foregone
18 conclusion even without the public land facilities skewed much of the agency’s review of
19 the Project, assuming that its impacts to water, wildlife, and habitat was largely limited to
20 what only will occur *in addition to* the speculative 50+ years of private-lands mining.

21 15. In addition to failing to properly analyze the Project’s impacts to ESA-
22 listed plant and animal species, the FEIS failed to analyze the critical baseline conditions
23 of public resources, especially groundwater and its dependent environments. For
24 example, despite approving an extensive network of deep exploration drilling (up to
25 6,800 feet deep), as well as voluminous discharges of pumped groundwater into nearby
26 watersheds, the agency failed to analyze the current baseline conditions of these water
27 resources—in violation of long-standing federal law requirements.

16. Plaintiffs, the Patagonia Area Resource Alliance (PARA) and Center for Biological Diversity (the Center), file this suit for vacatur, and for equitable, declaratory and injunctive relief under the Endangered Species Act, 16 U.S.C. §§ 1531 *et. seq.*; the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; the 1897 Organic Administration Act, 16 U.S.C. §§ 475, 478, 551; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et. seq.*; other federal laws and their implementing regulations, challenging Defendants' decisions approving the Hermosa Project.

JURISDICTION AND VENUE

17. Jurisdiction over this action is conferred by 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). This Court has the power to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201–02, and to set aside the challenged decisions pursuant to the APA, 5 U.S.C. § 706(2)(A), and the general equitable powers of this Court.

18. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District. Additionally, this case should be assigned to this Tucson District, as Plaintiffs PARA (in Patagonia), and the Center (in Tucson) are headquartered in this District, and because the Project lies within the counties of this Division. *See* LRCiv 77.1.

PARTIES

19. Plaintiff PARA is a grassroots organization of volunteer community members committed to protecting and preserving the Patagonia, Arizona, area. It is a watchdog organization that monitors the activities of mining corporations, as well as government agencies, to make sure their actions have long-term, sustainable benefits to the region's public lands, watershed, and broader ecosystem.

20. Plaintiff the Center is a non-profit environmental organization with over 100,000 members, including more than 4,700 in Arizona, where the Center is headquartered. The Center works through science, law, and creative media to secure a

1 future for all species, large or small, hovering on the brink of extinction. The Center's
2 members' diverse interests span natural history, ecology, conservation, wildlife and
3 native plant observation, nature photography, hiking, camping, backpacking, quiet and
4 solitude in nature, dark skies, spiritual renewal, and a love of the Patagonia Mountains'
5 natural landscapes. The Center's members derive benefit from engaging with these
6 landscapes and the imperiled species that reside there. The Center's members expect and
7 rely upon federal and state regulatory agencies, such as USFS and FWS, to protect the
8 species, habitats, viewsheds, and air and water quality of these lands.

9 21. The Project would be located in and adversely affect lands and waters
10 where PARA and Center staff and members have enjoyed, and intend to continue
11 enjoying in the coming months and years, hiking, birdwatching, photographing, and
12 appreciating these lands and waters and wildlife and plant species in the area. These
13 interests will be immediately, irreparably, and significantly harmed by the Project.

14 22. For example, PARA member Anna Darian regularly, on a monthly and
15 often weekly basis, visits the public lands at and nearby the Project site, including the
16 location of the new Primary Access Road, as well as along the existing Harshaw Road
17 that provides access to the mine. On August 20, 2026, Ms. Darian visited the public lands
18 to be affected by the new Primary Access Road. On September 15 and 22, 2026, she
19 visited the lands to be buried by the Project's tailings facility, and on September 27,
20 2026, she again visited the Primary Access Road route lands. In these visits, as she has
21 done in previous visits, Ms. Darian enjoyed the peace and quiet of these lands, the
22 undisturbed wildlife and plants and their habitat, including along the proposed Primary
23 Access Road route, as well as the public lands at the mine site and related operations
24 (such as the lands slated for the exploration drilling and associated road construction).
25 Ms. Darian also photographs the natural scenery of these areas, and listens for and hopes
26 to see birds and other wildlife, including those protected by the ESA, such as the
27 Mexican spotted owl and western yellow-billed cuckoo. Ms. Darian intends to continue
28 these ongoing visits in the coming months.

1 23. Similarly, Center member Russ McSpadden regularly visits, as he has
2 done for at least 10 years, the public lands at the Project site, including the Primary
3 Access Road route. On August 31 to September 1, 2026, Mr. McSpadden visited public
4 lands to be affected by the new Primary Access Road. On September 22, 2026, he hiked
5 to lands to be buried by the Project's tailings facility and documented the endangered
6 beardless chinchweed blooming on the edge of the planned tailings site and within the
7 Project Area. On these visits, Mr. McSpadden particularly enjoys hiking and camping
8 within the Project Area, and seeking out and photographing the wildlife, plants, and their
9 habitat, on these public lands. He has a deep interest in, and appreciation for, species
10 listed under the ESA, knowing their special status and precarious survival. He enjoys
11 listening to and looking for, and attempting to photograph Mexican spotted owls, western
12 yellow-billed cuckoos, and other birds. He appreciates the habitat connections of the
13 jaguar and ocelot in the Project Area, seeking out their sign, and values the unique nature
14 and habitat of the northern Mexican gartersnake, Gila topminnow, as well as Bartram's
15 stonecrop, and beardless chinchweed. Mr. McSpadden has plans to return to the area in
16 October 2026.

17 24. All of these uses, interests, and enjoyments by Ms. Darian and Mr.
18 McSpadden, and other PARA and Center members, will be irreparably and immediately
19 harmed by the operations approved by the ROD (supported by the FEIS and BiOp). A
20 decision vacating or enjoining the Project will protect their use and enjoyment of these
21 public lands.

22 25. Plaintiffs bring this action on their own behalf, and on behalf of their
23 members, who regularly use and enjoy the federal public lands at, and are affected by, the
24 Hermosa Project.

25 26. The legal violations described in this Complaint cause direct injury to
26 Plaintiffs' health, recreational, inspirational, religious, scientific, educational, and
27 aesthetic interests. Plaintiffs and their members, including Ms. Darian and Mr.
28 McSpadden, have been and will continue to be adversely affected and irreparably harmed

1 if Defendants' ongoing violations of the ESA, FLPMA, Organic Act, NEPA, and the
2 APA continue. These are actual, concrete injuries caused by the agencies' violations of
3 these laws. Plaintiffs' and their members' injuries will be redressed by the relief sought.

4 27. Defendants' failure to comply with NEPA and FLPMA additionally harms
5 Plaintiffs and their members by denying them the right to informed decision-making and
6 full disclosure under NEPA and FLPMA, as well as the right to meaningfully participate
7 in the decision-making process.

8 28. Defendant USFS is a federal agency within the U.S. Department of
9 Agriculture and is tasked with managing land and wildlife within the National Forest
10 System, including the Coronado National Forest. USFS has the responsibility to
11 administer and implement FLPMA, the 1897 Organic Act, and to comply with all other
12 applicable federal laws, including NEPA and the ESA. USFS issued the ROD and FEIS
13 and approved the Plan of Operations for the Hermosa Mine on the Coronado National
14 Forest.

15 29. Defendant FWS is the federal agency responsible for administering the
16 ESA, including consulting with other federal agencies regarding impacts to wildlife
17 species listed as threatened or endangered with extinction pursuant to the ESA.

18 30. PARA and the Center submitted extensive comments to USFS during
19 public comment periods for the Project. In addition, PARA and the Center submitted
20 timely administrative objections regarding the Project. All of the issues and claims raised
21 in this Complaint were previously raised to the agencies and are properly before this
22 Court for judicial review.²

23
24 ² This complaint focuses on the agencies' violations of these laws under the judicial
25 review provisions of the APA, 5 U.S.C. § 706. Pursuant to the citizen-suit provision of the
26 ESA, 16 U.S.C. § 1540(g), on September 10, 2026, Plaintiffs filed the required 60-day
27 notice letter to the agencies, notifying them of additional violations of the ESA, including
28 the Forest Service's illegal reliance on the inadequate FWS Biological Opinion in
authorizing the Project. Upon expiration of that 60-day period, unless the agencies have
corrected those alleged errors, Plaintiffs intend to amend their complaint to raise these

FACTUAL BACKGROUND

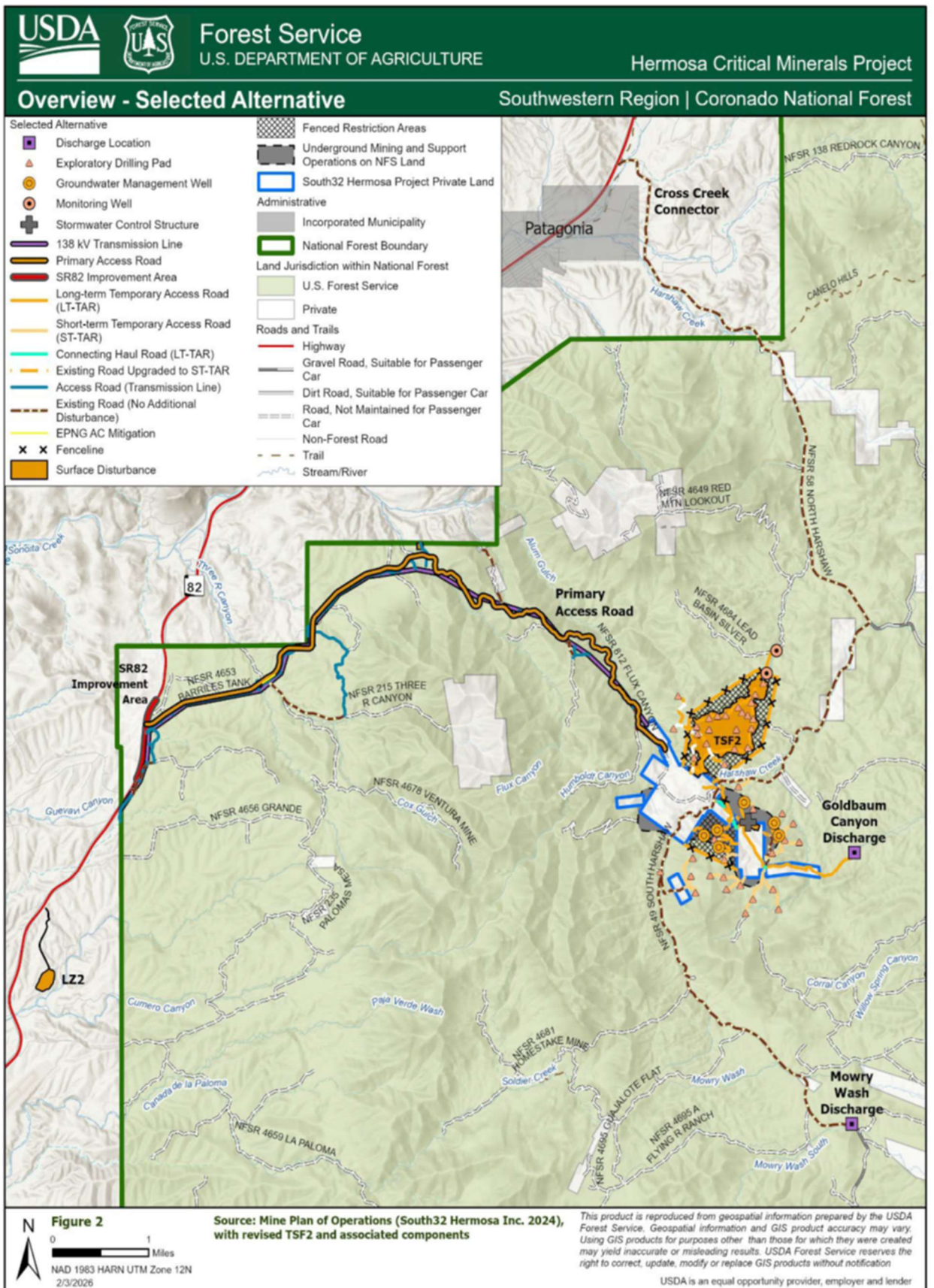
31. As authorized by the ROD, the Hermosa Project will result in extensive and permanent impacts to public resources in the Patagonia Mountains. After three years of construction, the Project would operate for approximately 70 years, with impacts remaining long after that. ROD at 2-4.

32. It would allow, for the first time, extensive underground mining on public lands in the area, the construction of a new 225-acre mine waste dump (tailings) facility, a 7.6-mile Primary Access Road (of which “4.7 miles of the Primary Access Road will be new construction.”), and “7.2 miles of new 138-kV overhead transmission line ... to serve the Project.” ROD at 2-3.

33. The ROD also authorizes continuous groundwater pumping (to allow underground mining), which “will be discharged directly into Goldbaum Canyon and Mowry Wash South through discharge control structures on [National Forest] land.” *Id.* These discharges would be at the end of two new water pipelines to be constructed across public lands (roughly 0.5 and 5 miles long, respectively), as approved in the ROD. Similar to the Primary Access Road, USFS did not require South32 to apply for a FLPMA right-of-way for these two pipelines.

34. ROD Figure 2 below shows the extent of the Project across the region, including the Primary Access Road and two water pipelines:

additional claims.



The Project Will Harm Protected Wildlife and Plants.

35. The Project will result in severe impacts to species and habitat protected under the ESA. These newly authorized components substantially expand the mine's footprint and impacts on public lands. Of particular concern are the fragmentation and loss of habitat for sensitive species including the jaguar and Mexican spotted owl, the construction of new industrial infrastructure through previously undeveloped areas, and the long-term risks associated with another major tailings facility in the region. The Project also introduces increased traffic, noise, dust, visual impacts, and industrial activity into the Patagonia Mountains.

36. The Forest Service prepared a Biological Assessment (BA) which it provided to FWS on July 10, 2025. FWS, relying on the BA, completed its biological opinion on February 26, 2026. The BiOp's completion pre-dated the Forest Service's Record of Decision on the project, which was issued on July 7, 2026.

37. The Forest Service's BA determined that the proposed action "may affect, and is likely to adversely affect" the threatened Bartram's stonecrop, the endangered beardless chinchweed, the endangered jaguar and its critical habitat, the endangered ocelot, the threatened Mexican spotted owl and its critical habitat, the threatened western yellow-billed cuckoo and its critical habitat, the threatened northern Mexican gartersnake and its critical habitat, the endangered Sonoran tiger salamander, and the endangered Gila topminnow. BiOp at 2–3. The Forest Service and FWS engaged in ESA Section 7 consultation for these species, which resulted in FWS's issuance of a BiOp determining that the project was not likely to jeopardize the continued existence of any species or adversely modify any critical habitat.

38. FWS's BiOp, and the Forest Service's reliance on it fail to ensure that the listed species will not be jeopardized or otherwise comply with the ESA..

39. For example, to support its conclusions that listed species will not be jeopardized by the proposed action, FWS's BiOp relies extensively on mitigation measures that were not yet developed when the agency issued the BiOp. *See, e.g.*, BiOp

1 at 46 (W-1 Water Monitoring and Mitigation Plan: “South32 Hermosa will develop and
2 implement a plan for water monitoring and mitigation in the Action Area . . . with the
3 following goals and objectives. . . . The plan will be approved by the Forest Service and
4 [FWS] and will be in place prior to implementation of the Proposed Federal Action . . .
5 .”); *see also id.* at 46 n.2 (noting that numerous “monitoring plans referenced in this
6 Biological Opinion have not yet been drafted or finalized”).

7 40. FWS’s practice of relying on uncertain, yet-to-be-developed mitigation
8 measures or monitoring plans is pervasive throughout the BiOp. *See, e.g.,* BiOp at 65
9 (“Invasive Wildlife Species Management (INV-2). South32 Hermosa will develop and
10 implement an Invasive Species Management Plan for vertebrates and invertebrates in
11 areas downgradient of the points of discharge”); *id.* at 65–66 (“Aquatic Invasive
12 Species Monitoring and Mitigation Treatment Plan Along Upper Sonoita Creek (INV-3).
13 South32 Hermosa, in consultation with the Forest Service and USFWS, will develop and
14 implement an Aquatic Invasive Species (AIS) Management Plan (Plan) for vertebrates
15 and invertebrates in [an unidentified] perennial stretch of upper Sonoita Creek”); *id.*
16 at 369 (regarding the northern Mexican gartersnake, noting the project proponent
17 “committed to *developing* and implementing an aquatic, predatory, nonnative species
18 control program within an undisclosed perennial reach of upper Sonoita Creek”
19 (emphasis added)).

20 41. The BiOp repeatedly expresses doubts as to the vagueness and
21 effectiveness of these uncertain, yet-to-be-developed conservation measures in doing the
22 job of protecting the listed species. *See, e.g.,* BiOp at 389, 415, 445 (noting FWS’s
23 “concerns for the efficacy of Conservation Measures INV-2 and INV-3”); *see also id.* at
24 405 (noting INV-2 “will only apply to 0.4 stream miles of up to 1.3 stream miles of
25 created wetted habitat and is therefore anticipated to have limited benefits”); *id.* at 370
26 (“There will be areas of upper Sonoita Creek that will not benefit from INV-3. The
27 Service is unaware of the total stream miles that will be protected from nonnative species
28 or the total stream miles exposed to nonnative species.”); *id.* at 278 (“Conservation

1 measure MSO-1 states that South32 Hermosa would minimize noise disturbance to owls
2 during their breeding season (March 1 through August 31), but no specifics or projections
3 were provided and the benefits derived from this Conservation Measure are uncertain.”).

4 42. The BiOp also states that some conservation measures are subject to
5 change without notice, again undermining any reliance on their effectiveness. *See, e.g.,*
6 BiOp at 101 (regarding “specific information related to species presence data (e.g.,
7 spotted cats) or specific data related to implementation of Conservation Measures (e.g.,
8 as yet unknown areas to be established as part of INV-2 and INV-3; various monitoring
9 plans to be developed), we have strived to incorporate the information we have into the
10 analysis, while recognizing in some cases, *final details may be iterative* (e.g., as they
11 evolve).” (emphasis added)).

12 43. The BiOp also bases its “no jeopardy” determination for numerous ESA-
13 listed species on vaguely defined or unenforceable mitigation measures. For example
14 (emphases added throughout):

- 15 - “Water Resources BMPs [Best Management Practices]. Use *suitable measures* to
16 *avoid or minimize* impacts to the aquatic resources when implementing
17 construction and maintenance activities, including the following” *Id.* at 47;
18 *see also id.* at 48 (“*Properly* compact fills to *avoid or minimize* erosion. Balance
19 cuts and fills to *minimize* disposal needs. . . . *Avoid or minimize* actions that would
20 *significantly* alter the natural drainage or flow patterns on lands immediately
21 adjacent to wetlands.”); *id.* at 49 (“*Consider* using temporary crossings on roads
22 that provide short-term or intermittent access to avoid, minimize, or mitigate
23 erosion, damage to streambed or channel, and flooding. Consider low-water
24 crossings to cross ephemeral streams”).
- 25 - Beardless Chinchweed 3 (BC-3)—Beardless Chinchweed TSF2 Pre-Construction
26 Survey. “If additional individuals are identified in the footprint of TSF2, South32
27 Hermosa *will coordinate* with Forest Service and the Service on *appropriate*
28 *actions.*” *Id.* at 62.
- INV-2. “South32 Hermosa will develop and implement an Invasive Species
Management Plan for vertebrates and invertebrates in areas downgradient of the
points of discharge on CNF and South32 Hermosa-owned private land in Mowry
Wash, Goldbaum Canyon, and Harshaw Creek. *The Plan will outline the methods,*
frequency, and timing to monitor, identify, and remove invasive aquatic species ...

1 that could impact Endangered Species Act-listed species.” *Id.* at 65, 370, 402.

- 2 - INV-3: “South32 Hermosa committed to developing and implementing an aquatic,
3 predatory, nonnative species control program within an *undisclosed* perennial
4 reach of upper Sonoita Creek, *at some location* upstream of Patagonia Lake State
5 Park . . . INV-3 will target [by unspecified means] crayfish, bullfrogs and
6 nonnative fish.” *Id.* at 369–70.

7 44. FWS recognizes repeatedly that its proposed mitigation measures and
8 monitoring programs lack detail. *See, e.g.*, BiOp at 521 (recommending a “status update
9 on ‘lacking’ details of the mitigation plans” that will affect Bartram’s stonecrop); *id.* at
10 523 (recommending a “status update on ‘lacking’ details of the Inv-1 Invasive Plant
11 Management plan”); *id.* at 524 (recommending a “status update on ‘lacking’ details of the
12 mitigation plans” that will affect beardless chinchweed).

13 45. The BiOp’s incidental take statement (ITS) for numerous listed species
14 similarly lack detail and rely on plans that were not defined when FWS issued the BiOp.
15 For example, the ITS for jaguar and ocelot includes Term and Condition (T&C) 1.1,
16 which requires the “creation and implementation of a Spotted Cat Monitoring Plan.”
17 BiOp at 253. However, FWS would not create that plan until months after the BiOp is
18 complete and approved: “The Spotted Cat Monitoring Plan *will be developed within six*
19 *months and implemented within 12 months* of the rendering of this Biological Opinion.”
20 BiOp at 255 (emphasis added).

21 46. The ITS for the Mexican spotted owl similarly includes reasonable and
22 prudent measures and terms and conditions that are vague and unenforceable. *See, e.g.*,
23 RPM 1 (“*Minimize* adverse effects to Mexican spotted owls affected by the Proposed
24 Federal Action”); T&C 1.1 (“The CNF *will work with the Service* to designate new PACs
25 if owl sites are detected”); T&C 1.2 (“Following the discovery or reporting of three
26 Mexican spotted owl fatalities within the Action Area, the [Coronado National Forest]
27 will work with the [FWS] to determine, identify, and implement *any needed actions or*
28 *measures* to *reduce* additional fatalities well in advance of exceeding incidental take from
vehicular collisions”). BiOp at 293 (emphases added).

1 47. Likewise, the BiOp’s ITS for the yellow-billed cuckoo includes T&Cs
2 intended to implement RPMs that are unenforceable, vague, and arbitrary and capricious.
3 *See, e.g.*, BiOp at 335 (Yellow-billed cuckoo T&C 1.1, providing that the Forest Service,
4 in coordination with South32 Hermosa, “will create or provide funding to create a
5 Yellow-Billed Cuckoo Monitoring Plan”).

6 48. For three ESA-listed species that rely heavily on riparian habitat for their
7 lifecycle—the northern Mexican garter snake, Sonoran tiger salamander, and Gila
8 topminnow—the BiOp also relies on unclear, unenforceable, inadequately measured, and
9 arbitrary triggers to define when take has been exceeded and thus reinitiation is required.
10 Specifically, for all three species, the BiOp ties the limit on take to incomplete
11 monitoring protocol conservation measures (INV-2 and INV-3) which do not yet exist.
12 *See, e.g.*, BiOp at 370 (with measure INV-2, South32 Hermosa “*will* develop and
13 implement an Invasive Species Management Plan,” which “*will* outline the methods,
14 frequency, and timing to monitor, identify, and remove invasive aquatic species.”
15 (emphases added)); *id.* at 369 (INV-3’s aquatic invasive species monitoring and
16 mitigation treatment plan will be focused “within an *undisclosed* perennial reach of upper
17 Sonoita Creek, at *some location* upstream of Patagonia Lake State Park,” and FWS “is, as
18 of yet, *unaware of the specific location or length of the ‘perennial reach’ where INV-3*
19 *will be implemented.*” *Id.* at 369 (emphases added)).

20 49. The BiOp repeatedly concludes that the habitat that the mine will degrade
21 is critically important to numerous species the ESA is meant to protect, but then
22 arbitrarily dismisses the project’s impacts to those species.

23 50. For example, FWS dismisses the Project’s effects on jaguars and ocelots
24 and their critical habitat, despite acknowledging that the Project would impact the last
25 remaining place where jaguars and ocelots can cross the U.S.-Mexico border across a
26 120-mile stretch.

27 51. Habitat connectivity with Mexico is essential for jaguars and ocelots. *See*
28 BiOp at 220 (“The conservation role or value of jaguar critical habitat is to provide areas

1 to support [jaguar movement and population expansion]. To realize these values, cross-
2 border connectivity with Mexico is essential.”); *id.* at 226 (“[T]he conservation of both
3 ocelots and jaguars is *dependent* on habitat connectivity and the opportunity to move
4 between the Patagonia and Huachuca mountains and Mexico.”).

5 52. Loss of habitat connectivity is likewise a key threat to ocelots. *See id.* at
6 205 (“Threats to ocelots vary across the range and include habitat loss and fragmentation
7 due to increased human development”); *id.* at 206 (“Ocelots in both management
8 units span the U.S.-Mexico international border and movement of individuals between
9 the two countries is needed to sustain these northernmost populations”).

10 53. The BiOp admits that extensive border wall construction has eliminated
11 virtually all places for large mammals such as jaguars and ocelots to cross the
12 international border. *See id.* at 94. The BiOp states that the final remaining corridor for
13 these species (and other large mammals) to cross the border in the entire region lies just a
14 mile and a half south of the Project Area. *Id.*

15 54. The BiOp further admits that the Project will impede this final remaining
16 habitat corridor. *Id.* at 240 (proposed mine “potentially results in an impediment to
17 connectivity to Mexico” for jaguar, and “adverse effects will likely impede (but not
18 eliminate) the use of this critical habitat unit by jaguars”); *id.* at 247 (the mine “is
19 expected to significantly alter connectivity to Mexico”).

20 55. Despite acknowledging (1) habitat connectivity with Mexico is essential
21 for the survival and recovery of jaguars and ocelots, (2) the Project Area lies in the final
22 remaining connectivity corridor for 120 miles, and (3) the Project will “significantly alter
23 connectivity to Mexico,” FWS concludes that the Project will not jeopardize the survival
24 or recovery of these species or adversely modify the jaguar’s critical habitat. *Id.* at 248–
25 49.³

26 56. FWS justifies its ‘no jeopardy’ conclusion for jaguars and ocelots on the
27

28 ³ FWS has declined to designate critical habitat for the ocelot.

1 grounds that the Project will “only” affect up to 10% of these species’ ranges. BiOp at
2 243. But this conclusion conflicts with FWS’s assumption that habitat connectivity with
3 Mexico is “essential” for these species. *Id.* at 220.

4 57. FWS also dismisses the Project’s impacts to key habitats and populations
5 of Bartram’s stonecrop, a rare plant. The BiOp notes that the Flux Canyon population in
6 the Project Area is

7 the third largest known population in the species’ entire range The
8 known individuals in the Action Area currently represent approximately
9 16% of total known individuals of the species. . . . These populations in the
10 Patagonia Mountains could, if sustained, contribute significantly to
11 recovery and delisting of the species as outlined in the Recovery Plan
12 (USFWS 2025a). . . . [T]he Flux Canyon population warrants priority
consideration for conservation due to its unique status as the taxonomic
anchor for [the species].

13 BiOp at 127–28. The BiOp notes the harm the Project will cause Bartram’s stonecrop, but
14 concludes, without explanation, that “[w]hile individuals, and in some cases, populations
15 will experience these [destructive] effects, [FWS] does not expect species-level effects.”
16 *Id.* at 145.

17 58. The BiOp acknowledges that that the population of beardless chinchweed
18 (another listed plant) in the Project Area is one of only nine remaining, and that “the
19 population in the Action Area plays a key conservation role because of its location and
20 the low number of populations of beardless chinchweed overall.” BiOp at 162–63; *see*
21 *also id.* at 163 (“This single population of 41 individuals in the Action Area is an
22 important population to maintain the representation of the species across its entire range. .
23 . . Redundancy of populations is important to the survival of the species”). The BiOp
24 states that the Project’s ground disturbance is “*of great concern for the beardless*
25 *chinchweed*” because the Project will “increase [the] spreading of aggressive, invasive
26 vegetation species, which can subsequently spread into other nearby habitats.” *Id.* at 165
27 (emphasis added)). The BiOp concludes that the Project will not jeopardize the species
28 because “[we] do not anticipate that such losses would result in species level effects.” *Id.*

1 at 174.

2 59. The BiOp underscores the importance of the Project Area for western
3 yellow-billed cuckoo:

4 [S]urveyors have consistently documented relatively high numbers of
5 cuckoos in the Action Area Within the western DPS [distinct population
6 segment], cuckoos are increasingly uncommon outside of New Mexico,
7 Arizona, and Sonora Mexico, suggesting that populations in southeastern
8 Arizona are of *elevated importance for recovery* of the cuckoo. The density
9 of suitable habitat and documented territories in the Action Area also suggest
the Patagonia Mountain range supports a *significant population* of breeding
pairs.

10 BiOp at 309 (emphasis added); *see also id.* at 310 (“Having all physical and biological
11 features essential to cuckoo conservation and recovery present in the Action Area
12 elevates the importance of these areas”). The BiOp admits that the Project could have “a
13 population-level effect” on the Cuckoo, *id.* at 329, but nonetheless concludes that the
14 Project will not jeopardize the Cuckoo because “in the larger context, . . . the area and
15 number of cuckoos affected are small relative to their status range-wide, and additional
16 suitable cuckoo habitat currently occurs throughout the region outside of the Action
17 Area.” *Id.*

18 60. The BiOp highlights the unique and outsized value of the Project Area for
19 the northern Mexican gartersnake, noting that the “San Rafael Valley supports one of
20 [only] three northern Mexican gartersnake populations known to occur in the United
21 States where the species remains reliably detected.” BiOp at 366. “Given the persistence
22 of this population over time and its role in conservation of the species, *this area is*
23 *considered uniquely important for conservation and recovery of the northern Mexican*
24 *gartersnake in the United States.*” *Id.* (emphasis added). The BiOp holds that actions that
25 harm one or more designated units of gartersnake habitat “may have a larger, more
26 pronounced effect on the overall conservation value of designated critical habitat for this
27 species.” *Id.* at 358. Despite the importance and fragility of this population, and despite
28 that fact that the BiOp acknowledges that the Project will reduce gartersnake populations

1 in the Project Area and negatively affect critical habitat, the BiOp finds no jeopardy or
2 adverse modification of critical habitat because “these effects attenuate on the regional
3 scale.” *Id.* at 375–76.

4 61. The BiOp states that for the Gila topminnow, the Project Area “represents
5 an important conservation role in terms of genetic representation for the *entire species*.”
6 See BiOp at 428 (emphasis added). The BiOp explains that to avoid extinction, the Gila
7 topminnow needs “multiple resilient populations of each genetic lineage,” and
8 acknowledges that the Project will degrade the genetic health of the only two remaining
9 populations of the Lower Santa Cruz River lineage to an unknown extent, given that
10 FWS “is unaware of the total stream miles that will be protected from nonnative species
11 or the total stream miles exposed to nonnative species.” *Id.* at 432, 435. Despite the
12 importance of the topminnow’s habitat in the Project Area for the “entire species,” and
13 despite the fact that “it is reasonably certain that the resiliency, redundancy, and
14 representation of the Gila topminnow will be negatively affected within the Action
15 Area.” The BiOp concludes that “the range-wide survival of the Gila topminnow will not
16 be affected by the Proposed Federal Action.” *Id.* at 436.

17 62. In addition, the BiOp repeatedly concludes that the impacts to the U.S.
18 populations of listed species is unimportant and unlikely to lead to jeopardy because the
19 species have populations outside the country.

20 63. With respect to the jaguar and the ocelot, FWS rests its no-jeopardy
21 conclusions on the fact that this Project will not impact jaguar and ocelot populations in
22 other countries: “The majority of the range (> 90%) for both of these species occurs
23 outside the Action Area and outside of the U.S. to the extent that the range-wide
24 distribution will be unaffected. Thus, no appreciable reduction to the survival of either
25 species will occur.” *Id.* at 243. This conclusion directly conflicts with FWS’s statement
26 that habitat connectivity with Mexico is “*essential*” for these species. *Id.* at 220
27 (emphasis added).

1 64. FWS’s conclusion regarding impacts to the jaguar’s ability to recover is
2 also contingent on FWS’s speculative assumption that other countries will implement
3 necessary recovery measures:

4 [T]he recovery of the jaguar does not hinge on the availability of habitat
5 in the U.S., *if Recovery Actions are implemented in the > 90% of the range*
6 *that occurs outside of the U.S.* Given that the Proposed Federal Action
7 does not reduce the ability of these sub-action [sic] from being
8 implemented outside of the U.S., the Proposed Federal Action does not
9 reduce connectivity for the jaguar that prevents the recovery of the species.

10 *Id.* at 245 (emphasis added).⁴

11 65. FWS’s reliance on recovery actions in other countries to ensure jaguar
12 recovery is complete speculation because FWS does not identify evidence suggesting that
13 those actions are being or will be taken.

14 66. With respect to the northern Mexican gartersnake, FWS similarly rests its
15 no-jeopardy determination on the species’ presence in Mexico: “The range of the
16 northern Mexican gartersnake that occurs in the United States represents approximately
17 10% of its overall range, which extends south to the Transvolcanic Belt Region near
18 Mexico City. . . . Therefore, a project that could reach a tipping point for recovery of the
19 species would need to affect an amount of occupied habitat that is significantly larger
20 than that affected by the Hermosa Critical Minerals Project.” *Id.* at 379.

21 67. But FWS provides no analysis or information regarding the gartersnake’s
22 status in Mexico. In fact, FWS admits it has no idea how the species’ Mexican
23 populations are doing: “In Mexico, current information on the status of northern Mexican
24 gartersnakes is lacking” *Id.* at 346. Without knowing whether Mexican populations
25 are capable of providing for the species’ survival and recovery, FWS cannot base its

26 ⁴ FWS’s assertion that “the recovery of the jaguar *does not hinge on the*
27 *availability of habitat in the U.S.*” is inconsistent with its statement that “conservation of
28 both ocelots and jaguars *is dependent on* habitat connectivity and the opportunity to move
between the Patagonia and Huachuca mountains and Mexico.” BiOp at 245, 226
(emphases added).

1 jeopardy and adverse modification conclusions on the fact that the species' range extends
2 into Mexico. *See Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 879 n.12 (9th
3 Cir. 2009) (rejecting FWS's reliance on a species' persistence in Mexico where FWS
4 "acknowledge[d] that 'the distribution of the species in Mexico is poorly understood").

5 **The Project Will Deplete Groundwater, an Impact the FEIS Arbitrarily Minimizes.**

6 68. In addition to these direct impacts to land, species, and habitat, the Project
7 would pump and remove massive amounts of groundwater from the area, causing a cone
8 of depression spanning 55.8 square miles at its peak. FEIS at 3.17-38.

9 69. This "cone of depression" represents the extent of the drawdown/
10 elimination of the groundwater that is caused by the decades-long groundwater pumping
11 that is needed to mine below the current water table to keep the ore body dry. FEIS at
12 Section 3.17 (discussing drawdown).

13 70. The new discharges of pumped groundwater will require up to 4,500
14 gallons per minute "directly discharged into Harshaw Creek, Mowry Wash South, and
15 Goldbaum Canyon." ROD at 2-5. "Direct discharge of water ... into Goldbaum Canyon
16 will require an above-ground 0.5-mile pipeline." *Id.* "Direct discharge of water ... into
17 Mowry Wash South will require a pipeline that will be located within the road prism of
18 Harshaw Road South." *Id.* That pipeline would be roughly 5 miles long. ROD Figure 2
19 above.

20 71. Such dewatering will lower, and in some cases, eliminate flows in local
21 streams, along with the habitat of plant and animal species dependent on the groundwater
22 recharge and contribution to current flows. *See* FEIS Figure 3.17-13 (showing extent of
23 dewatering across the region, up to 250 feet below current levels).

24 72. In its analysis of groundwater dewatering, however, the Forest Service
25 assumed that South32 would be mining, and pumping groundwater, for another 50+ years
26 even without the Project's new mining under the public lands. *See* FEIS Figure 3.17-5,
27 showing groundwater depletions from the "No-Action Alternative." Thus, according to
28

1 the agency, the additional dewatering caused by the approved Project would only slightly
2 expand what South32 would be doing for 50 years anyway.

3 73. But the record does not support the Forest Service’s assumption that this
4 50+ years of mining, which is dependent on a future and speculative off-site processing
5 plant and large tailings facility—which has not even been proposed by South32—will
6 occur without federal approval of the Project.

7 74. Despite the lack of any such plans, let alone even where these new
8 facilities will be constructed, the FEIS assumed that the *current* “baseline” environmental
9 conditions at the site was represented by the conditions resulting from the *future* 50+
10 years of mining on South32’s private lands. “The no action alternative (Alternative 1 –
11 No Action) outlines what happens if Alternative 2 – Proposed Action, or the other action
12 alternative, is not approved by the Forest Service. Alternative 1 – No Action also serves
13 as a benchmark against which the effects from other alternatives are compared.” FEIS at
14 2-1.

15 75. The difference between the assumed “baseline” conditions and what the
16 Project will do (for 70 years) is not an idle exercise, as, for example, it directly affects the
17 magnitude of the Project’s groundwater dewatering, especially on water resources that
18 USFS has determined need special protection.

19 76. The Forest Service failed to ascertain the current “baseline” groundwater
20 levels, flows and other conditions, at and around the site, instead using a future prediction
21 of groundwater conditions resulting from another 50 years of private lands mining—
22 mining that is dependent on a speculative and unknown processing plant and tailings
23 facility on private land somewhere in Arizona.

24 77. The Forest Service also failed to provide baseline analysis of resources
25 directly affected by the Project. For example, there is no baseline data or analysis of
26 groundwater quality that will be directly affected by the extensive network of exploratory
27 drilling. The agency anticipates 260 exploration drill holes at 26 drill pad locations, in
28 addition to 17 locations within the footprint of the new tailings facility, TSF2, and “an

1 additional 48 geotechnical pads with boreholes and test pits,” drilling up to 6,800 feet
2 deep into the regional aquifer, with direct environmental impacts. FEIS 3.17-33; BiOp at
3 21, 24–26.

4 78. “As many as 260 exploratory holes would be drilled on NFS land under
5 Alternative 2 – Proposed Action, to an average depth of about 3,500 feet. Additional
6 holes would be drilled in the footprint of TSF2 for exploration and geotechnical
7 investigation. Drilling introduces potential for contamination of groundwater by drilling
8 mud, drilling additives, or other drilling products.” FEIS 3.17-33; *see also* BiOp at 21
9 (noting “an additional 48 geotechnical pads with boreholes and test pits will be created in
10 the TSF2 footprint”). These contamination issues are in addition to the disruption of the
11 regional aquifer system that will result from the hundreds of wells drilled into the aquifer.

12 79. These operations will be away from the actual mine site, and include a
13 network of new “temporary” roads needed to reach these new sites. See FEIS Figure 2-3
14 (alternative 2) and Figure 2-6 (alternative 3). The ROD focuses most of the drilling away
15 to the south of the mine site, although many still are proposed north of the mine site.
16 ROD Figure 2.

17 80. Despite this extensive drilling and road network, there is no data or
18 analysis of the affected groundwater quality and quantity, or how the drilling may impact
19 groundwater quality and movement, and its associated effects on groundwater-dependent
20 resources such as riparian areas and wildlife habitat.

21 81. Regarding the actual mining, discharges, and related operations, there is no
22 analysis of the baseline groundwater conditions on Forest Service lands that will
23 experience significant hydrological impacts. For example, there is no baseline data for the
24 Mowry Wash and Goldbaum Canyon areas that will receive the project’s re-routed water
25 discharges (substantially affecting the local and regional hydrology). *See* ROD Figure 2
26 (showing approved project facilities). In addition, even if the baseline conditions were
27 analyzed (which they were not) the agency does not know the “[s]pecific constituents that
28 might experience a concentration increase above baseline water quality are not known

1 because leaching tests have not been performed on sediment samples from these
2 tributaries.” FEIS at 3.17-39.

3 82. Closer to the site, the FEIS contains no groundwater quality data from the
4 Hershaw Creek watershed just below the new tailings facility (TSF2).

5 83. In response to Plaintiffs’ Objections to the FEIS and Draft ROD
6 highlighting the lack of groundwater baseline data and analysis, the Forest Service and
7 FEIS rely on South32’s consultant reports:

8 The Final EIS includes a comprehensive evaluation of groundwater
9 conditions and potential impacts. Baseline groundwater conditions were
10 characterized through the Groundwater Baseline Characterization Report [PR 2335], Spring and Seep Baseline Characterization Report [PR 1843],
11 Groundwater modeling studies [PR 503; PR 1878], and, Water quality
12 baseline investigations [PR 1843], which describe existing groundwater
13 levels, flow, hydrogeology, groundwater-dependent features, and baseline
14 chemistry. These studies provide the basis for evaluating groundwater levels
15 and water quality changes during mining and after closure.

16 U.S. Forest Serv., App’x A to FEIS, Summarize Objection Contentions and Responses
17 (Objection Response), at 74. “PR” denotes the document number in the agency’s public
18 record.

19 84. Yet none of these reports contain baseline data or analysis of the
20 groundwater that will be affected by the project. For example, South32’s consultant’s
21 report, “Groundwater Baseline Characterization Report,” (PR 2335) focused only on
22 groundwater well data from the company’s current private land mining operations, not
23 the groundwater that will be affected by the various drill sites and discharge locations on
24 Forest Service lands miles away, north, south, and east of the private lands. [https://usfs-](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155293008477)
25 [public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155293008477](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/2155293008477) (Forest
26 Service website for project documents, last visited Aug. 1, 2026). *See* Figures 2 and 3 of
27 the Report, showing private land well locations.

28 85. The FEIS relies on that Report as the basis for the Forest Service’s
groundwater baseline analysis to satisfy its NEPA obligations. But neither the agency nor

1 South32 have any groundwater data for Project operations on public lands (except two
2 wells far downstream in lower Harshaw Creek). *See* FEIS at 3.17-8, and Figure 3-17.4
3 (showing well locations from which the limited data was gathered).

4 86. The agency's reliance on the company's "Seep and Spring Baseline
5 Characterization Report" (Public Record 1843) also does not contain the required
6 groundwater information. Instead, this report just discusses surface water springs and
7 seeps in the local area, with no groundwater analysis. Similarly, the company's
8 Groundwater Modeling Study" (PR 1878) is just a plan for future modeling of
9 groundwater impacts, with no data or analysis of current groundwater conditions.

10 87. Nor do USFS or FWS provide any evidence that the groundwater data
11 from these private-land wells in the South32 Baseline Report accurately depicts the
12 situation miles away, across different watershed drainages.

13 88. Notably, the Forest Service acknowledges that there are numerous
14 groundwater wells in the area that could have been analyzed for water quality data. *See*
15 FEIS Figure 3.17-2 (showing location of state-registered groundwater wells in the area).

16 89. The agency never explains why it never checked these obvious sources of
17 information for water quality, at a minimum.

18 90. Due to the unique and significant values of the water flows in Harshaw
19 Creek, which will be within the extensive "cone of depression" caused by the Project's
20 dewatering, the Forest Service submitted an Application for an Instream Flow Water
21 Right with the Arizona Dept. of Water Resources (ADWR) in 2011.

22 <https://infoshare.azwater.gov/docushare/dsweb/Get/SWDoc-5960/33-096951.pdf>
23 (Arizona Department of Water Resources file on Forest Service's Instream Flow
24 Application) (last visited Aug. 28, 2026).

25 91. As the Forest Service stated in its current Instream Flow Application (No.
26 33-96951, submitted in 2011), the riparian area along Harshaw Creek "corridor contains
27 the stream channel, its recognizable floodplain, and the belt of identifiable riparian
28 vegetation community. It is habitat for all aquatic species (plant and animal), and most

1 terrestrial species, which are either riparian obligate or otherwise dependent on riparian
2 corridor at least part of the time. The maintenance of this system is at very least
3 dependent on stream flow of adequate volume and duration.” Application at 7.

4 92. The Forest Service detailed the impacts from any reduction in Harshaw
5 Creek flows, such as those from the Project’s dewatering: “An increase in the depth to
6 groundwater can threaten riparian vegetation particularly upper story canopy trees. Long
7 term droughty condition can lead to reduction in riparian corridor width and thereby
8 increases in relative humidity, air temperatures and evaporation potential. Reduction in
9 flows below the requested levels would likely pose serious passage issues with fish
10 species. Water quality, especially temperature and algae growth may be [affected] by
11 reduction in shading as a result of decreased riparian vegetation corridor width and
12 vigor.” USFS Harshaw Instream Flow Assessment for Application Number 33-96951, at
13 10.

14 93. The Arizona Game and Fish Department (AGFD), in stating its support for
15 the Forest Service’s Application for an Instream Flow Water Right for Harshaw Creek at
16 and around the mine site, detailed how any lowering of water flows, dependent on
17 groundwater recharge, would directly and indirectly affect protected species.

18 94. “[T]he minimum base flows requested in the application are not the
19 minimum flows needed to maintain the aquatic and riparian habitat into the future,
20 especially in light of predicted impacts of climate change to precipitation patterns of the
21 arid southwest. A properly functioning riparian and aquatic riverine ecosystem needs
22 periodic higher flows to meet sediment transport, aquatic habitat maintenance, riparian
23 vegetation reproduction, and many other ecological needs in these types of ecosystems.”
24 June 13, 2013 letter from AGFD to Arizona Dept. of Water Resources.

25 95. The Forest Service’s Instream Flow Application for Harshaw Creek is still
26 pending before the Arizona Department of Water Resources.

27 96. Yet the Forest Service ignores this, stating incorrectly that: “The
28 [Coronado National Forest] has not submitted instream flow applications for Harshaw

1 Creek or Redrock Canyon Creek. There are currently no instream flow water rights in
2 these drainages. Without instream flow water rights awarded for these drainages, they are
3 currently not subject to surface water appropriation statutes. Therefore, this topic did not
4 need to be addressed in the Final EIS.” Objection Response at 104.

5 97. But the fact that the Arizona Department of Water Resources has yet to
6 formally adjudicate the Forest Service’s Instream Flow Application does not mean that
7 the Forest Service can disregard what the Forest Service itself considers a vital public
8 resource under its public land management and protection duties under the ESA, Organic
9 Act, and implementing regulations.

10 98. The ROD fails to contain any mitigation or other measures that will protect
11 these flows and dependent habitat, which the Forest Service had asserted is needed to
12 protect Harshaw Creek’s Instream Flows.

13 99. In addition to the direct mine and mineral extraction, processing, and
14 groundwater pumping/dewatering operations, the ROD approved hundreds of exploration
15 drill holes, drilling up to 6,800 feet into the regional aquifer, with direct environmental
16 impacts. “As many as 260 exploratory holes would be drilled on NFS land under
17 Alternative 2 – Proposed Action, to an average depth of about 3,500 feet. [170]
18 [a]dditional holes would be drilled in the footprint of TSF2 for exploration and
19 geotechnical investigation. Drilling introduces potential for contamination of
20 groundwater by drilling mud, drilling additives, or other drilling products.” FEIS 3.17-33;
21 *see also* BiOp at 21 (noting “an additional 48 geotechnical pads with boreholes and test
22 pits will be created in the TSF2 footprint”).

23 100. These contamination issues are in addition to the disruption of the regional
24 aquifer system that will result from the hundreds of wells drilled into the aquifer.

25 101. These operations will be away from the actual mine site, and include a
26 network of new “temporary” roads needed to reach these new sites. *See* FEIS Figure 2-3
27 (alternative 2) and Figure 2-6 (alternative 3). The ROD approved most of the drilling to
28

1 the south of the mine site (although it does not show the extensive network of new roads
2 needed to be constructed to reach the drill sites). ROD Figure 2.

3 **The Primary Access Road and Water Pipelines Lack Legal Authorization.**

4 102. “The proposed Primary Access Road was submitted as part of South32
5 Hermosa’s MPO [Mining Plan of Operations] and is being reviewed as a component of
6 mining activities under the Mining Law, not as a standalone access route requiring a Title
7 V ROW [right-of-way] under FLPMA.” U.S. Forest Serv., [Public] Comment Analysis
8 and Response Report (Mar. 2026) (DEIS Comment Response), at 22.

9 103. USFS approved the Primary Access Road as a statutory right under the
10 mining laws because, the agency asserted, it is “reasonably incident” to mining at the
11 distant private lands site. “The Forest Service may authorize surface use of [National
12 Forest] lands for operations reasonably incident to mining claims under the 1872 Mining
13 Law, including access routes.” *Id.*

14 104. The agency reasoned that this was required because the Primary Access
15 Road was “necessary” for the Hermosa Project to proceed. *Id.*

16 105. The Forest Service thus did not require South32 to apply for any FLPMA
17 right-of-way or special use permit approvals for the Primary Access Road or water
18 pipelines. “[I]t would be arbitrary for the Forest Service to apply its 36 CFR Part 251
19 special use regulations.” *Id.* at 21. But the “Part 251 regulations apply to uses of National
20 Forest land that is not encumbered by mining claims.” *Ctr. for Biological Diversity v.*
21 *U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1211 (9th Cir. 2022). It is undisputed that the
22 route of the Primary Access Road is not encumbered by mining claims, let alone claims
23 that have been shown to be valid and subject to rights under the mining laws.

24 106. The same is true for the two off-site water pipelines, delivering mine
25 discharge water to Goldbaum Canyon and Mowry Wash. The Goldbaum Canyon pipeline
26 would be roughly 0.5 miles long, while the pipeline to Mowry Wash would be
27 approximately 5 miles long. ROD Figure 2 (above).

1 107. This is despite the fact that the “Forest Service recognizes that not all
2 components of the proposed Project may be authorized solely under the 1872 Mining
3 Law and is evaluating these project elements with that in mind. Project components that
4 are not authorized by the mining laws ... may require authorization under other
5 regulations, such as Title V of FLPMA and special use regulations at 36 CFR Part 251.”
6 DEIS Comment Response at 21.

7 108. The Primary Access Road is not “necessary” for the Hermosa Project to
8 proceed. As the agency admitted in its response to Plaintiffs’ administrative Objections,
9 the Primary Access Road is an “alternative access option.” Objection Response at 22.

10 109. The FEIS acknowledges that the existing “access using Harshaw Road and
11 the Cross Creek Connector,” which has been used for longstanding access the mine site,
12 meets the “Purpose and Need” for the Hermosa Project. FEIS at 2-37.

13 110. USFS described the existing route:

14 Purpose and Need Test: This option meets the Forest Service’s need for
15 action to assess whether the proposed operations would be conducted to
16 minimize, where feasible, adverse environmental impacts on NFS surface
resources, in accordance with 36 CFR 228.8.

17 Reasonable Test: This is a reasonable option because it will be used by
18 South32 Hermosa during project development and during construction of the
19 Primary Access Road, if selected.

20 This is a reasonable option under Alternative 3 – Modified Proposed Action,
21 with a mine life of 70 years, because it has been developed separately as part
of Alternative 1 – No Action, with a mine life of 50 years.

22 USFS, Hermosa Critical Minerals Project Alternatives Evaluation Report, at 34.

23 [https://usfs-](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/1845332901043)
24 [public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/1845332901043](https://usfs-public.app.box.com/s/ubfq7wq9blil9g4og2aahob2sfgdcso/file/1845332901043) (last
25 visited Aug. 21, 2026).

26 111. “[T]he existing road would remain available as a secondary and emergency
27 access [PR 2114, p. 3.14-10].” Objection Response at 65. Indeed, under the agency’s
28

1 (erroneous) assumption that South32 could conduct mining for 50+ years, without any
2 new expansion onto/under public lands, the existing Harshaw Road route would be the
3 access route onto the site throughout. *See* FEIS at 2-49.

4 112. Although the Primary Access Road is the agency's "preferred option" over
5 the existing Harshaw Road route (with modifications), that does not translate into a
6 statutory right of access under the Mining Law.

7 113. At a minimum, the Primary Access Road will result in significant
8 elimination of vegetation, compared to the exiting route, as "110.3 acres of vegetation
9 removal for Primary Access Road (100.3 acres permanent vegetation removal and 10.0
10 acres temporary removal)" will occur. FEIS Table 3.15-19, FEIS at 3.15-38.

11 114. The new Primary Access Road route will result in significant new impacts
12 to wildlife. "Construction of the Primary Access Road in Alum Gulch, Flux Canyon, and
13 areas to the west would create a new travel route through the analysis area that would not
14 occur in this area under Alternative 1 – No Action [existing route], and that could directly
15 and indirectly impact special status species, including via increased potential for wildlife
16 injury." FEIS at 2-46.

17 115. "Additionally, the new segments of road created by the construction of the
18 Primary Access Road would increase noise and dust, the impacts of which can be found
19 in more detail in Section 3.9, Noise and Vibration, and Section 3.2, Air Quality,
20 respectively. Construction of the Primary Access Road under Alternative 2 – Proposed
21 Action would create a new travel route through the analysis area that could directly and
22 indirectly impact special status and other species. Impacts to wildlife and habitat along
23 the road corridors include surface disturbance, dust, decreased habitat permeability,
24 noise, light, vibration, human presence, vehicle-related injury and fatality, phytotoxic air
25 pollutant generation, hydrology changes, and increased colonization and spread of
26 invasive species. For impacts to special status species and vegetation, see Section 3.13,
27 Special Status Species, and Section 3.15, Vegetation, respectively." *Id.* at 3.14-11.

116. The Primary Access Road would also create new adverse impacts to cultural resources. The “Proposed Action is anticipated to have an adverse effect on cultural resources in the APE [Area of Potential Effect] Disturbance Zone, including from the construction of the Primary Access Road.” *Id.* at 3.14-11.

117. Regarding the new Primary Access Road, “During sulfide and oxide operations,[⁵] there is an estimated total of 169 heavy truck round trips per day and 76 light vehicle or bus round trips per day using the Primary Access Road. During oxide-only operations, there is an estimated 62 heavy truck round trips per day and 44 light vehicles or bus round trips per day using the Primary Access Road.” ROD at 2-7.

STATUTORY BACKGROUND

Administrative Procedure Act (APA)

118. The APA provides for judicial review of federal agency actions for persons adversely affected or aggrieved by the agency action. 5 U.S.C. § 702. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy are subject to judicial review. *Id.* § 704.

119. The APA requires a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706.

120. An agency action is arbitrary and capricious if the agency relied on factors which Congress did not intend for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵ The proposed expanded mine will have an “operational life of approximately 70 years (2029–2099), within which the sulfide ore will be mined for approximately 30 years and the oxide ore for approximately 70.” BiOp at 12–13.

1 121. Under the APA, the court must “engage in a substantial inquiry” and a
2 “thorough, probing, in-depth review.” *Or. Natural Res. Council Fund v. Brong*, 492 F.3d
3 1120, 1125 (9th Cir. 2007). The agency must present a “rational connection between the
4 facts found and the conclusions made.” *Id.* If the agency fails to consider an important
5 aspect of the problem, or offers an explanation that is contrary to the evidence, the
6 agency’s action is arbitrary and capricious and shall be set aside. *Or. Natural Res.*
7 *Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007). “[Courts] ‘must not
8 ‘rubber-stamp’ . . . administrative decisions [they] deem inconsistent with a statutory
9 mandate or that frustrate the congressional policy underlying a statute.” *Ocean Advocates*
10 *v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 859 (9th Cir. 2005).

11 **Endangered Species Act (ESA)**

12 122. The ESA is “the most comprehensive legislation for the preservation of
13 endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153,
14 180 (1978). It is designed to conserve the ecosystems upon which endangered and
15 threatened species depend and to provide a program to conserve listed species. 16 U.S.C.
16 § 1531(b). “[T]he plain intent of Congress in enacting the [ESA] was to halt and reverse
17 the trend toward species extinction, whatever the cost.” *Hill*, 437 U.S. at 184.

18 123. ESA Section 7(a)(2) requires each federal agency, in consultation with a
19 federal wildlife agency (FWS here), to ensure that any proposed action is not likely to
20 jeopardize the continued existence of a listed species or destroy or adversely modify its
21 critical habitat. 16 U.S.C. § 1536(a)(2).

22 124. To “jeopardize the continued existence of” means “to engage in an action
23 that reasonably would be expected, directly or indirectly, to reduce appreciably the
24 likelihood of both the survival and recovery of a listed species in the wild by reducing the
25 reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

26 125. FWS’s jeopardy analysis is arbitrary and capricious where it dismisses
27 effects to a listed species as not “species-level,” despite acknowledging that the habitats
28 and populations of threatened and endangered species harmed by the Project are some of

1 the most important remaining habitats and populations. *See, e.g., Gifford Pinchot Task*
2 *Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1075 (9th Cir. 2004) (recognizing the
3 principle that “[f]ocusing solely on a vast scale” can overlook important localized
4 impacts); *Klamath Forest All. v. U.S. Fish and Wildlife Serv.*, No. 2:24-cv-02347, 2025
5 WL 2753167 (E.D. Cal. Sept. 26, 2025) (finding a “serious question on the merits” as to
6 whether the Forest Service’s reliance on “analysis at recovery unit scale” arbitrarily
7 masked impacts to an important source population for imperiled spotted owls).

8 126. As the Supreme Court and Ninth Circuit have explained, “insure” in
9 Section 7(a)(2) means “[t]o make certain, to secure, to guarantee.” *Ctr. for Biological*
10 *Diversity v. Haaland*, 87 F.4th 980, 987 (9th Cir. 2023) (quoting *Nat’l Ass’n of Home*
11 *Builders v. Defs. of Wildlife*, 551 U.S. 644, 667 (2008)).

12 127. The ESA defines critical habitat as: (1) specific areas of occupied habitat
13 that contain the “physical or biological features [PBFs] essential to the conservation of
14 the species” and “which may require special management considerations or protection,”
15 and (2) unoccupied habitat that is “essential for the conservation of the species.” 16
16 U.S.C. § 1532(5)(A). As noted, “conservation” means “to use and the use of all methods
17 and procedures which are necessary to bring any endangered species or threatened
18 species to the point at which the measures provided pursuant to this chapter are no longer
19 necessary,” *Id.* § 1532(3).

20 128. If any agency action “may affect” a listed species or its critical habitat,
21 “formal consultation” is required unless FWS concurs in writing that the action is “not
22 likely to adversely affect” the species. *Id.* at § 1536(c)(1); 50 C.F.R. §§ 402.12,
23 402.14(a)–(b). During formal consultation, FWS must review all relevant information,
24 evaluate the current status and environmental baseline of the species, and evaluate the
25 effects and cumulative effects of the proposed action on the species. 16 U.S.C. §
26 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(1)–(3).

27 129. The “[e]ffects of the action” refers to the direct and indirect effects of an
28 action on the species or critical habitat, together with the effects of other activities that

1 are interrelated or interdependent with that action, that will be added to the environmental
2 baseline.” 50 C.F.R. § 402.02. FWS must “[a]dd the effects of the action and cumulative
3 effects to the environmental baseline and[,] in light of the status of the species and critical
4 habitat, formulate [its] opinion as to whether the action is likely to jeopardize the
5 continued existence of [the] listed species or result in the destruction or adverse
6 modification of critical habitat.” *Id.* § 402.14(g)(4). Throughout its analysis, FWS must
7 utilize the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50
8 C.F.R. § 402.14(d).

9 130. At the conclusion of consultation, FWS issues a “biological opinion
10 [BiOp] as to whether the action, taken together with cumulative effects, is likely to
11 jeopardize the continued existence of listed species or result in the destruction or adverse
12 modification of habitat of such species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d),
13 (g)(4). If FWS concludes that the proposed action “will jeopardize the continued
14 existence of” a listed species or adversely modify critical habitat, the biological opinion
15 must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A).

16 131. To comply with Section 7(a)(2), a BiOp must identify the conditions
17 necessary for a species’ survival and recovery. *See Nat’l Wildlife Fed’n v. Nat’l Marine*
18 *Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (“It is only logical to require that the
19 agency know roughly at what point survival and recovery will be placed at risk before it
20 may conclude that no harm will result from ‘significant’ impairments to habitat that is
21 already severely degraded.”). Further, the BiOp must consider impacts on recovery; a
22 BiOp that focuses solely on whether a species can cling to survival despite an action’s
23 adverse effects violates the ESA. *Id.* at 931.

24 132. Although the ESA’s implementing regulations direct FWS to “give
25 appropriate consideration to any beneficial actions as proposed or taken by the Federal
26 agency or applicant,” 50 C.F.R. § 402.14(g)(8), a BiOp cannot rely upon mitigation or
27 minimization plans that “refer only to generalized contingencies or gesture at hopeful
28 plans” in reaching a “no jeopardy” or “no adverse modification” conclusion. *Ctr. for*

1 *Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020). A biological
2 opinion cannot rely on conservation measures that do not yet exist; and mitigation
3 measures must include “specific and binding plans.” *Nat’l Wildlife Fed’n*, 524 F.3d at
4 936; *see also Save the S. Fork Salmon v. U.S. Forest Serv.*, No. 1:25-CV-00086, 2026
5 WL 2409733, at *28 (D. Idaho Aug. 18, 2026) (“[Mining company’s] argument that
6 ‘adaptive management is a recognized, effective tool to minimize take’ ignores that the
7 ‘monitoring plans’ to which the [terms and conditions] refer have yet to be developed and
8 articulated.”).

9 133. If an action agency fails to carry out the mitigation measures contained in
10 a BiOp, it must re-initiate consultation with FWS. *See* 50 C.F.R. § 402.16(a). If the action
11 agency does not re-initiate consultation, the BiOp is invalid. *Bernhardt*, 982 F.3d at 744.
12 An indefinite mitigation measure is less likely to trigger re-consultation because it will be
13 difficult to know at which point or whether the action agency has failed to comply. “For
14 this reason, measures that are too vague, or do not commit resources, or are otherwise
15 insufficiently integrated into the proposed action are generally unenforceable under the
16 ESA, and thus cannot be properly relied upon.” *Id.*

17 134. Although FWS is responsible for the content of the biological opinion, the
18 ultimate duty to ensure that an activity does not jeopardize the continued existence of a
19 listed species, or result in the destruction or adverse modification of critical habitat, lies
20 with the action agency—in this case, USFS. An agency’s reliance on an arbitrary,
21 capricious, and/or invalid biological opinion violates the agency’s ESA Section 7(a)(2)’s
22 substantive duty to ensure against jeopardy and adverse modification. *See Wild Fish*
23 *Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010).

24 135. If the biological opinion concludes that the action will not result in
25 jeopardy, FWS must provide an “incidental take statement” specifying the impact of such
26 incidental taking on the species, specifying any “reasonable and prudent measures” that
27 FWS considers necessary to minimize such impact, and setting forth the “terms and
28 conditions” that must be complied with by the agency to implement those measures. 16

1 U.S.C. § 1536(b)(4). The incidental take statement must specify the impact of incidental
2 taking on the species “as the amount or extent of such taking” or by using a surrogate
3 that, among other requirements, “sets a clear standard for determining when the level of
4 anticipated take has been exceeded.” 50 C.F.R. § 402.14(i)(1)(i). Reasonable and prudent
5 measures and implementing terms and conditions must be “clear, precise, and
6 enforceable.” FWS, Endangered Species Consultation Handbook (Mar. 1998) at 4-48; *see*
7 *also Ctr. for Biological Diversity v. Culver*, 2024 WL 4505468, at *65 (N.D. Cal. Oct.
8 15, 2024) (relying on this passage of the Handbook).

9 136. The ESA was designed to “safeguard[], for the benefit of all citizens, the
10 Nation’s heritage in fish, wildlife, and plants.” 16 U.S.C. § 1531(a)(5). Congress
11 specifically found that threatened and endangered species “are of esthetic, ecological,
12 educational, historical, recreational, and scientific value to the [United States] and its
13 people.” *Id.* § 1531(a)(3). Thus, even if an ESA-listed species’ range is largely in other
14 nations, FWS must protect U.S. populations of the species. *See, e.g., Ctr. for Biological*
15 *Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1094 (D. Ariz. 2009); *Defs. of Wildlife v.*
16 *Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997) (“FWS cannot be allowed to dismiss the
17 contiguous United States population of a species merely because it is more plentiful
18 elsewhere.”).

19 137. FWS cannot base its jeopardy conclusions on an unjustified assumption
20 that recovery actions will be implemented in other countries. *See Nat’l Wildlife Fed’n*,
21 524 F.3d at 936 n.17 (explaining that if “agencies lack the power to guarantee the
22 improvements in question,” then “the proper course is to exclude them from the analysis
23 and consider only those actions that are in fact under agency control or otherwise
24 reasonably certain to occur”); *Kempthorne*, 607 F. Supp. 2d at 1094 (rejecting FWS’s
25 reliance on the jaguar’s presence in foreign countries as a justification for not developing
26 a recovery plan).

1 **National Environmental Policy Act (NEPA)**

2 138. The purposes of NEPA are: “To declare a national policy which will
3 encourage productive and enjoyable harmony between man and his environment; to
4 promote efforts which will prevent or eliminate damage to the environment and biosphere
5 and stimulate the health and welfare of man; to enrich the understanding of the ecological
6 systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

7 139. “In NEPA, Congress recognized the ‘profound impact’ of human
8 activities, including ‘resource exploitation,’ on the environment and declared a national
9 policy ‘to create and maintain conditions under which [humans] and nature can exist in
10 productive harmony.’” *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 623
11 F.3d 633, 642 (9th Cir. 2010) (quoting 42 U.S.C. § 4331(a)). “Section 101 of NEPA
12 declares a broad national commitment to protecting and promoting environmental
13 quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

14 140. NEPA has “twin aims.” First, it requires federal agencies “to consider
15 every significant aspect of the environmental impact of a proposed action. Second, it
16 ensures that the agency will inform the public that it has indeed considered environmental
17 concerns in its decision-making process.” *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir.
18 2002) (quoting *Baltimore Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87,
19 97 (1983)).

20 141. NEPA mandates “all agencies of the Federal Government” to perform
21 certain procedures. 42 U.S.C. § 4332(2), including for “major Federal actions
22 significantly affecting the quality of the human environment, a detailed statement by the
23 responsible official on—

24 reasonably foreseeable environmental effects of the proposed agency action;

25 any reasonably foreseeable adverse environmental effects which cannot be
26 avoided should the proposal be implemented;

27 a reasonable range of alternatives to the proposed agency action, including
28 an analysis of any negative environmental impacts of not implementing the

1 proposed agency action in the case of a no action alternative, that are
2 technically and economically feasible, and meet the purpose and need of the
3 proposal;

4 the relationship between local short-term uses of man's environment and the
5 maintenance and enhancement of long-term productivity; and

6 any irreversible and irretrievable commitments of Federal resources which
7 would be involved in the proposed agency action should it be implemented.

8 42 U.S.C. § 4332(2)(C). The "detailed statement" is known as an "Environmental Impact
9 Statement" or "EIS," which USFS prepared for the Hermosa Project.

10 142. The agency must "ensure the professional integrity, including scientific
11 integrity, of the discussion and analysis in an environmental document," make use of
12 reliable data and resources, and "study, develop, and describe technically and
13 economically feasible alternatives." *Id.* §§ 4332(2)(D), 4332(2)(E), 4332(2)(F).

14 143. As part of its required review of alternatives to proposed projects, the
15 agency's review of the "no-action alternative" necessarily includes the analysis of the
16 affected area's current, baseline, conditions. "In general, NEPA analysis uses a no-action
17 alternative as a baseline for measuring the effects of the proposed action." *Biodiversity*
18 *Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014). The
19 establishment of the baseline conditions is a fundamental requirement of the NEPA
20 process, because an inadequate baseline precludes an accurate assessment of an action's
21 environmental impacts. *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067,
22 1085 (9th Cir. 2011). "Without establishing the baseline conditions which exist . . .
23 before [a project] begins, there is simply no way to determine what effect the [project]
24 will have on the environment and, consequently, no way to comply with NEPA." *Great*
25 *Basin Res. Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (quoting
26 *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988)).
27
28

1 144. Baseline analysis “must be based on accurate information and defensible
2 reasoning.” *Or. Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016). An
3 “unsupported assumption” is insufficient. *Id.*

4 145. “When conducting an environmental analysis of a proposed action under
5 NEPA, an agency compares the action’s projected environmental effects to the existing
6 condition of the environment. Through that comparison, the agency can ascertain the
7 magnitude of the proposed action’s environmental impacts. The agency’s choice of the
8 baseline for comparison matters a great deal. If the baseline is artificially high, the agency
9 might erroneously conclude that even highly disruptive actions will have minimal
10 incremental environmental effects.” *Marin Audubon Soc’y v. FAA*, 121 F.4th 902, 915-16
11 (D.C. Cir. 2024).

12 146. Courts within the Ninth Circuit have rejected Forest Service approvals of
13 mineral operations for failing to undertake the required detailed baseline data and
14 analysis of groundwater resources that would be affected by mineral operations. *See*
15 *Cascade Forest Conservancy v. Heppler*, No. 3:19-cv-00424, 2021 WL 641614, at *17–
16 20 (D. Or. Feb. 15, 2021); *Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810,
17 2014 WL 3019165, at *25–33 (D. Or. July 3, 2014); *Idaho Conservation League v. U.S.*
18 *Forest Serv.*, No. 1:11-cv-00341, 2012 WL 3758161, at *14–17 (D. Idaho Aug. 29,
19 2012); *Idaho Conservation League v. U.S. Forest Serv.*, 429 F. Supp. 3d 719, 732 (D.
20 Idaho 2019).

21 147. The duty to ascertain and analyze baseline conditions extends to all
22 resources affected by the mineral operations. *See Idaho Conservation League*, 2012 WL
23 3758161 at *14–17 (agency failed to gather data and analyze baseline conditions for plant
24 species that would be affected by drilling operations); *see also Great Basin Res. Watch.*,
25 844 F.3d at 1101.

26 148. As one court held in rejecting the Forest Service’s reliance on a limited set
27 of groundwater wells away from the actual drilling locations to establish baseline
28 groundwater data for a mineral project, “there may be specific conditions at these

1 drillholes effecting the quality of the water sampled such that they may not be reflective
2 of groundwater conditions at other sections of the Project Area. Without more, the Court
3 cannot conclude on this administrative record that the method utilized for establishing
4 baseline conditions was ‘based on accurate information and defensible reasoning.’ *Great*
5 *Basin Res. Watch*, 844 F.3d at 1101.” *Cascade Forest Conservancy v. Heppler*, No. 3:19-
6 cv-00424, 2021 WL 641614, at *20 (D. Or. Feb. 15, 2021).

7 149. That decision followed a string of cases faulting the Forest Service for the
8 same fundamental flaw—lack of baseline data and analysis for mineral projects. *See*
9 *Gifford Pinchot Task Force v. Perez*, No. 03:13-cv-00810, 2014 WL 3019165, *at 25–33
10 (D. Or. July 3, 2014); *Idaho Conservation League v. U.S. Forest Serv.*, No. 1:11-cv-
11 00341, 2012 WL 3758161, at *14–17 (D. Idaho Aug. 29, 2012); *see also Idaho*
12 *Conservation League v. U.S. Forest Serv.*, 429 F. Supp. 3d 719, 732 (D. Idaho 2019).

13 **Federal Land Policy and Management Act (FLPMA)**

14 150. In enacting FLPMA, Congress declared that it is the policy of the United
15 States to manage the public lands “in a manner that will protect the quality of scientific,
16 scenic, historical, ecological, environmental, air and atmospheric, water resource, and
17 archeological values” and that, “where appropriate, will preserve and protect certain
18 public lands in their natural condition.” 43 U.S.C. § 1701(a)(8).

19 151. Among other provisions, FLPMA governs the issuance of discretionary
20 rights-of-ways and Special Use Permits to use and cross federal land. The Forest
21 Service’s authority to permit powerlines, access roads, and other ancillary infrastructure
22 is found in FLPMA Title V. Rights-of-ways may be “granted, issued or renewed . . .
23 consistent with . . . any other applicable laws.” *Id.* § 1764(c). A right-of-way that “may
24 have significant impact on the environment” requires submission of a plan of
25 construction, operation, and rehabilitation of the right-of-way. *Id.* § 1764(d). Under Title
26 V, Section 504, the agency may grant a right-of-way for such infrastructure only if it
27 “will do no unnecessary damage to the environment.” *Id.* § 1764(a).

1 152. A Title V right-of-way “shall contain terms and conditions which will . . .
2 (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and
3 otherwise protect the environment.” *Id.* § 1765(a)(ii); *see also id.* § 1765(b) (additional
4 environmental protection requirements). “Damage” is not limited to the land within the
5 right-of-way corridor, but to all lands and resources that may be affected by the right-of-
6 way.

7 153. USFS not only has the authority to consider the adverse impacts on lands
8 and waters outside the immediate right-of-way corridor, but also the obligation to protect
9 these public resources under FLPMA. *See County of Okanogan v. Nat’l Marine Fisheries*
10 *Serv.*, 347 F.3d 1081, 1085–86 (9th Cir. 2003) (affirming the imposition of mandatory
11 minimum stream flows as a condition of granting a right-of-way for a water pipeline).

12 154. The Forest Service may grant a right-of-way only if it “protect[s] the
13 public interest in the lands traversed by the right-of-way or adjacent thereto.” 43 U.S.C.
14 § 1765(b). FLPMA requires that any right-of-way contain terms and conditions
15 “necessary” to protect federal property and economic interests. *Id.*

16 155. FLPMA also requires that “the United States receive fair market value of
17 the use of the public lands and their resources.” *Id.* § 1701(a)(9). “The holder of a right-
18 of-way shall pay in advance the fair market value thereof, as determined by the Secretary
19 granting, issuing, or renewing such right-of-way.” *Id.* § 1764(g).

20 156. The Forest Service’s right-of-way and special use permit regulations are
21 found at 36 C.F.R. Part 251 (Land Uses). In particular for the situation here, Subpart D
22 deals with “Access to Non-Federal Lands.” These regulations require that “the landowner
23 must apply for and receive a special-use or road-use authorization” to cross federal land.
24 36 C.F.R. § 251.110(d).

25 157. Under FLPMA, “no provision of this section or any other section of this
26 Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators
27 or claims under that Act, including, but not limited to, rights of ingress and egress.” 43
28 U.S.C. § 1732(b). But in the situation where a person already has access across federal

1 land, such as South 32's existing and future uses of the Harshaw Route, there is no
2 statutory right of access under federal mining laws (as asserted by the Forest Service) via
3 another route (such as the Primary Access Road). "Where there is existing access or a
4 right of access to a property over non-National Forest land or over public roads that is
5 adequate or that can be made adequate, there is no obligation to grant additional access
6 through National Forest System lands." *Id.* § 251.110(g). The "Part 251 regulations apply
7 to uses of National Forest land that is not encumbered by mining claims." *Ctr. for*
8 *Biological Diversity*, 33 F.4th at 1211.

9 158. The burden is on the person seeking access across federal lands to show
10 that another existing route is not available: "The authorizing officer, prior to issuing any
11 access authorization, must also ensure that: (1) The landowner has demonstrated a lack of
12 any existing rights or routes of access available by deed or under State or common law."
13 *Id.* § 251.114(f).

14 159. Federal land agencies have long held that approval of water pipelines is
15 not governed by, or subject to, statutory rights under the Mining Law. "FLPMA repealed
16 or amended previous acts and Title V now requires that BLM approve a right-of-way
17 application prior to the transportation of water across public land for mining purposes."
18 *Desert Survivors*, 96 IBLA 193, 1987 IBLA LEXIS 81, at *8-9 (1987) (citing FLPMA,
19 43 U.S.C. § 1761); *see also Far West Exploration*, 100 IBLA at 308 n.4, 1987 IBLA
20 LEXIS 185, at *3 ("[A] right-of-way must be obtained prior to transportation of water
21 across Federal lands for mining.").

22 160. USFS did not require South32 to obtain a FLPMA right-of-way or Special
23 Use Permit for construction and use of the Primary Access Road, or additional off-site
24 infrastructure such as the water discharge pipelines in Goldbaum Canyon and Mowry
25 Wash, erroneously assuming instead that the company had a statutory right under federal
26 mining laws to these routes and facilities.

1 **Forest Service Organic Act of 1897 (Organic Act)**

2 161. The Organic Act requires the Forest Service “to regulate [the] occupancy
3 and use [of national forests] and to preserve the forests thereon from destruction.” 16
4 U.S.C. § 551. The Organic Act also requires that those persons “prospecting, locating,
5 and developing the mineral resources” on a national forest “comply with the rules and
6 regulations covering such national forests.” *Id.* § 478.

7 162. Congress declared its policy that “the national forests are established and
8 shall be administered for outdoor recreation, range, timber, watershed, and wildlife and
9 fish purposes.” *Id.* § 528.

10 163. The Forest Service is also directed by the Organic Act to, among other
11 things, protect and “secur[e] favorable conditions of water flows” on public land. 16
12 U.S.C. § 475.

13 164. To fulfill those mandates and policies, the Forest Service must set
14 “provisions for the protection” of “the public forests and national forests” and “make
15 such rules and regulations” to ensure their protection. *Id.* § 551. Under that authority, the
16 Forest Service promulgated regulations that govern its oversight of mining operations on
17 National Forest lands, including on the Coronado National Forest.

18 165. The regulations require that mining operations “be conducted so as, where
19 feasible, to minimize adverse environmental impacts on National Forest surface
20 resources.” 36 C.F.R. § 228.8; *see also id.* § 228.1. “This environmental-impact provision
21 requires compliance with federal air and water quality standards, as well as (among other
22 things) the use of ‘all practicable measures to maintain and protect fisheries and wildlife
23 habitat which may be affected by the operations.’” *Karuk Tribe of Cal. v. U.S. Forest*
24 *Serv.*, 681 F.3d 1006, 1033 (9th Cir. 2012) (quoting 36 C.F.R. § 228.8(e)).

25 166. Thus, to comply with its duty to protect against, and minimize, adverse
26 effects on forest resources, USFS may not approve mining proposals that would cause
27 unmitigated damage to those resources, such as public land “water flows,” or that would
28 compromise fish and wildlife habitat, or federal or state natural resource laws.

167. The Forest Service’s mining regulations are limited to and govern “operations authorized by the United States mining laws (30 U.S.C. [§§] 21–54).” 36 C.F.R. § 228.1. Operations not specifically “authorized by the Mining Law” are not governed by any statutory rights under the mining laws. *Ctr. for Biological Diversity*, 33 F.4th at 1221 (operations are “authorized by the Mining Law” only if they occur on valid mining claims). There, the court affirmed the district court decision that vacated and remanded the Forest Service’s approval of a large copper mine due to the agency’s erroneous interpretation and application of the 1872 Mining Law, related federal public land law, and NEPA.

168. For those operations that have been determined to have statutory rights under the 1872 Mining Law, the Forest Service’s rules require that “all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources.” 36 C.F.R. § 228.8. The regulations also require the Forest Service “to maintain and protect fisheries and wildlife habitat which may be affected by the operations.” *Id.* § 228.8(e). The Forest Service can and must reject an unreasonable mine plan and prohibit mining activity until appropriate evaluation of the plan is completed and reasonable mitigation measures are in place to protect public resources.

FIRST CLAIM FOR RELIEF

Violation of the Endangered Species Act: Reliance on Vague and Undefined Mitigation and Conservation Measures

169. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated herein.

170. Courts hold that FWS violates the ESA when it relies on uncertain and unspecified future mitigation measures to conclude that a project will not jeopardize a listed species or adversely modify critical habitat. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020). Mitigation measures relied upon in a BiOp must constitute a “clear, definite commitment of resources,” and be “under agency

1 control or otherwise reasonably certain to occur.” *Nat’l Wildlife Fed. v. Nat’l Marine*
2 *Fisheries Serv.*, 524 F.3d 917, 936 & n.17 (9th Cir. 2008).

3 171. FWS’s reliance on incomplete, vague, and ill-defined conservation
4 measures and mitigation measures in the BiOp to support its “no jeopardy”
5 determinations for numerous listed species, including Mexican spotted owl, yellow-billed
6 cuckoo, Bartram’s stonecrop, beardless chinchweed, northern Mexican gartersnake, Gila
7 topminnow, and Sonoran tiger salamander, violates ESA Section 7, 16 U.S.C. § 1536,
8 and is arbitrary, capricious, an abuse of discretion, and contrary to law, in violation of the
9 APA. 5 U.S.C. § 706(2)(A).

10 172. FWS’s reliance on incomplete, vague, and ill-defined measures in the
11 BiOp’s Incidental Take Statements also violates ESA Section 7 and is arbitrary and
12 capricious.

13 173. The BiOp’s ITS for both the jaguar and ocelot includes terms and
14 conditions intended to implement reasonable and prudent measures that arbitrarily rely on
15 conservation measures—namely the ill-defined “Spotted Cat Monitoring Plan”—which
16 did not exist when the BiOp was issued, rendering the BiOp’s terms and conditions
17 unenforceable, vague, and arbitrary and capricious. Because the ITS for jaguar and ocelot
18 contains a T&C that relies on a not-yet-created monitoring plan, the ITS is arbitrary and
19 capricious.

20 174. The ITSs for the Mexican spotted owl and western yellow-billed cuckoo
21 are similarly unlawful because the reasonable and prudent measures and terms and
22 conditions are vague and unenforceable.

23 175. For three ESA-listed species that rely heavily on riparian habitat for their
24 lifecycle—the northern Mexican garter snake, Sonoran tiger salamander, and Gila
25 topminnow—the BiOp also relies on unclear, unenforceable, inadequately measured, and
26 arbitrary triggers to define when take has been exceeded and thus reinitiation is required.

27 176. The BiOp’s reliance on vague and undefined mitigation and conservation
28 measures violates ESA Section 7, 16 U.S.C. § 1536, and is arbitrary, capricious, an abuse

1 of discretion, and contrary to law, in violation of the APA. 5 U.S.C. § 706(2).

2 **SECOND CLAIM FOR RELIEF**

3 *Violation of the Endangered Species Act: Arbitrary and Inconsistent Dismissal of* 4 *Significant Effects on Key Habitats and Populations*

5 177. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
6 herein.

7 178. ESA Section 7(a)(2) requires each federal agency, in consultation with a
8 federal wildlife agency (FWS here), to ensure that any proposed action is not likely to
9 jeopardize the continued existence of a listed species or destroy or adversely modify its
10 critical habitat. 16 U.S.C. § 1536(a)(2). To “jeopardize the continued existence of” means
11 “to engage in an action that reasonably would be expected, directly or indirectly, to
12 reduce appreciably the likelihood of both the survival and recovery of a listed species in
13 the wild by reducing the reproduction, numbers, or distribution of that species.” 50
14 C.F.R. § 402.02.

15 179. FWS’s jeopardy analysis is arbitrary and capricious where it dismisses
16 effects to a listed species as not “species-level,” despite acknowledging that the habitats
17 and populations of threatened and endangered species harmed by the Project are some of
18 the most important remaining habitats and populations. *See, e.g., Gifford Pinchot Task*
19 *Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1075 (9th Cir. 2004) (recognizing the
20 principle that “[f]ocusing solely on a vast scale” can overlook important localized
21 impacts); *Klamath Forest All. v. U.S. Fish and Wildlife Serv.*, No. 2:24-cv-02347, 2025
22 WL 2753167, at *11 (E.D. Cal. Sept. 26, 2025) (finding a “serious question on the
23 merits” as to whether the Forest Service’s reliance on “analysis at recovery unit scale”
24 arbitrarily masked impacts to an important source population for imperiled spotted owls).

25 180. The BiOp repeatedly finds that the habitat that the Project will degrade is
26 critically important to numerous species the ESA is meant to protect—including the
27 jaguar, ocelot, Bartram’s stonecrop, beardless chinchweed, western yellow-billed cuckoo,
28 northern Mexican garter snake, and Gila topminnow—but then arbitrarily concludes that

1 the proposed action will not jeopardize the species' continued existence. FWS's failure to
2 explain or address this inconsistency renders the BiOp's analysis and conclusions
3 arbitrary and capricious, in violation of ESA Section 7(a)(2), 16 U.S.C. 1536(a)(2), and
4 the FWS's duty to avoid jeopardy, and the APA, 5 U.S.C. § 706(2)(A). It is also
5 inconsistent with the ESA's mandate that the agency base its consultations on the best
6 available science, in violation of ESA Section 7, 16 U.S.C. § 1536. The BiOp's
7 effectively condemning to extirpation the U.S. populations of the jaguar and ocelot
8 likewise constitutes a "fail[ure] to consider an important aspect of the problem," *Motor*
9 *Vehicle Mfrs. Ass'n*, 463 U.S. at 43, in violation of the APA.

10 **THIRD CLAIM FOR RELIEF**

11 *Violation of the Endangered Species Act: Unlawful Interpretation of Critical Habitat* 12 *Protections*

13 181. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
14 herein.

15 182. Section 7(a)(2) of the ESA requires federal agencies, in consultation with
16 FWS, to ensure that their actions are not likely to "result in the destruction or adverse
17 modification" of designated critical habitat. 16 U.S.C. 1536(a)(2).

18 183. At the time the Project BiOp was issued, FWS's regulations defined
19 "destruction or adverse modification" as a "direct or indirect alteration that appreciably
20 diminishes the value of critical habitat *as a whole* for the conservation of a listed
21 species." 50 C.F.R. § 402.02 (2024) (emphasis added). The U.S. District Court for the
22 Northern District of California vacated this definition in March 2026, finding the
23 definition inconsistent with the ESA. *Ctr. for Biological Diversity v. U.S. Dep't of the*
24 *Interior*, No. 24-CV-04651, 2026 WL 898264, at *18 (N.D. Cal. Mar. 30, 2026) (finding
25 the regulation inconsistent with the ESA because the ESA's "prohibition on adverse
26 modification is absolute, rather than limited to modifications affecting the habitat 'as a
27 whole'").
28

1 184. The Project BiOp’s critical habitat conclusions all rest upon this unlawful
2 “as a whole” standard. *See, e.g.*, BiOp at 72–73 (quoting now-vacated regulation and
3 outlining framework for the BiOp’s destruction or adverse modification determinations:
4 FWS assesses whether the Project is “likely to impair or preclude the capacity of critical
5 habitat *as a whole* to serve its intended function for the conservation of the listed species”
6 (emphasis added)); *id.* at 248–49 (finding the Project “not likely to reduce appreciably the
7 role of critical habitat *as a whole* for the conservation of the jaguar” (emphasis added));
8 *id.* at 290 (same, Mexican spotted owl); *id.* at 332 (same, yellow-billed cuckoo); *id.* at
9 381 (same, northern Mexican gartersnake).

10 185. FWS’s application of an unlawful standard of destruction or adverse
11 modification of critical habitat violates ESA Section 7, 16 U.S.C. § 1536, and renders the
12 BiOp’s critical habitat determinations arbitrary, capricious, an abuse of discretion, and
13 contrary to law, in violation of the APA. 5 U.S.C. § 706(2).⁶

14 **FOURTH CLAIM FOR RELIEF**

15 *Violation of the Endangered Species Act: Unsupported Reliance on Species’ Presence in* 16 *Other Countries*

17 186. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
18 herein.

19 187. The ESA was designed to “safeguard[], for the benefit of all citizens, the
20 Nation’s heritage in fish, wildlife, and plants,” 16 U.S.C. § 1531(a)(5), and thus, even if
21 an ESA-listed species’ range is largely in other nations, FWS must protect U.S.

22 ⁶ Although typically courts apply the regulations in place at the time a BiOp was
23 issued, where a regulation is held to be inconsistent with the applicable statute, the
24 regulation is void ab initio and any application of the regulation is thus unlawful. *United*
25 *Nat. Bank v. U.S. Dep’t of Interior*, 54 F. Supp. 2d 1309, 1312 (S.D. Fla. 1998) (“It is
26 well settled that a regulation that is not in harmony with the statute is void ab initio and
27 cannot be relied upon by the agency.” (citing *United States v. Larionoff*, 431 U.S. 864,
28 873 (1977))); *Pac. Gas & Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981)
29 (“[A] regulation which operates to create a rule out of harmony with the statute[] is a
mere nullity.”). Thus, although the unlawful regulatory definition was vacated after the
BiOp was issued, the BiOp’s application of the regulation is nevertheless unlawful.

1 populations of the species. *See, e.g., Ctr. for Biological Diversity v. Kempthorne*, 607 F.
2 Supp. 2d 1078, 1094 (D. Ariz. 2009).

3 188. FWS's no-jeopardy determinations for the jaguar, the ocelot, and the
4 northern Mexican gartersnake rely heavily on the fact that these species' ranges extend to
5 other countries.

6 189. FWS's unsupported reliance on these species' presence in other countries
7 violates ESA Section 7, 16 U.S.C. § 1536, and is arbitrary, capricious, an abuse of
8 discretion, and contrary to law, in violation of the APA. 5 U.S.C. § 706(2).

9 **FIFTH CLAIM FOR RELIEF**

10 *Violation of Endangered Species Act: Arbitrary Incidental Take Statements*

11 190. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
12 herein.

13 191. If FWS concludes in a BiOp that an action is not likely to jeopardize listed
14 species or result in the destruction or adverse modification of critical habitat but will
15 result in incidental take, it must provide the action agency with a written Incidental Take
16 Statement. The ITS must specify the "impact of such incidental taking on the species,"
17 specify "those reasonable and prudent measures that [FWS] considers necessary or
18 appropriate to minimize" those impacts, and set forth "terms and conditions" that the
19 action agency must follow to implement those measures. 16 U.S.C. § 1536(b)(4); 50
20 C.F.R. § 402.14(i)(1)(i).

21 192. In its Hermosa BiOp, FWS issued arbitrary and unlawful ITSs for the
22 jaguar, ocelot, MSO, cuckoo, northern Mexican gartersnake, Sonoran tiger salamander,
23 and Gila topminnow.

24 193. Jaguar/ocelot ITS: First, FWS's failure to provide any take exceedance
25 trigger for the anticipated harassment of jaguar and ocelots in the incidental take
26 statement for those two cats violates the ESA. *See* 16 U.S.C. § 1532(19) (defining "take"
27 to include "harassment" or "harm"); *Ctr. for Biological Diversity*, 982 F.3d at 749–50
28 (explaining that an ITS that fails to include a numerical "harassment" take trigger violates

1 the ESA).⁷

2 194. Due to the Project’s significant impacts on jaguars and ocelots, FWS
3 anticipates that any ocelot or jaguar that enters the Project Area during the Project will
4 experience incidental take in the form of harassment. BiOp at 251.

5 195. Despite expecting take in the form of harassment, FWS provides that take
6 will only be considered exceeded “*if harm in the form of injury or fatality of any*
7 *individual ocelot or jaguar occurs.*” *Id.* at 252 (emphasis added). Thus, FWS’s ITS
8 purports to allow an unlimited amount of *harassment* to jaguars and ocelots. *See id.*
9 (“[T]he maximum *allowable* incidental take of ocelot and jaguar is the *harassment of any*
10 *individuals* of either species in the Action Area by actions attributable to the Proposed
11 Federal Action” (emphasis added)); *see also id.* at 255 (providing for a monitoring
12 plan that will monitor “take exceedance as the injury or fatality of any ocelot or jaguar”);
13 *id.* at 257 (“Since take, as harassment is authorized across the entire Action Area”).
14 Put differently, even if the Project harasses every jaguar and ocelot left on Earth, FWS’s
15 take limit would not be exceeded and reinitiation of consultation would not be required.

16 196. Second, FWS’s ocelot/jaguar ITS is arbitrary because Term and Condition
17 (T&C) 3.4 requires the provision of “an explanation of the causes of any incidents of take
18 in the form of harm through injury or fatality and review with the [FWS] the need for
19 possible modification of the reasonable and prudent measures should take be exceeded.”
20 *Id.* at 254. This T&C is arbitrary because if *any* incident of harm through injury or fatality
21 is an exceedance, it is unclear how such “review” could find otherwise. Moreover, courts
22 have rejected incidental take thresholds that provide for mere agency coordination rather
23

24 ⁷ To the extent FWS’s provision of a take exceedance trigger only for “harm in the
25 form of injury or death” could be interpreted as an attempt to use this trigger as a
26 “surrogate” for measuring take in the form of harassment, FWS fails to (i) state that it is
27 doing so, (ii) “[d]escribe[] the causal link between the surrogate and take of the listed
28 species,” or (iii) “set[] a clear standard for determining when the level of anticipated take
has been exceeded.” 50 C.F.R. § 402.14(i)(1)(i) (providing requirements for use of a
surrogate to measure incidental take).

1 than immediate reinitiation of consultation. *See Ctr. for Biological Diversity*, 441 F.
2 Supp. 3d at 863 (rejecting an incidental take threshold where the action agency was
3 required to consult with other agencies and the project proponent if groundwater
4 drawdowns exceeded the threshold); *see also* 50 C.F.R. § 402.14(i)(5) (requiring
5 reinitiation of consultation “immediately” if the incidental take limit is exceeded).

6 197. Third, FWS’s jaguar/ocelot ITS is arbitrary because FWS’s take limit for
7 harm in the form of injury or fatality will only be exceeded if FWS determines that the
8 harm is “attributable to the Proposed Federal Action.” *Id.* at 252. FWS provides no
9 standard whatsoever for determining whether an action is “attributable” to the Project.
10 This unenforceable ambiguity renders the take trigger arbitrary and violates the ESA. *See*
11 *Ctr. for Biological Diversity v. Moore*, No. CV-23-00354, 2026 WL 2409453, at *8 (D.
12 Ariz. Aug. 18, 2026) (finding that an ITS violated the ESA because its requirement that
13 effects be directly attributable the agency action failed to specify “which agency will
14 make this determination, what metrics it will use to measure causation, and what amount
15 of causation is sufficient to trigger reinitiated consultation”).

16 198. Mexican spotted owl ITS: FWS’s Mexican spotted owl ITS quantifies
17 incidental take at the protected activity center (“PAC”) level, because FWS asserts it is
18 difficult to quantify the number of individual owls taken. BiOp at 291.

19 199. FWS sets an incidental take limit for harm to the Upper Humboldt PAC as
20 follows:

21 We anticipate that incidental take would occur within the Upper Humboldt
22 PAC during the construction phase of the Hermosa Project over
23 approximately three years . . . The Service will consider incidental take to
24 be exceeded if, during the construction phase, protocol monitoring
25 demonstrates Mexican spotted owls associated with the Upper Humboldt
PAC are absent for four consecutive breeding seasons.

26 *Id.* at 292.

27 200. If the PAC is harmed such that owls are entirely absent for four
28 consecutive seasons, this duration represents longer than the entirety of the three-year

1 construction phase. At this limit, reinitiation would only occur after the harm is already
2 complete, and once no means of adjusting construction to remedy it remain. *See Or. Nat.*
3 *Res. Council*, 476 F.3d at 1038 (invalidating an ITS because “it would allow the take of ‘all
4 spotted owls’ associated with a project,” and thereby “would not allow for reinitiation of
5 consultation and is therefore not a proper surrogate”).

6 201. Western yellow-billed cuckoo ITS: FWS’s cuckoo ITS arbitrarily uses an
7 unclear and overly long five-year rolling average of cuckoo density to measure its
8 surrogate for take. FWS will consider incidental take exceeded “if the five-year rolling
9 average for density of cuckoos” in the Project Area “indicates more than a 50% decline in
10 the total average density of cuckoos . . . compared to the baseline values determined from
11 existing survey data.” BiOp at 334.

12 202. The BiOp does not specify how the five-year rolling average will be
13 calculated. The BiOp states that it will be “calculated annually using existing survey
14 data.” *Id.* However, many survey transects have only been surveyed once, and the most
15 recent survey data from any transect is from 2023. *See id.* at 303 (“South32 Hermosa
16 conducted surveys for cuckoo throughout the Action Area . . . in 2012, 2013, and 2016
17 through 2023.”); *id.* at 306–07 (chart showing how many times each transect has been
18 surveyed). The BiOp also states that South32 Hermosa and CNF “*will develop* and
19 submit a Cuckoo Survey and Monitoring Plan as part of the first annual report that will be
20 approved by the Service,” *id.* at 337, which indicates that FWS may *not* rely on prior
21 data, but is unclear.

22 203. This lack of clarity is arbitrary. For example, if the five-year rolling
23 average includes only one year of baseline data, then reinitiation could not occur for
24 another four years—regardless of how many cuckoos are taken in the first four years of
25 the Project. There can be no five-year rolling average until five years of data are
26 collected. If, on the other hand, the five-year average includes several years of baseline
27 data, using a five-year average would misleadingly underreport the amount of cuckoo
28 take in the first few years of the Project. Under this scenario, the cuckoo could be

1 completely extirpated in the first year of the Project, yet reinitiation would not occur for
2 years, because the years of baseline data would keep the five-year rolling average take
3 above a 50% decline.

4 204. Both of these scenarios are particularly arbitrary because the effects of the
5 Project on the cuckoo are anticipated to be the worst in the first three years of the Project.
6 *See id.* at 311 (noting vegetation clearing will occur in the first three years); *id.* at 318
7 (noting lighting will affect 473 acres of suitable cuckoo habitat in years 0–3, compared to
8 383 acres in years 10–30); *id.* at 320 (“Noise effects . . . are anticipated to be highest
9 during the first three years of implementation”); *id.* at 321 (“The potential for vehicle
10 strikes of cuckoos is predicted to be highest during the three-year construction phase
11”). Thus, no matter how the rolling five-year average is calculated, it will falsely
12 mask the impacts caused by the Project during the first three years—which are the most
13 harmful to the cuckoo.

14 205. Northern Mexican gartersnake ITS: FWS’s ITS for the gartersnake is
15 arbitrary, capricious, and inconsistent with the ESA because the ITS’s take exceedance
16 triggers, reasonable and prudent measures, and terms and conditions are vague and
17 unenforceable.

18 206. The ITS for the northern Mexican gartersnake utilizes three surrogates to
19 estimate the level of take:

- 20 (1) the extent to which nonnative predators and competitors are present in
21 upper Sonoita Creek above Patagonia Lake State Park and within the
22 wetted habitat resulting from the discharge of water into Mowry Wash;
- 23 (2) “If the number of vehicle visits to the Mowry Wash outfall for operation
24 and maintenance activities exceeds an average of six visits per month by
25 25% (equal to or more than 90 visits per year)”; and
- 26 (3) “If habitat for northern Mexican gartersnakes is removed during closure
27 and restoration activities without coordination with the CNF and the
28 Service.”

Id.

1 207. To assess when incidental take is exceeded, each of these surrogate
2 measures has an associated trigger. As relevant here, FWS’s take trigger to measure
3 vehicle mortality (Trigger 2) provides: “If the number of vehicle visits to the Mowry
4 Wash outfall for operation and maintenance activities exceeds an average of six visits per
5 month by 25% (equal to or more than 90 visits per year), take is exceeded,” and FWS’s
6 take trigger to measure removal of habitat (Trigger 3) provides: “If habitat for northern
7 Mexican gartersnakes is removed during closure and restoration activities without
8 coordination with the CNF and the Service, take is exceeded.” *Id.*

9 208. Take Triggers 2 and 3 are unclear, unenforceable, and arbitrary. First,
10 FWS does not in any way “[d]escribe[] the causal link between the surrogate and take of
11 the listed species” for Triggers 2 and 3, in violation of the ESA and its implementing
12 regulations. 50 C.F.R. § 402.14(i)(1)(i). It is unclear how these triggers will accurately
13 correspond to take.

14 209. Additionally, Trigger 3 does not set “a clear standard for determining
15 when the level of anticipated take has been exceeded.” *Id.* It is unclear what constitutes
16 “remov[al],” northern Mexican gartersnake “habitat,” “closure and restoration activities,”
17 or “coordination with the CNF and the Service.” BiOp at 382. FWS does not explain why
18 “removal” of northern Mexican gartersnake habitat *with* coordination would not cause
19 excessive take or be more acceptable than destruction without coordination. *Cf. Ctr. for*
20 *Biological Diversity*, 441 F. Supp. 3d at 863 (rejecting an incidental take threshold where
21 the action agency was required to consult with other agencies and the project proponent if
22 groundwater drawdowns exceeded the threshold).

23 210. The BiOp’s reasonable and prudent measures and terms and conditions for
24 the gartersnake are similarly vague and unenforceable.

25 211. T&C 1.2 provides only that there will be “coordination” with FWS prior to
26 final approval of the non-native monitoring and control plans. BiOp at 382.
27 “Coordination” is a vague, undefined measure that on its own cannot limit harm to
28 gartersnakes. *See Ctr. for Biological Diversity*, 441 F. Supp. 3d at 863.

1 212. T&C 1.5 requires that a “decision . . . be made within 30 calendar days
2 regarding revising the approach to implementing the Conservation Measure(s)” INV-2
3 and INV-3 if “it appears that one or both of these Conservation Measures are ineffective,
4 i.e., the occurrence of nonnative species in upper Sonoita Creek and/or Mowry Wash is
5 approaching the exceedance of take.” BiOp at 384. But FWS does not define the type of
6 ‘decision’ that will be made, or whether the decision may be to take no action. Similarly,
7 FWS does not define what it means to “appear” to be “ineffective,” nor does it define
8 what it means to “approach the exceedance of take” in any identifiable or enforceable
9 manner. These requirements are vague, arbitrary, and unenforceable.

10 213. The BiOp also relies on RPM 2, which requires that the Forest Service and
11 South32 “shall ensure the avoidance of the *unnecessary* removal of any habitat for
12 northern Mexican gartersnakes or their prey that has developed as the result of the
13 discharge of water.” *Id.* (emphasis added). FWS does not define “unnecessary,” rendering
14 the RPM arbitrary and unenforceable. Similarly, T&C 2.1 requires that the Forest Service
15 and South32 “coordinate” with FWS “to determine if existing habitat . . . can be
16 retained,” but does not actually require habitat retention or protection, and therefore lacks
17 any enforceable, protective requirement.

18 214. Sonoran tiger salamander and Gila topminnow ITS: The BiOp’s ITSs for
19 the Sonoran tiger salamander and the Gila topminnow rely on two surrogates and
20 associated incidental take triggers that are substantively identical to those FWS uses for
21 the northern Mexican gartersnake. *See id.* at 408–09 (Sonoran tiger salamander ITS); *id.*
22 at 382 (northern Mexican gartersnake ITS). For all the same reasons discussed above in
23 relation to northern Mexican gartersnake Triggers 2 and 3, the second and third Sonoran
24 tiger salamander take triggers, and those for the Gila topminnow are unclear,
25 unenforceable, and arbitrary.

26 215. Furthermore, for all the same reasons discussed above in relation to the
27 northern Mexican gartersnake reasonable and prudent measures and terms and conditions
28 (except for reliance on INV-3), the Sonoran tiger salamander reasonable and prudent

1 measures and terms and conditions are unenforceable, vague, and arbitrary. *See* Sonoran
2 tiger salamander RPM 2, and T&Cs 1.1, 1.2, 1.5, and 2.1. The same is true for the Gila
3 topminnow.

4 216. FWS's ITSs for the jaguar, ocelot, Mexican spotted owl, cuckoo, northern
5 Mexican gartersnake, Sonoran tiger salamander, and Gila topminnow violate ESA
6 Section 7, 16 U.S.C. § 1536, and are arbitrary, capricious, an abuse of discretion, and
7 contrary to law, in violation of the APA. 5 U.S.C. § 706(2).

8 **SIXTH CLAIM FOR RELIEF**

9 *Violation of FLPMA and the Organic Act: Failure to Require Rights-of-Way and Properly*
10 *Regulate the Off-Site Primary Access Route and Water Pipelines*

11 217. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
12 herein.

13 218. The ROD and FEIS are based on the erroneous assumption that South32
14 has a statutory right under the 1872 Mining Law to construct the Primary Access Road to
15 access the mine site, because USFS considers the Primary Access Road part of a mining
16 "operation" under its 36 C.F.R. Part 228A regulations. These regulations only apply to
17 "operations authorized by the United States mining laws (30 U.S.C. 21–54)" such as the
18 mining of "locatable" minerals such as gold.

19 219. Because South32 has no statutory right of access under the Mining Law
20 (or any other law) for the new Primary Access Road access route, the Part 228A
21 regulations do not apply, as this second access route is not "authorized by the mining
22 laws." As such, the Forest Service can only consider reviewing the Primary Access Road
23 as a discretionary right-of-way under FLPMA—which the Forest Service admits it did
24 not do.

25 220. Federal land agencies have long held that approval of water pipelines is not
26 governed by, or subject to, statutory rights under the Mining Law. "FLPMA repealed or
27 amended previous acts and Title V now requires that BLM approve a right-of-way
28 application prior to the transportation of water across public land for mining purposes."

1 *Desert Survivors*, 96 IBLA 193, 1987 IBLA LEXIS 81, at *8–9 (1987) (citing FLPMA,
2 43 U.S.C. § 1761).

3 221. Because the USFS failed to require a right-of-way for the water pipelines
4 under FLPMA Title V and the agency’s 43 C.F.R. Part 251 regulations, its approval of
5 the Project violates FLPMA.

6 222. The Forest Service’s actions and omissions noted herein regarding its
7 review and approval of the Project violate FLPMA and the Organic Act, and their
8 implementing regulations, are arbitrary, capricious, an abuse of discretion, not in
9 accordance with FLPMA and the Organic Act, without observance of procedure required
10 by law, and in excess of statutory jurisdiction, authority, or limitations, within the
11 meaning of the judicial review provisions of the APA. 5 U.S.C. § 706(2). The FEIS and
12 ROD should be held unlawful, set aside, vacated, and remanded to the Forest Service.

13 **SEVENTH CLAIM FOR RELIEF**

14 *Violation of NEPA: Erroneous Assumption that Mining Would Last for Over 50 Years,*
15 *Even if the Agency Denied Expansion Onto Public Lands*

16 223. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
17 herein.

18 224. The FEIS was based on the erroneous position that mining on South32’s
19 private land would continue for an additional 56 years, even if USFS denied the initiation
20 of underground mining and waste dumping on federal public lands. “Under Alternative 2
21 – Proposed Action, groundwater management would differ from Alternative 1 –No
22 Action in multiple ways. The first key difference is that underground mining and
23 dewatering pumping would last for 70 years instead of 56 years, with dewatering
24 projected to continue through the end of mining in 2093.” FEIS at 3.17-25.

25 225. “Under Alternative 1 – No Action, dewatering to facilitate underground
26 mining that began in August 2023 will continue throughout the 56-year mining period until
27 2079. During that time, mine dewatering will remove an estimated 144,000 acre-feet from
28 the groundwater system, or about 2,550 acre-feet per year (GSI Environmental 2024a).”

1 *Id.* at 3.17-13.

2 226. This view, that the analysis of the “No-Action Alternative” (required by
3 NEPA) must be based on mining on private lands continuing for 50+ years, is unfounded
4 and contradicts the record.

5 227. The company’s own mining plan admits that without the new public lands
6 mining and waste dumping approved in the ROD, currently-approved operations would
7 cease within less than 10 years, as the existing TSF1 (Tailings Storage Facility 1) would
8 reach capacity. “There is an existing lined dry-stack TSF on South32 Hermosa private
9 land (known as TSF1) that was voluntarily constructed by the company to remediate
10 legacy mine tailing deposition and drainage impacting water quality (more detail on
11 TSF1 can be found in Section 2.2.3). TSF1 will be expanded to receive production
12 tailings. TSF1 has capacity for less than 10 years of placement of waste rock and
13 tailings.” South32 Plan of Operations at 1-4. [https://usfs-](https://usfs-public.app.box.com/v/PinyonPublic/file/2155267509023)
14 [public.app.box.com/v/PinyonPublic/file/2155267509023](https://usfs-public.app.box.com/v/PinyonPublic/file/2155267509023) (last visited Aug. 28, 2026).

15 228. “Once expanded, TSF1 will have the capacity to accept production
16 tailings, PAG waste rock, solids from WTP1 and WTP2, and core cutting solids and
17 drilling solids for less than 10 years of mining.” *Id.* at 2-55–56. [https://usfs-](https://usfs-public.app.box.com/v/PinyonPublic/file/2155267509023)
18 [public.app.box.com/v/PinyonPublic/file/2155267509023](https://usfs-public.app.box.com/v/PinyonPublic/file/2155267509023).

19 229. Despite this lack of capacity, the agency accepted South32’s assertion that
20 it could mine for another 50 years on its private lands, based on a vague plan to truck all
21 of the ore across federal land to be processed at a speculative and unknown location
22 somewhere in Arizona. The FEIS and South32 admit that such future operations have not
23 even been planned.

24 230. “South32 Hermosa plans to construct the oxide ore beneficiation plant on
25 private land distal from the mine site. The crushed oxide ore would be transported in
26 sealed containers across NFS land to the beneficiation facility. Once oxide ore leaves
27 NFS land, it would not again enter NFS land either before or after beneficiation. Tailings
28 associated with the oxide ore would be produced and placed in a facility at or near the

1 distal beneficiation facility, not on NFS land. The distal oxide ore beneficiation facility
2 has not yet been sited.” FEIS at 1-11.

3 231. None of the environmental impacts from these speculative operations,
4 including the transport across public lands, were analyzed in the FEIS.

5 232. The FEIS should have taken a hard look based on the best available
6 information—that the baseline conditions cannot assume another 50+ years of operations,
7 and that the new Hermosa Project’s impacts to water resources, wildlife, and habitat, are
8 much greater than considered.

9 233. The FEIS was based on the erroneous view that the impacts to public lands
10 from the ROD would not appreciably degrade public resources, as they would continue
11 for 50+ years anyway. But the record shows otherwise.

12 234. This skewed the Forest Service’s review of the Project, assuming that its
13 impacts to water, wildlife, and habitat was largely limited to only what will occur in
14 addition to the speculative 50+ years of existing mining, in addition to some new
15 operations, such as the new Primary Access Road route and water pipelines.

16 235. USFS’s actions and omissions described herein regarding its review and
17 approval of the Project violate NEPA, FLPMA, and their implementing regulations. The
18 FEIS and ROD are arbitrary, capricious, an abuse of discretion, not in accordance with
19 NEPA, without observance of procedure required by law, and in excess of statutory
20 jurisdiction, authority, or limitations, within the meaning of the judicial review provisions
21 of the APA. 5 U.S.C. § 706(2). The FEIS and ROD should be held unlawful, set aside,
22 vacated, and remanded to the Forest Service.

23 **EIGHTH CLAIM FOR RELIEF**

24 *Violation of NEPA: Failure to Take the Required “Hard Look” at Project Impacts and*
25 *Obtain Baseline Information on Affected Resources*

26 236. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
27 herein.
28

1 237. A “critical” part of the “hard look” required by the agencies under NEPA
2 involves “[e]stablishing appropriate baseline conditions.” *Great Basin Res. Watch*, 844
3 F.3d at 1101. “Without establishing the baseline conditions which exist before a project
4 begins, there is simply no way to determine what effect the project will have on the
5 environment and, consequently, no way to comply with NEPA.” *Id.* (cleaned up).

6 238. The FEIS lacks adequate baseline data and analysis for critical resources
7 that will be impacted at, around, and downstream, from the mine site.

8 239. The Hermosa Project FEIS and BiOp fail to meet the mandates under
9 NEPA and the ESA to fully analyze the baseline conditions of all affected resources.

10 240. The FEIS improperly considered the “baseline” conditions at the site, not
11 on the current situation, but rather on the future conditions that would result if South32
12 conducted 50+ years on its private lands (i.e., if USFS did not approve South32’s
13 expansion onto, and under, public land).

14 241. By failing to analyze the baseline conditions of the groundwater and
15 affected resources, the agency necessarily fails to meet its NEPA and public land
16 protection duties to adequately analyze the impacts to groundwater and resources
17 dependent on that groundwater, such as riparian areas and important wildlife habitat.
18 “Without establishing the baseline conditions which exist . . . before [a project] begins,
19 there is simply no way to determine what effect the [project] will have on the
20 environment and, consequently, no way to comply with NEPA.” *Great Basin Res. Watch*,
21 844 F.3d at 1101.

22 242. FWS’s and USFS’s actions and omissions noted herein regarding its
23 review and approval of the Project violate NEPA, FLPMA, and their implementing
24 regulations. The BiOp, FEIS and ROD are arbitrary, capricious, an abuse of discretion,
25 not in accordance with NEPA, without observance of procedure required by law, and in
26 excess of statutory jurisdiction, authority, or limitations, within the meaning of the
27 judicial review provisions of the APA. 5 U.S.C. § 706(2). The FEIS, ROD, and BiOp
28 should be held unlawful, set aside, vacated, and remanded to the Forest Service and FWS.

1 **NINTH CLAIM FOR RELIEF**

2 *Violation of ESA: Failure to Obtain Baseline Information on Affected Resources*

3 243. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
4 herein.

5 244. Related to the Forest Service’s duty under NEPA to fully analyze the
6 baseline conditions of all affected resources, FWS failed to review all relevant
7 information, evaluate the current status and environmental baseline of the species and
8 affected habitat, and analyze the direct, indirect, and cumulative effects of the proposed
9 action on ESA-listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(1)–(3).

10 245. In issuing the Project BiOp, FWS failed to use the “best scientific and
11 commercial data available” in addressing the Project’s impacts on groundwater quality.
12 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). *Am. Rivers & Ala. Rivers All. v. Fed.*
13 *Energy Regul. Comm’n*, 895 F.3d 32, 47 (D.C. Cir. 2018) (finding a biological opinion
14 arbitrarily “failed to incorporate the environmental baseline into its jeopardy analysis”).

15 246. While the BiOp includes citation to groundwater drawdown studies, none
16 of these studies address groundwater *quality*. *See, e.g.*, BiOp at 126 (citing groundwater
17 modeling that “forecasted groundwater drawdown”); *id.* at 323–25 (addressing
18 groundwater drawdown impacts on cuckoo critical habitat).

19 247. Groundwater pollution will affect ESA-listed species and designated
20 critical habitat through numerous means, including through direct exposure to
21 contaminants, degraded surface water quality, impacts to native vegetation, and
22 ecosystem disruptions (for example, by impacting prey species).

23 248. FWS’s failure to identify and analyze the best available information
24 regarding the baseline conditions violates the ESA and its implementing regulations. The
25 BiOp is arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA,
26 within the meaning of the APA. 5 U.S.C. § 706(2). The BiOp should be held unlawful,
27 set aside, vacated, and remanded to FWS.

1 **TENTH CLAIM FOR RELIEF**

2 *Violation of Organic Act: Failure to Protect Forest Resources*

3 249. Plaintiffs reallege and incorporate all previous paragraphs as if fully stated
4 herein.

5 250. The Project's unmitigated damage to public lands and waters, wildlife and
6 habitat will result in severe impacts to these resources, in contradiction of the Forest
7 Service's Organic Act mandate to the agency "regulate [the] occupancy and use [of
8 national forests] and to preserve the forests thereon from destruction." 16 U.S.C. § 551;
9 *see also* 16 U.S.C. § 475 (regarding protecting water flows on public land); 36 C.F.R.
10 Part 228 (agency duties to "minimize" adverse impacts from mining operations).

11 251. The Forest Service's actions and omissions noted herein regarding its
12 review and approval of the Project violate the Organic Act and its implementing
13 regulations. The ROD and FEIS are arbitrary, capricious, an abuse of discretion, not in
14 accordance with federal law, without observance of procedure required by law, and in
15 excess of statutory jurisdiction, authority, or limitations, within the meaning of the
16 judicial review provisions of the APA. 5 U.S.C. § 706(2). The FEIS and ROD should be
17 held unlawful, set aside, vacated, and remanded to the Forest Service.

18 **REQUEST FOR RELIEF**

19 For the foregoing reasons, Plaintiffs respectfully request that this court:

20 A. Declare that the Defendants have violated the ESA, FLPMA, NEPA, the
21 Organic Act, and their implementing regulations and policies, the other laws noted
22 herein, and the APA;

23 B. Vacate and set aside the ROD, BiOp, FEIS, and any actions or decisions
24 reliant on the FEIS, ROD, or BiOp;

25 C. Enjoin Defendants from allowing, authorizing, or approving the Project in
26 reliance on the FEIS, BiOp or ROD until the Forest Service and FWS have
27 complied with the ESA, FLPMA, NEPA, Organic Act, Forest Service regulations,
28 the other laws noted herein, the APA, and the implementing regulations and

1 policies of these laws;

2 D. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements,
3 including attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412,
4 and any other applicable federal law; and

5 E. Grant such additional relief as this Court deems equitable, just, and proper.

6 Respectfully submitted this 29th day of September, 2026,

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