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**pro hac vice forthcoming*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GRAND CANYON CHAPTER OF THE SIERRA CLUB & MARICOPA AUDUBON SOCIETY,

Plaintiffs,

v.

NEIL BOSWORTH, in his official capacity as Forest Supervisor for the Tonto National Forest; UNITED STATES FOREST SERVICE; THOMAS VILSACK, in his official capacity as U.S. Secretary of Agriculture; Jeffrey Humphreys, in his official capacity as Field Supervisor for the U.S. Fish and Wildlife Service's Arizona Ecological Services Office; UNITED STATES FISH AND WILDLIFE SERVICE; and DEBRA HAALAND, in her official capacity as U.S. Secretary of the Interior,

Defendants.

No. CV-

COMPLAINT

INTRODUCTION

1. This case challenges the U.S. Forest Service's decision to approve the expansion of an open pit mine whose water pumping is drying up Pinto Creek. The creek, located within the Tonto National Forest west of Miami, Arizona, has been recognized as a nationally important biodiversity resource, as its flows sustain invaluable desert riparian habitat that hosts imperiled birds and other wildlife. As former Arizona Senator Barry M. Goldwater once put it, Pinto Creek is a "jewel in the desert."

Figure 1. Pinto Creek in the mid-1980s.

2. Pinto Valley Mine is an open-pit copper and molybdenum mine that was opened in 1974. It operated without causing obvious damage to Pinto Creek's riparian habitat for decades, but that changed dramatically shortly after Capstone Mining Corp. (now Capstone Copper Corp.) purchased the mine in 2013. On average, the mine now uses 9,722 gallons of water per minute, or 15,682 acre-feet of water per year—enough to fill the Arizona Diamondbacks' stadium, Chase Field, to the brim about 4 times over. Its massive water withdrawals have reduced Pinto Creek's baseflows—meaning subsurface water that flows upward to the stream's surface channel—by at least 82 percent since the end of 2012, with more loss expected.

3. As a result, significant stretches of Pinto Creek that formerly flowed with water year-round now run dry much of the year. Riparian habitat along the creek has dried and perished, a trend that will persist if the creek's flows are not restored.

4. This dewatering robs threatened and endangered species of critically important willow and cottonwood habitat. Among them are the western yellow-billed cuckoo, a secretive bird with a bright-yellow beak and polka-dot tail, and the southwestern willow flycatcher, a perky, olive-gray bird whose speed and agility in flight allow it to snatch insects in midair. Both birds nest exclusively along flowing water channels and depend on riparian-obligate food sources.

5. Decisionmakers for the Tonto National Forest—Defendants Neil Bosworth, U.S. Forest Service, and Thomas Vilsack (collectively, "TNF")—knew that the mine was drying up the creek, killing riparian vegetation, and depriving wildlife of habitat well before it approved the mine's expansion. Recognizing that mining operations threatened the creek, TNF acquired an instream water right in 1999 specifically to protect flows for the benefit of fish, wildlife, and recreation. In 2020, it presented evidence of the mine's damaging effects—reduced flows and dead trees—to the Arizona Department of Water Resources ("ADWR") and asked it to declare that the mine's pumping violated TNF's instream right. When ADWR claimed it was unable to do so, TNF abandoned its efforts to protect the creek's flows, disregarded its duty to protect the creek under federal law, and authorized the mine to expand operations and continue pumping through 2039.

6. The decision ensured that Pinto Creek's baseflows would be depleted for decades and precluded the creek's ecological recovery from the prior years of pumping.

7. Defendants Jeffrey Humphreys, U.S. Fish and Wildlife Service, and Debra Haaland (collectively, "FWS") signed off on TNF's decision. Implementing its statutory role under the Endangered Species Act ("ESA"), FWS determined that the mine would not jeopardize threatened or endangered species or harm their critical habitat. In reaching that

conclusion, it adopted TNF's defined "action area"—the area evaluated for effects on protected species—that excluded from analysis the stretch of creek most affected by the mine's baseflow reductions: the portion immediately downstream of where the mine pumps its water. This is the very same stretch that TNF told ADWR the mine was improperly dewatering, with devastating effects on the creek's riparian habitat.

8. In omitting that portion of Pinto Creek from its ESA analysis, FWS overlooked information central to its ultimate conclusions. Western yellow-billed cuckoos use that stream reach during breeding season, and southwestern willow flycatchers rely on it for migration (and may breed there as well). TNF and FWS did not consider how these species might be affected by the mine's dewatering there.

9. By ignoring the mine's impact on Pinto Creek and failing to impose meaningful mitigation measures to counteract the mine's dewatering, TNF violated its own regulations promulgated under the Forest Service Organic Act and violated the National Environmental Policy Act ("NEPA"). Both TNF and FWS also violated the ESA.

10. Plaintiffs Maricopa Audubon Society and Sierra Club (the "Conservation Groups")—whose members birdwatch and recreate along Pinto Creek—thus turn to this Court for redress. They ask the Court to enforce

these bedrock environmental laws so that Pinto Creek and its imperiled species have a chance at survival in the decades to come.

JURISDICTION AND VENUE

11. The Conservation Groups bring this case pursuant to the laws of the United States. Jurisdiction is therefore proper pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

12. The Defendants' sovereign immunity is waived under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, and the ESA, 16 U.S.C. § 1540(g). The Court has authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201–2202, 5 U.S.C. § 706, and Rule 65 of the Federal Rules of Civil Procedure. The Court also has inherent authority to award injunctive relief.

13. The Court has authority to award costs and attorney fees under 28 U.S.C. § 2412 and under 16 U.S.C. § 1540(g)(4).

14. Venue is proper pursuant to 28 U.S.C. § 1391 because the Conservation Groups have offices, and members who reside, in the Phoenix Division of the District of Arizona; some of the Defendants reside in the Phoenix Division; the decision at issue was made in the Phoenix Division; the lands at issue are located in the Phoenix Division; and a substantial part of the events giving rise to the Conservation Groups' legal claims occurred in the Phoenix Division.

PLAINTIFFS

15. Plaintiff GRAND CANYON CHAPTER OF THE SIERRA CLUB is a regional chapter of the Sierra Club, one of the oldest and most influential grassroots environmental organizations in the United States. The Grand Canyon Chapter is based in Phoenix and seeks to engage its members and the public in protecting public lands, including national parks, forests, and wildlife refuges; rivers and streams; and wildlife—as well as the people and communities who depend on them. The Grand Canyon Chapter was originally formed in 1965 to focus attention on stopping dam projects that threatened the Grand Canyon. Its work today has expanded to safeguard other important natural areas, like Pinto Creek and its surrounding ecosystem. Protecting Arizona's water resources and its disappearing riparian areas—among the most biodiverse habitats in the state—is one of the Grand Canyon Chapter's top priorities.

16. Plaintiff MARICOPA AUDUBON SOCIETY is a nonprofit organization with over 3,000 members dedicated to the study and enjoyment of birds and other wildlife, and to the protection and restoration of their habitat in the Southwest. It is a chapter of the National Audubon Society based in the Phoenix metropolitan area. Maricopa Audubon is run by volunteers and strives to protect and restore wildlife habitat through education and community involvement.

17. The Conservation Groups' members use and enjoy the lands and waters in and along Pinto Creek. They view, value, and appreciate the wildlife that depends on Pinto Creek's flows and the riparian habitat it supports. As they have for years, the Groups' members intend on visiting the lands and waters along Pinto Creek to continue these uses and enjoyments. Without water in the creek, and the lush vegetation and habitat that water supports, the Conservation Groups' members will be unable to enjoy the natural beauty of the creek, the flowing water, the native vegetation, and the wealth of bird and animal life. These uses and values are, and will continue to be, severely and adversely affected by TNF's unlawful decision to approve the mine's expansion and continued operation.

18. Unless this Court grants the requested relief, the Conservation Groups' interests will continue to be harmed.

19. The Conservation Groups participated in TNF's administrative process for approving Pinto Valley Mine's expansion and continued operation, including by submitting comment letters on the agency's draft environmental impact statement. Both organizations formally protested TNF's final decision, and TNF denied those protests. Both organizations have exhausted their administrative remedies.

20. The Conservation Groups notified TNF and FWS of their ESA violations more than 60 days ago, on June 11, 2024. *See* 16 U.S.C. § 1540(g)(2)(A)(i).

DEFENDANTS

21. Defendant NEIL BOSWORTH is sued in his official capacity as Forest Supervisor for the Tonto National Forest. In that capacity, he is responsible for all decisions of the U.S. Forest Service involving the Tonto National Forest's management. Bosworth signed the 2021 final record of decision ("ROD") approving Pinto Valley Mine's plan to expand and continue operating.

22. Defendant UNITED STATES FOREST SERVICE is an agency of the U.S. Department of Agriculture. The Forest Service and its officers are responsible for implementing all laws and regulations relating to the management of the National Forests, including the Tonto National Forest.

23. Defendant THOMAS VILSACK is sued in his official capacity as the U.S. Secretary of Agriculture. In that capacity, he is responsible for ensuring that the Department of Agriculture and its constituent agencies, including the U.S. Forest Service, comply with federal law.

24. Defendant JEFFREY HUMPHREYS is sued in his official capacity as the Field Supervisor for the U.S. Fish and Wildlife Service's Arizona Ecological Services Office. He is the official responsible for

discharging the U.S. Fish and Wildlife Service's ESA obligations regarding the Pinto Valley Mine. Humphreys signed the 2020 biological opinion for Pinto Valley Mine's operation and expansion.

25. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the U.S. Department of the Interior primarily responsible for administering the provisions of the ESA regarding species listed as threatened or endangered, including the southwestern willow flycatcher and western yellow-billed cuckoo.

26. Defendant DEBRA HAALAND is sued in her official capacity as the U.S. Secretary of the Interior. She is charged with implementing the ESA and, among other things, ensuring the recovery of threatened and endangered terrestrial species and their habitat. She is responsible for ensuring that the U.S. Department of the Interior and its constituent agencies, including the U.S. Fish and Wildlife Service, comply with federal law.

27. The above-named Defendants have the authority, ability, and obligation to remedy the harms to the Conservation Groups' interests alleged in this complaint.

LEGAL BACKGROUND

I. The Forest Service Organic Act and Related Regulations

28. The Forest Service Organic Administration Act of 1897 obligates TNF to protect the resources it manages—including Pinto Creek—from mining operations. The Organic Act authorizes the U.S. Forest Service to create National Forests, "regulate their occupancy and use," and "preserve [them] from destruction." 16 U.S.C. § 551. Congress declared its policy that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. National Forests are established and administered to, among other things, "secur[e] favorable conditions of water flows." *Id.* § 475.

29. To fulfill those mandates and policies, the Forest Service must set "provisions for the protection . . . [of] the public forests and national forests" and is empowered to "make such rules and regulations" to ensure their protection. *Id.* § 551. Under that authority, the Forest Service promulgated regulations that govern its oversight of mining operations on National Forest lands, including on the Tonto National Forest.

30. Those regulations require that mining operations "be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. § 228.8; *see also id.* § 228.1. "This environmental-impact provision requires compliance with federal air

and water quality standards, as well as (among other things) the use of 'all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by [mining] operations.'" *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1033 (9th Cir. 2012) (en banc) (quoting 36 C.F.R. § 228.8(e)); *see also, e.g.*, *Rock Creek All. v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1164, 1170 (D. Mont. 2010) (holding mine approval violated Organic Act and Part 228 regulations by failing to protect water quality and fisheries).

31. Thus, to comply with its duty to minimize adverse effects on forest resources, TNF may not approve mining proposals that would cause unmitigated damage to those resources or that would violate federal or state natural resource laws. *E.g.*, *Save Our Cabinets v. U.S. Dep't of Agric.*, 254 F. Supp. 3d 1241, 1248 (D. Mont. 2017) ("The Forest Service acted arbitrarily and capriciously in approving [a mining project] despite noncompliance with Montana [water] nondegradation standards.").

II. The National Environmental Policy Act ("NEPA")

32. NEPA is the "basic national charter for protection of the environment." *Ctr. for Bio. Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020). The law has "twin aims." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). First, a federal agency must "consider every significant aspect of the environmental impact of a proposed action"; and

second, the agency must "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.* (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)).

33. To fulfill these purposes, NEPA requires federal agencies to prepare a "detailed statement" for all "major Federal actions significantly affecting" the environment. 42 U.S.C. § 4332(2)(C). This statement—referred to as an environmental impact statement ("EIS")—must take a "hard look" at the environmental impacts of the proposed action before they occur. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). This requirement ensures "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id.* at 349. It also ensures that "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.* "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

34. Agencies must also identify and analyze measures to mitigate anticipated adverse environmental consequences associated with the major

action under consideration. An EIS must "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives." 40 C.F.R. § 1502.14(e) (2021). It must also discuss "[m]eans to mitigate adverse environmental impacts (if not already covered under § 1502.14(e))." *Id.* § 1502.16(a)(9) (2021). An agency may not defer identification of mitigation measures and analysis of their effectiveness until after a project has been approved and adverse environmental impacts have started to occur. *Robertson*, 490 U.S. at 352 (holding that, without "a reasonably complete discussion" of mitigation measures, "neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects").

III. The Endangered Species Act ("ESA")

35. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its purpose is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Congress enacted the ESA to achieve two purposes: to provide for the protection of imperiled species to prevent their extinction, and to facilitate recovery of those species so that they no longer need the protections provided by the ESA. *Gifford*

Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004); 16 U.S.C. § 1532(3).

36. To achieve its twin objectives of survival and recovery, the ESA directs the U.S. Fish and Wildlife Service to determine which species of plants and animals are "endangered" or "threatened" within the meaning of the ESA. 16 U.S.C. § 1533(a)(1). A species is "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A species is "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Concurrently with listing, the Fish and Wildlife Service must designate "critical habitat," meaning areas "essential to the conservation of the species." *Id.* §§ 1533(a)(3), 1532(5)(A).

37. Section 7 of the ESA requires each federal agency to ensure that its actions are not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. *Id.* § 1536(a)(2). An "action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02 (2021).

38. The ESA includes specific, mandatory processes designed to ensure that federal agencies comply with their substantive duty to avoid jeopardizing listed species or destroying or adversely modifying critical

habitat. Section 7 of the ESA provides that a federal agency proposing an action "shall . . . request of the [Fish and Wildlife Service] information whether any species which is listed or proposed to be listed may be present in the area of such proposed action." 16 U.S.C. § 1536(c)(1). If the Fish and Wildlife Service determines that such species may be present, the agency "shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action." *Id*. If the action "may affect" such species, the agency must consult with the Fish and Wildlife Service. 50 C.F.R. § 402.14(a) (2021); *see Karuk Tribe*, 681 F.3d at 1027. Consultation requires a formalized process with the Fish and Wildlife Service, unless the agency determines that its action is "not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(b)(1) (2021).

39. The formal consultation process culminates in the issuance of a biological opinion. That opinion must provide: (1) a "summary of the information on which the opinion is based"; (2) a "detailed discussion of the environmental baseline of the listed species and critical habitat"; (3) a "detailed discussion of the effects of the action on listed species or critical habitat"; and (4) the Fish and Wildlife Service's opinion as to whether the action is "[l]ikely to jeopardize the continued existence of a listed species or

result in the destruction or adverse modification of critical habitat." *Id.* § 402.14(h)(1) (2021).

40. A biological opinion resulting in a jeopardy finding must include "reasonable and prudent alternatives" to the proposal, if any, or indicate that there are none to the best of the Fish and Wildlife Service's knowledge. *Id.* § 402.14(h)(2) (2021).

41. In fulfilling the consultation requirements of the ESA, both the Fish and Wildlife Service and the agency proposing the action—here, TNF—must use the best scientific data available. 16 U.S.C. § 1536(a)(2).

42. A biological opinion must address the effects of an agency's action not only on the ability of the species to survive, but also to recover to the point that it no longer needs the protection of the ESA. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931–32 (9th Cir. 2008); 50 C.F.R. § 402.02 (2021). Similarly, when addressing whether an agency action will adversely modify a species' designated critical habitat, the Fish and Wildlife Service's biological opinion must consider the effects of the action on the value of the critical habitat for the survival and recovery of the species. *Gifford Pinchot*, 378 F.3d at 1069–70.

43. The Fish and Wildlife Service must analyze the full "effects of the action"—meaning "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other

activities that are caused by the proposed action." 50 C.F.R. § 402.02 (2021). In other words, the biological opinion must consider "all the impacts" that could result from the mine's proposed plan of operations "using the best available science." *Ctr. for Bio. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1156 (D. Ariz. 2002).

44. As part of that requirement, the action agency's biological assessment and the Fish and Wildlife Service's biological opinion must properly define the "action area" where anticipated effects will occur. The action area must encompass "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02 (2021). To enable a reviewing court to determine whether an action area was properly defined, "[t]he agency must explain the 'scientific methodology, relevant facts, or rational connections linking the project's potential impacts' to the action area boundaries." *Nw. Env't Def. Ctr. v. Nat'l Marine Fisheries Serv.*, 647 F. Supp. 2d 1221, 1230 (D. Or. 2009) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002)).

45. When a biological opinion's no-jeopardy or no-adverse-modification conclusion is based in whole or part on mitigation measures, those measures "must constitute a 'clear, definite commitment of resources,' and be 'under agency control or otherwise reasonably certain to occur.'" *Ctr. for Bio. Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) (quoting

Nat'l Wildlife Fed'n, 524 F.3d at 936 & n.17). The proposed mitigation measures must involve "enforceable" obligations, *id.*, and must address threats to the listed species so as to satisfy the ESA's jeopardy and adverse modification standards, *Ctr. for Bio. Diversity v. Haaland*, 87 F.4th 980, 988–89 (9th Cir. 2023).

46. Although consultation may satisfy an agency's "*procedural* obligations under the ESA," a biological opinion alone does not establish that an agency complied "with its *substantive* obligations under section 7(a)(2)." *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). The action agency—here, TNF—has an independent duty to meet its substantive Section 7 obligation to ensure its actions are not likely to jeopardize listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). An action agency violates its substantive Section 7 duty if it unreasonably relies on an inadequate, incomplete, or flawed biological opinion in carrying out an action. *E.g.*, *Salazar*, 804 F. Supp. 2d at 1010.

IV. Arizona Water Appropriation Laws

47. Arizona water appropriation laws protect against interference with existing beneficial uses of water. Under a principle of first in time, first in right, "[a]ny person . . . may appropriate unappropriated water," and the person "first appropriating the water shall have the better right." Ariz. Rev.

Stat. § 45-151(A). Arizona law criminalizes using or diverting water without authorization. *Id.* § 45-112(A). Specifically, it is a misdemeanor to "divert[] water from a stream" without authorization, use "water to which another is entitled," or "[u]se[], store[], or divert[] water without or before the issuance of a permit to appropriate such waters." *Id.*

48. These rules of appropriation apply to subsurface water that has a close hydrological connection to surface water. Arizona law labels such water "subflow," defined as "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream." *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 334 (2000) (quoting *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 39 Ariz. 65, 96 (1931)). Thus, subsurface waters that directly feed a flowing water body may not be used or diverted without right.

V. The Administrative Procedure Act ("APA")

49. The APA provides a right of review for any "person suffering legal wrong because of agency action." 5 U.S.C. § 702. It waives sovereign immunity and provides for judicial review of final agency actions "for which there is no other adequate remedy in a court." *Id.* § 704. Under the APA, reviewing courts shall "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(2).

50. This standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). In general, an agency decision is arbitrary and capricious where "the agency has relied on factors which Congress has not intended 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." *Id.*

FACTS

I. Pinto Creek – an Imperiled "Jewel in the Desert"

51. Pinto Creek is a rare Arizona perennial stream that provides invaluable riparian habitat for fish and wildlife in a semi-arid desert. The creek runs 28 miles northward from the Pinal Mountains through the Sonoran Desert before emptying into Roosevelt Lake, which supplies water to Maricopa County and the city of Phoenix.

52. Much of Pinto Creek is perennial—meaning flowing year-round—because "baseflows" keep the creek running during periods of dry weather. Baseflows refer to water that moves through the stream bed and banks into the above-ground stream channel. These flows combine with surface runoff from precipitation to form the creek's flows.

53. Pinto Creek's flowing water develops and maintains riparian habitat. That habitat consists of the water in the stream as well as the water-loving vegetation that grows along the streambanks and in the floodplain. Riparian areas are the most ecologically diverse and productive ecosystems in the southwestern United States, and their limited size—only 1 to 2 percent of the land surface area—makes them even more invaluable. Riparian areas are vital for fish and wildlife: up to 80 percent of vertebrate species depend on these areas at some stage in their life cycle.

54. Fueled by baseflows, Pinto Creek and its associated riparian habitat support a wealth of native animal species. Some are protected by the ESA, including the southwestern willow flycatcher and western yellow-billed cuckoo. The creek is also an important stopover area for migratory birds on their way to nearby Roosevelt Lake and other locations.

55. Because of its beauty and valuable contribution to the region's biodiversity, Pinto Creek has garnered statewide and national acclaim. The creek has been nominated for Unique Waters (now Outstanding Arizona

Waters) status, and it was identified as an Aquatic Resource of National Importance by the federal Environmental Protection Agency. As noted, former Arizona Senator Barry M. Goldwater called Pinto Creek a "jewel in the desert." U.S. Dep't of Agric., Technical Guide to Managing Ground Water Resources, at 20 (May 2007).

56. However, mining operations threaten to dewater this vital stream. It "has been listed by the American Rivers Organization as one of the country's most endangered rivers due to threats from proposed mining operations." *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1009 (9th Cir. 2007) (holding mine permit violated federal Clean Water Act).

57. As Senator Goldwater observed, "Maybe we need copper, but we also need exceptional places like Pinto Creek. We've lost a lot of little gems like Pinto Creek in Arizona over the years for various reasons. How many more can we afford to lose?" Steve Yozwiak, *Creek Rated Among U.S.' Most Imperiled*, THE ARIZONA REPUBLIC (April 18, 1996).

A. Western yellow-billed cuckoo

58. The western yellow-billed cuckoo is one of the imperiled species protected by the ESA that depends on Pinto Creek's perennial flows. Adult yellow-billed cuckoos have a downward-curving bill with bright yellow along the base; a slender, elongated body; and long tail with white-on-black spots

on the underside. Males sing a loud, percussive *ka-ka-ka-ka-kow-kowlp-kowlp*, and both males and females give a softer *kowwp, kowwp* call too.

Figure 2. Western yellow-billed cuckoo.

59. Cuckoos breed in riparian and xeroriparian habitat along rivers, streams, and adjacent draws. They rely especially on cottonwood and willow trees for food and nesting habitat. Streamflow and groundwater reductions have caused significant habitat loss and degradation through the western portion of the cuckoo's historic range, driving its decline.

60. The Fish and Wildlife Service listed the western yellow-billed cuckoo under the ESA as threatened in 2014, and it designated critical habitat for the species on April 21, 2021—4 months before TNF's approval of the mine expansion. 79 Fed. Reg. 59,992 (Oct. 3, 2014); 86 Fed. Reg. 20,798 (Apr. 21, 2021). The Fish and Wildlife Service based its listing decision on the loss and degradation of the cuckoo's riparian habitat, including from surface and groundwater diversions. It cited studies that have "documented the connection between overutilization of the ground water, lowering of the water table, and the decline and eventual elimination of riparian vegetation." 79 Fed. Reg. at 60,018.

61. Western yellow-billed cuckoos occupy the riparian habitat along Pinto Creek, including during breeding season. Two units of designated critical habitat are located along the creek: Pinto Creek South and Pinto Creek North. 86 Fed. Reg. at 20,860–61.

B. Southwestern willow flycatcher

62. The southwestern willow flycatcher is a small grayish-green bird with a perky crown of feathers on its head, white striping on its wings, and a short, pointed bill. It hunts by sitting on a perch and watching for insects, then flying deftly into the open and catching its prey in flight. The flycatcher's song is a sharp, distinctive *fitz-bew*.

Figure 3. Southwestern willow flycatcher.

63. Like the cuckoo, the flycatcher lives in dense, riparian willow and cottonwood forests. And, also like the cuckoo, it has suffered from an extensive loss of habitat due to dewatering and die-off of riparian areas, with consequent reductions in population levels. The Fish and Wildlife Service listed the flycatcher as endangered in 1995 and designated its critical habitat in 2013. 60 Fed. Reg. 10,694 (Feb. 27, 1995); 78 Fed. Reg. 344 (Jan. 3, 2013).

64. Southwestern willow flycatchers live along Pinto Creek and use it as a migration corridor. A unit of designated critical habitat is located near the confluence of Pinto Creek and the Salt River. 78 Fed. Reg. at 376.

II. TNF Obtains an Instream Flow Right

65. Reflecting the creek's importance, TNF holds a certificated water right under Arizona state law that legally protects Pinto Creek's flows.

66. TNF first applied for this right in 1983, "for the maintenance of wildlife habitat including fish, and for recreation including visual and aesthetic enjoyment." Ariz. Dep't Water Res., Application for Permit to Appropriate Water, No. 33-89109 (Dec. 14, 1983). To perfect its right, TNF conducted an instream flow assessment that concluded in 1991, followed by another supplemental assessment that concluded in 1996. These assessments measured and documented the creek's flows throughout the year to establish the amount of water put to "beneficial use" for purposes of TNF's right—i.e., providing fish and wildlife habitat and enhancing recreation opportunities via instream flows.

67. In 1999, ADWR granted a certificate recognizing TNF's instream flow right with a seniority date of December 14, 1983. It establishes that TNF has a right to use 1,794.2 acre-feet per year of water "flowing in Pinto Creek, for recreation and wildlife, including fish." Ariz. Dep't Water Res., Certificate of Water Right No. 33-89109, at 1 (Apr. 16, 1999, amended June 8,

1999). The right applies to an approximately 9-mile perennial reach of Pinto Creek that begins just downstream of the mine and about 0.4 miles upstream of a flow-measuring gauge known as the Magma Weir, and ends at Pinto Creek's confluence with Blevins Wash about 5 miles upstream of Roosevelt Lake.

68. The certificate provides that water used pursuant to the right must remain "instream" and cannot "be diverted from the natural channel of Pinto Creek." *Id.* It further stipulates that "impoundments," "consumptive use," and "degradation of water quality" are all prohibited. *Id.* at 2.

69. TNF's website declares that, because of this instream right, "Pinto Creek is protected from de-watering by mining operations." U.S. Forest Service, Instream Flow Water Rights Program, https://www.fs.usda.gov/detail/tonto/landmanagement/resourcemanagement/?cid=fsbdev3_018784 (accessed Sept. 4, 2024).

III. Pinto Valley Mine Starts Drying Up Pinto Creek.

70. Pinto Valley Mine began operating in 1974. In the succeeding decades, several entities have owned and operated the mine, and, until recently, they did so without apparent harm to Pinto Creek's flows or riparian habitat. According to U.S. Geological Service records, beginning in 1997, Pinto Creek's perennial reach located below the mine flowed every single day for over 16 years straight.

71. However, Pinto Creek's flows and riparian ecosystem began dramatically worsening in 2013. Only three months after Pinto Valley Mine's current owner—Pinto Valley Mining Corp., a subsidiary of Capstone Copper Corp. (collectively, "Capstone")—acquired the mine, the creek's measured surface flows abruptly stopped, dropping to zero in December 2013.

72. The cause of precipitous decline in the creek's flows was Capstone's pumping of subsurface water from 23 water wells near Pinto Creek called the Peak Well field. The Peak Well field wells sit on private-land inholdings within Tonto National Forest (except one, which sits on public land). Eight of the wells are located apart from the main mine site, and their water is carried via pipelines across National Forest land to the main site. The Forest authorized these pipelines' construction under a special use permit, GLO-445303, in 1987. Associated service roads and power lines were also authorized under GLO-445303 and another special use permit, GLO-445302, which was issued in 1973. Pinto Valley Mine Final Environmental Impact Statement, at 2-15 (Apr. 9, 2021) ("FEIS").

73. On average, the Peak Well field pumps approximately 3,500 gallons of water per minute, or 5,646 acre-feet per year. The mine as a whole uses 9,722 gallons of water per minute, or approximately 15,682 acre-feet of water per year, equivalent to the usage of nearly 50,000 homes. *Id.* at 2-52–53.

74. Capstone's pumping at the Peak Well field has substantially reduced baseflows into Pinto Creek. At the start of 2013, flows averaged 1,070 gallons per minute and, by the end of 2018, diminished to just 188 gallons per minute—an 82 percent reduction. Continued pumping is estimated to further reduce flows to a meager 73 gallons per minute, a reduction of 93 percent from 2013. *Id.* at 3-95, 3-450–51.

75. This dewatering of Pinto Creek devastated the fragile riparian habitat located immediately below the mine. As described further in Section IV.B below, the portion of Pinto Creek that was supposed to be protected by TNF's instream flow right experienced significant die-off due to lack of water, and Forest hydrologists ruled out drought as the cause.

76. The riparian die-off continues. Recent field visits by members of the Conservation Groups verify the significant, ongoing consequences of Pinto Creek's diminished flow on surrounding riparian vegetation. For example, on one site visit, members documented nearly a half mile of dead and downed trees in the vicinity of the Magma Weir, impacts they had not observed during previous visits to the creek.

77. The following photos illustrate the dewatering impacts on wildlife habitat and formerly verdant vegetation:

Figure 4. Pinto Creek at the Magma Weir in 2003.

Figure 5. Pinto Creek just upstream of the Magma Weir in 2017.

IV. TNF's Flawed Analysis Under NEPA

78. Pinto Creek would have begun recovering from these ecologically devastating effects if the mine had stopped pumping Pinto Creek's subflow. However, in 2016, Capstone submitted to TNF a new proposed mining plan of operations. It proposed to expand the mine's physical footprint, including new occupation of 229 acres of National Forest land to expand the mine's open pit, tailings storage facilities, and other features, and 29 acres of National Forest land for existing "legacy" encroachments. Capstone also proposed to extend the mine's operations through 2039.

79. The company also proposed to continue operating the Peak Well field. The permits authorizing the Peak Well pipelines, service roads, and power lines—GLO-445302 and GLO-445303—had expired in 2007, so, absent TNF's decision, the company would have had to discontinue its pumping from wells located apart from the main mine site.

A. TNF initiates the NEPA process

80. Because Pinto Valley Mine's proposed expansion and extension of operations would cause significant environmental harm—including the dewatering of Pinto Creek and its riparian ecosystem—TNF was required to prepare an EIS under NEPA.

81. TNF initiated the EIS process on March 28, 2017 and released a draft EIS for public comment on December 13, 2019.

82. TNF's 2019 draft EIS developed only two alternatives: A "no-action" alternative that would have allowed continued operation until 2027, and the proposed action, which would have allowed the mine to continue operating and pumping from the Peak Well field until 2039.

83. The draft EIS found that the mine, under Capstone's watch, had significantly dewatered Pinto Creek and would continue to do so if it kept operating. Specifically, it employed a groundwater flow model to conclude that the mine had decreased the creek's baseflows by 82 percent from 2013 to 2018, with additional suppression of baseflows expected for decades to come.

84. The draft EIS listed 11 alternative water supply options to reduce or eliminate the need for continued pumping from the Peak Well Field. However, TNF eliminated them from further study. The draft EIS did not consider requiring Capstone to operate the Peak Well field in a manner similar to prior owners, when no severe impacts to the creek's riparian habitat occurred. Nor did it consider other options proposed by public commenters like water exchange mechanisms.

B. TNF asks ADWR to declare the mine's pumping illegal

85. While its NEPA analysis was ongoing, TNF in May 2020 wrote a letter to ADWR documenting the mine's damage to Pinto Creek and asking ADWR to declare the mine's pumping illegal. Letter from Neil Bosworth,

Forest Supervisor, Tonto Nat'l Forest, to Elizabeth Logan, Surface Water Program Manager, Ariz. Dep't Water Res. (May 29, 2020).

86. The letter highlighted TNF's instream water right for Pinto Creek and explained the draft EIS's finding that the mine had already reduced the creek's baseflows by 82 percent. It supported this finding in significant detail, including with determinations by Forest hydrologists who had compared flows in nearby Cherry Creek with flows in Pinto Creek to isolate the mine's effect. Historically, TNF explained, flows in Cherry Creek and Pinto Creek had been closely correlated, but they diverged when Capstone began pumping vast amounts of water from the Peak Well field in 2013.

87. The letter also documented the resulting damage to riparian habitat. It included photos and other evidence showing significant die-off where the company's pumping had diminished the creek's flows and harmed associated vegetation and habitat.

88. The letter stated that TNF "believe[d] that wells operated by [the mine] [were] having a direct and appreciable impact on surface water flow in Pinto Creek." *Id.* at 1. It focused in particular on 11 Peak Well field wells close to the stream that it believed were most likely responsible for the dramatic change in the creek's flows.

89. Given the significant reduction in instream flows, TNF requested that ADWR "make a determination of appropriability for [the mine's] near-stream wells"—i.e., determine whether the mine could legally divert water in a manner that impaired TNF's instream flow right. *Id.*

90. In a July 28, 2020 response letter, ADWR responded that it was "unable [to] make the determinations of appropriability" but offered to assist TNF in resolving the issue. Letter from Carol M. Ward, Deputy Assistant Director, Water Planning and Permitting Division, Ariz. Dep't Water Res. to Neil Bosworth, Forest Supervisor, Tonto Nat'l Forest, (July 28, 2020).

91. TNF did not respond to ADWR's letter and took no further action to protect its instream flow right or the invaluable riparian habitat it supports.

C. TNF approves the mine's expansion with no mitigation

92. Less than a year after corresponding with ADWR, and despite the ongoing harm to the creek, TNF finalized its NEPA analysis and approved the mine's plan to expand and continue operating until 2039. TNF issued its final EIS ("FEIS") on April 9, 2021.

93. The FEIS considered three alternatives: a no-action alternative, which would have denied the plan outright and required the mine to begin closure and reclamation within six months; Alternative 1, which would have extended the mine's life by approximately 7 years (the draft EIS's no-action

alternative); and the proposed action, approving the mine's plan of operations and allowing it to pump subflow out of Pinto Creek through 2039.

94. The FEIS determined that the mine's operation will devastate Pinto Creek. Like the draft EIS, it relied on a groundwater flow model to conclude that the mine had already decreased the creek's baseflows by 82 percent from 2013 (1,070 gallons per minute) to 2018 (188 gallons per minute), with additional suppression of baseflows expected for decades to come. FEIS at 3-450–51. It also found that the mine had decreased surface flows at the Magma Weir—from approximately 10 cubic feet per second prior to 2013 to approximately 4.3 cubic feet per second after—including many days with zero flow beginning in 2013. *Id.* at 3-451. The FEIS concluded that baseflow reductions that "occurred as a result of pumping from the Peak Well field during the 2013–2018 period. . . would continue at a similar magnitude until pumping ceases under the proposed action." *Id.* at 3-475.

95. The FEIS did not attempt to determine what factors, other than the large volume of water that Capstone pumped after 2013, explained the significant reductions in baseflows resulting from the mine's operations. For example, the FEIS did not evaluate hydrological connectivity between any of the individual Peak Well field wells and Pinto Creek, nor did it evaluate how different configurations of pumping within the Peak Well field (i.e., pumping more or less water at individual wells) would alter baseflows.

96. Despite finding significant effects on Pinto Creek, the FEIS artificially constrained its analysis of how baseflow reductions would affect the ecosystem. It assessed impacts to wildlife and vegetation only in a defined "drawdown area," meaning "the area where the water table would be lowered by 5 feet or more at some point in time during the mining or post-mining period." *Id.* at 3-90 n.42.

97. As a result, all of Pinto Creek downstream of the 5-foot drawdown area—including the biologically rich stretch of habitat covered by TNF's instream water right—was omitted from consideration. *E.g.*, *id.* at 3-475 (discussing impacts to "perennial stream flow in Pinto Creek *in the affected area*" (emphasis added)). TNF's 9-mile instream flow right begins approximately 0.4 miles upstream of the Magma Weir, and the 5-foot drawdown action area ends approximately 0.3 miles downstream of the weir, meaning 8.3 out of 9 miles—92 percent—of the instream right section was excluded from consideration. Thus, the known harm to flows, vegetation, and wildlife documented in TNF's letter to ADWR was excluded from consideration in the FEIS simply because they occurred outside the modeled 5-foot drawdown area. *E.g.*, *id.* at 3-107 (discussing how baseflow depletion will harm wildlife within the drawdown area).

98. The FEIS did not explain or support its assumption that wildlife and ecosystems along the stretch of Pinto Creek downstream of the mine would not be affected.

99. The FEIS contained minimal, ineffective, conditional, and non-binding mitigation measures that TNF claimed would address the predicted harmful impacts to Pinto Creek. None required the mine to do anything beyond monitoring, reporting, and engaging in various discussions. *Id.* at 3-486–87. TNF did not analyze the effectiveness of these purported mitigation measures, and identification of specific actions was deferred for discussion at an unspecified future point. TNF did not explain what effects monitoring might reveal, such that mitigation was needed, that TNF had not already documented in its FEIS or letter to ADWR.

100. The FEIS expressly stated that TNF lacked information critical to crafting required mitigation measures. Specifically, "[t]he Forest Service recognize[d] that additional data collection [was] necessary to better understand impacts and to inform appropriate mitigation of impacts." *Id.* at J-106. Nonetheless, TNF issued the FEIS without that "necessary" additional data.

101. The FEIS did not evaluate alternative pumping strategies for the Peak Well field, or alternative sources of water for the mine, in detail. Among other things, TNF did not consider requiring Capstone to operate the

Peak Well field in a manner similar to prior operators—who did not cause similar damage to the creek's riparian habitat—because TNF never assessed why Capstone's method of pumping caused that damage. Nor did the FEIS consider alternative water sources in detail. Instead, like the draft EIS, it dismissed alternative sources of water from further study, partly to avoid additional costs for the mine. The FEIS also failed to consider other mitigation measures like water exchange mechanisms (e.g., sourcing water from nearby Roosevelt Lake in exchange for credits) or purchasing from a private water purveyor.

102. On the same day TNF issued its FEIS, it issued a draft record of decision selecting the proposed action. Pursuant to Forest Service regulations, the Conservation Groups submitted formal objections to the Regional Forester's Office detailing the agency's various legal and factual errors under NEPA.

103. TNF rejected the Conservation Groups' and others' objections with cursory analysis on August 6, 2021. TNF issued its final record of decision ("ROD") on August 19, 2021, approving the mine's expansion in accordance with the proposed action.

104. TNF approved the mine's plan of operations, which authorized the mine to implement the proposed action, on November 3, 2021.

V. The Agencies' Flawed Consultation under the ESA

105. In a separate, concurrent process, TNF consulted with FWS to evaluate the mine's impacts on imperiled species under the ESA. Like TNF's flawed NEPA assessment, the agencies' consultation excluded from analysis the portion of Pinto Creek protected by TNF's instream flow right, causing them to overlook some of the mine's most significant effects. That misstep and other errors led TNF and FWS to conclude —falsely—that the mine will not jeopardize listed species or harm their critical habitat.

A. The agencies' ESA process and conclusions

106. On June 16, 2019, TNF submitted a document to FWS that identified five species and one critical habitat to be evaluated under Section 7 of the ESA, including the western yellow-billed cuckoo, its critical habitat, and the southwestern willow flycatcher. On August 21, 2019, FWS responded with a letter approving the list of species to be included in TNF's biological assessment pursuant to 16 U.S.C. § 1536(c)(1).

107. TNF submitted a draft biological assessment to FWS on February 18, 2020, along with a request for formal consultation. The formal consultation request was based on TNF's determination that the mine's operations may affect, and were likely to adversely affect, the yellow-billed cuckoo and its critical habitat (which, at the time, had been proposed for listing but not finalized). The agencies also initiated informal consultation

based on TNF's determination that the mine's operations may affect, but were not likely to adversely affect, the southwestern willow flycatcher and its designated critical habitat.

108. The agencies held a series of teleconferences in March and April 2020. As a result of those conversations, TNF revised the draft biological assessment to, among other things, amend the action area, refine proposed mitigation measures, and remove the southwestern willow flycatcher critical habitat from the analysis.

109. On July 16, 2020, TNF completed its final biological assessment ("BA") and, as relevant here, reached the following conclusions regarding the mine's proposed plan of operations:

- southwestern willow flycatcher: may affect, not likely to adversely affect
- western yellow-billed cuckoo: may affect, likely to adversely affect
- proposed critical habitat for western yellow-billed cuckoo: not likely to result in destruction or adverse modification.

BA at 46, 49.

110. Between May and July 2020, the agencies conferred regarding drafts of FWS's forthcoming biological opinion. The final biological opinion ("BiOp") was issued on August 4, 2020.

111. During the Section 7 consultation process, TNF and FWS were aware that the mine's proposed plan of operations would allow it to use approximately 15,682 acre-feet of water per year, including 2,536 acre-feet of fresh water. BiOp at 6. And the agencies knew that the "primary source" of fresh water for these withdrawals was the Peak Well field, *id.* at 16, which sits "along and west of Pinto Creek" and extracts on average 3,500 gallons of water per minute, *id.* at 6.

112. The BiOp acknowledged that the mine's water pumping had already significantly reduced baseflows into Pinto Creek—the "main watershed in the action area." *Id.* at 15. For example, the BiOp noted that, "from 2013–2018, Pinto Creek baseflow was substantially reduced from an initial rate of 1,070 gallons per minute to 188 gallons per minute," marking "an 82 percent reduction." *Id.* at 16; *see also, e.g.*, BA at 7.

113. Both agencies also acknowledged that baseflow reductions affect the creek's ecology because "groundwater discharge sustains flows during the low-flow period[s]" in Pinto Creek's perennial reaches. BiOp at 16; *see also* BA at 4 ("Perennial flows within Pinto Creek during . . . low-flow period[s] are sustained entirely by discharge from the groundwater system."). The agencies also acknowledged that, with the duration of pumping extended by 19 years under the mine-plan approval, the reductions in baseflow and surface flow—and associated destruction of riparian habitat—would continue

well into the future. *E.g.*, BA at 46 (noting that continued pumping will "delay[] recovery of affected riparian vegetation").

114. Despite these known harmful effects on Pinto Creek, the BiOp concluded that the mine's operations were not likely to jeopardize the cuckoo or adversely modify or destroy its critical habitat. BiOp at 25. The BiOp also concurred with the BA's "may affect, not likely to adversely affect" determination for the southwestern willow flycatcher. *Id.* at 32–33. FWS issued an incidental take statement providing that it "d[id] not anticipate the proposed action will incidentally take any western yellow-billed cuckoos." *Id.* at 26.

B. The arbitrarily constrained action area

115. For both the BA and BiOp, the agencies restricted the action area—the geographic zone of analysis—to exclude most of Pinto Creek downstream of the Peak Well field, where the harmful effects of the pumping were most evident. Like the FEIS, the action area was limited to "the area subject to groundwater drawdown of five feet or greater as modeled by SRK Consulting, Inc. (2019a)." BA at 22–23; BiOp at 11, 34. The BiOp claimed that this area included "the farthest-reaching" effects of the action, including all areas "affected by water extraction." BiOp at 11.

116. But the mine's pumping was dewatering—and continues to dewater—downstream reaches of Pinto Creek excluded from the action area.

That exclusion caused the agencies to omit a significant amount of impacted riparian habitat from their analysis. The action area includes just 0.7 miles of "Pinto Creek North," a unit of yellow-billed cuckoo designated critical habitat that runs along Pinto Creek, and excludes the remaining 5.3 miles of that unit. *Id.* at 18. That unit of habitat follows the creek's northern perennial reach, which is shown (in solid blue) running north from the action area (in red) in the center of this image:

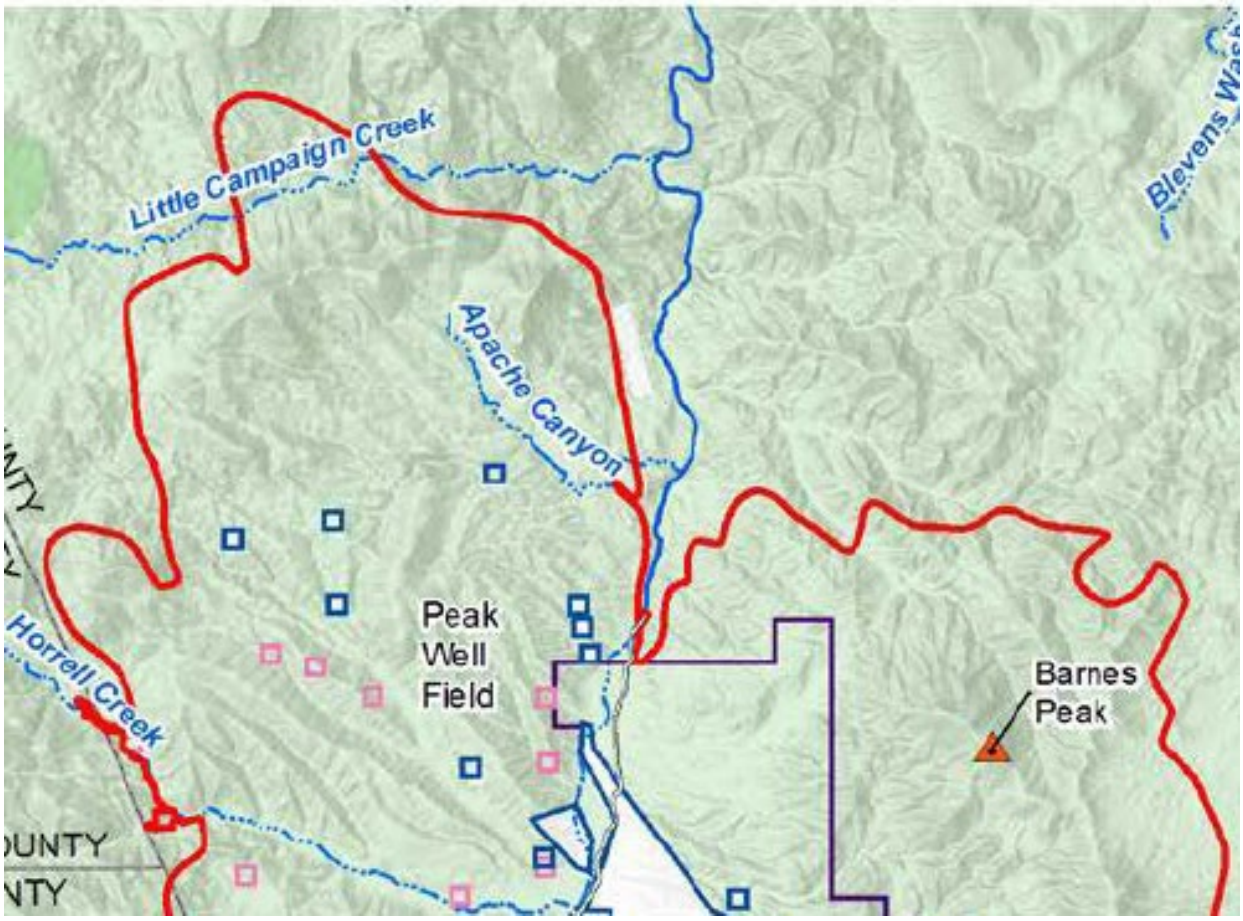

Figure 6. ESA action area (BiOp at 34, Figure 1, cropped).

117. The BiOp acknowledged that the mine's pumping had already harmed riparian habitat along Pinto Creek outside the defined action area. For example, it noted that researchers discovered "abnormally high tree mortality" and "replacement of pool habitat by riffles and glides" along Pinto Creek downstream of the mine after PVM renewed water pumping in 2013. BiOp at 16–17. The BA described similar findings and explained that "this area is mostly located beyond the northern boundary of the action area." BA at 6. The BA also noted that these effects were likely due to mining operations "as opposed to regional factors such as drought." *Id.*

118. Furthermore, TNF documented this significant dewatering and destruction of riparian habitat in the material it submitted to ADWR when it requested a determination of appropriability. As noted, 92 percent of the stream reach covered by TNF's instream right falls outside the 5-foot drawdown area and was thus excluded from consideration under the ESA.

119. The BA and BiOp did not explain why the downstream reach of Pinto Creek was excluded from analysis.

120. The arbitrarily constrained action undermined the entire Section 7 consultation process by tainting one of the first and most important steps: defining the scope of analysis. The constrained action area also undermined the BiOp's ultimate conclusions that (1) the mine's operations would not jeopardize the yellow-billed cuckoo; (2) the mine would not destroy or

adversely modify yellow-billed cuckoo critical habitat; and (3) the mine was not likely to adversely affect the southwestern willow flycatcher.

1. Yellow-billed cuckoo

121. FWS reached its no-jeopardy conclusion based primarily on its finding that no cuckoos breed within the action area. *Id.* at 19, 25. However, Pinto Creek North—the unit of critical habitat immediately downstream of the action area—is "consistently occupied by western yellow-billed cuckoos during the breeding season." BA at 38–39; *see also* 85 Fed. Reg. 11,458, 11,487 (Feb. 27, 2020) (proposing critical habitat and finding that Pinto Creek North "is used by the western yellow-billed cuckoo during the breeding season").

122. Thus, the arbitrarily constrained action area eliminated from consideration habitat immediately adjacent to the analysis area that cuckoos use during breeding season. This omission undermined a premise—that no breeding cuckoos would be affected—central to the no-jeopardy conclusion.

2. Yellow-billed cuckoo critical habitat

123. FWS determined that the mine's pumping will "adversely affect[] approximately 308 acres of proposed cuckoo critical habitat" due to dewatering. BiOp at 23, 25. But it concluded that this effect was insignificant because 308 acres is "0.06 percent" of the species' total critical habitat and "4.3 percent" of the critical habitat in Tonto Basin. *Id.* at 23, 25.

124. That reasoning overlooked the 373 acres of Pinto Creek North that were arbitrarily omitted from the action area. *See id.* at 18 (noting 54 acres of Pinto Creek North are in action area); 85 Fed. Reg. at 11,487 (providing that Pinto Creek North is 427 acres total). Because *all* of Pinto Creek North will be affected by the mine's pumping, the amount of critical habitat adversely affected is more than double what FWS evaluated: 681 acres (308 + 373), representing 9.7 percent of the species' critical habitat in Tonto Basin.

125. Moreover, FWS identified Pinto Creek North as part of "the core area" for the agency's "conservation strategy" in designating critical habitat. 85 Fed. Reg. at 11,487. Thus, the BiOp overlooked destruction of *highly* critical habitat, undermining its determination that the proposed action would not "appreciably diminish[] the conservation role of proposed critical habitat." BiOp at 25.

3. Southwestern willow flycatcher

126. Concurring with TNF's determination, FWS found that the mine-related subflow pumping would not "cause any effects to breeding flycatchers" because breeding flycatchers had not been recently detected along Pinto Creek. *Id.* at 33. However, even though "no potential southwestern willow flycatcher breeding habitat was [modeled to be] present within the action area," there are "[n]ine patches of potential breeding habitat . . . just

downstream of the action area." BA at 34. The BiOp did not consider whether impacts to this breeding habitat might affect species survival or recovery because the habitat was arbitrarily excluded from analysis.

127. Moreover, the excluded portion of Pinto Creek "provides a direct south-north [migration] corridor to known [flycatcher] breeding sites along Roosevelt Lake." *Id.* The BiOp found that "any reduction in riparian habitat quality along Pinto Creek will be an insignificant effect to migrating flycatchers because of their ability to move freely and take advantage of a wider diversity and quality of habitat." BiOp at 33. But this analysis was confined to the action area, overlooking significant effects stemming from dewatering of additional habitat in Pinto Creek's downstream reaches.

128. Thus, the constrained action area undermined FWS's cuckoo no-jeopardy determination, cuckoo critical habitat determination, and flycatcher concurrence.

C. The BiOp's vague and unenforceable mitigation measures

129. The BiOp's mitigation measures consist only of vague plans. Capstone "will conduct yellow-billed cuckoo surveys every three years"; "will monitor Pinto Creek riparian habitat and yellow-billed cuckoo proposed critical habitat"; and will design a "water monitoring and mitigation plan" for water resources "within the action area." *Id.* at 11.

130. None of these plans includes concrete actions that would ensure survival and recovery of the species, such as habitat protection or limits on water depletion. Instead, the various surveying and monitoring would, at most, require Capstone to "coordinate" with TNF to "identify appropriate actions and/or mitigation measures." *Id.*

131. While the BiOp references a Biological Resources Monitoring and Mitigation Plan ("BRMMP"), that plan similarly lacks substantive mitigation requirements. It provides that certain survey result thresholds would merely require Capstone to "consult[]" with TNF and "consider[]" "potential mitigation actions" like unspecified "[o]ptions for reducing water-resource related impacts resulting from mine drawdown". FEIS App'x H, Attach. A (BRMMP at 18–19).

132. FWS relied on these vague, non-substantive measures to reach its conclusions in the BiOp. TNF relied on the mitigation measures in approving the mine's plan of operations.

VI. The consequences of TNF's approval

133. Without TNF's 2021 approval decision, the mine would have been required to promptly cease operations and commence reclamation activities. But instead, the expansion of Pinto Valley Mine and extension of its operations will have profound, adverse impacts on the hydrology of Pinto Creek (and other hydrologic features in the region) for decades to come.

134. Critically, continuing mine operations for 19 additional years will prolong the devastating baseflow reductions that have already occurred, deepening the ecological harm and delaying Pinto Creek's recovery. Without the mine's pumping, baseflows in Pinto Creek would rebound to over 1,000 gallons per minute and remain over 800 gallons per minute through 2039. FEIS at 3-459 (Figure 3-21). Under the approved expansion plan, baseflows will remain well under 200 gallons per minute during the same period. *Id.* The creek's riparian habitat, and the threatened and endangered species it supports, will suffer as a result. *See id.* at 3-107 (explaining that "aquatic and riparian resources would continue to deteriorate" and "would not begin to recover" for an additional 19 years).

135. Thus, as a result of the challenged agency decisions, the ecologically invaluable segments of Pinto Creek that previously flowed year-round will continue to dry up at a faster rate and for almost two decades longer than if the extension and expansion had not been approved. Given the riparian die-off that has already occurred, an additional 19 years of riparian degradation is simply untenable for the threatened and endangered species that occupy Pinto Creek. TNF's decision to let the mine operate through 2039 risks destroying the creek's rare, desert riparian ecosystem.

136. Furthermore, Capstone Copper has publicly stated that it is taking steps to obtain "a mine life extension through 2050." Capstone

Copper, *Pinto Valley*, https://capstonecopper.com/operations/pinto-valley/ (accessed Sept. 4, 2024). TNF's approval of the mining plan of operations through 2039 may thus prove to be a steppingstone to even more mining, pumping, and dewatering for decades to come.

FIRST CLAIM FOR RELIEF

Against Neil Bosworth, the U.S. Forest Service, and Thomas Vilsack under the APA, 5 U.S.C. §§ 701–706

Violation of Forest Service regulations, 36 C.F.R. § 228.8
Failure to protect and minimize harm to National Forest resources

137. The Conservation Groups re-allege and incorporate the allegations made in each of the preceding paragraphs.

138. Under regulations that implement the Organic Act, TNF is required to ensure that mining operations, "where feasible . . . minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. § 228.8; *see also id.* § 228.1. To meet this requirement, TNF was obligated to ensure that the mine's operations would "take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations." *Id.* § 228.8(e). TNF was also required to ensure that the operations would comply with, among other things, Arizona water laws. *Id.* § 228.8; *see also* FEIS at J-108 (explaining that the mine must "compl[y] with applicable environmental laws and regulations" including those regarding "surface and groundwater rights . . . under Arizona State

law"); ROD at B-37 (acknowledging the need to "identif[y]" and "mitigate[]" "[a]dverse impacts on . . . water rights . . . as required under Arizona State law").

139. TNF's FEIS and approval of Pinto Valley Mine's plan of operations violated 36 C.F.R. § 228.8 in at least two ways.

140. *First*, the plan of operations, as approved, will not "maintain and protect fisheries and wildlife habitat." 36 C.F.R. § 228.8(e). TNF disregarded its own evidence—including its 2020 letter to ADWR—that Capstone's pumping would have severe, adverse impacts on the creek's water flows, its ecological health, and the protected species that depend on the creek. By disregarding that evidence and approving the mine's expanded operations, TNF allowed the mine to degrade important wildlife habitat.

141. *Second*, the plan of operations, as approved, violates Arizona water appropriation laws. Arizona law prohibits "divert[ing] water from a stream" without authorization, using "water to which another is entitled," or "[u]s[ing], stor[ing], or divert[ing] water without or before the issuance of a permit to appropriate such waters." Ariz. Rev. Stat. § 45-112(A). The water pumped from the Peak Well field constitutes subflow under Arizona law and is thus subject to appropriative rights. The mine lacks an appropriative right to use and divert Pinto Creek's flows. Its use and diversion of that water violates TNF's instream water right. The mine's dewatering of the creek thus

violates Arizona water appropriation laws. TNF, in turn, violated 36 C.F.R. § 228.8, by authorizing the mine's unlawful pumping.

142. Despite these violations, TNF failed to require feasible measures to minimize the adverse environmental impacts of the mine's expansion and continued operations. TNF could have investigated why Capstone's operation of the Peak Well field resulted in increased damage to the creek's riparian habitat relative to prior mine owners and required a return to prior pumping practices. But it did not. And TNF dismissed—or wholly failed to consider—multiple options for sourcing water other than pumping from the Peak Well field, partly because they involved additional costs for the mine. TNF contravened 36 C.F.R. § 228.8 by ignoring feasible options for avoiding harm to National Forest resources.

143. TNF also erroneously relied on unlawfully vague and noncommittal mitigation measures to claim compliance with 36 C.F.R. § 228.8. *See* ROD at 12 (finding the FEIS's mitigation measures were "required to be applied to minimize [the mine's] potential impacts to the extent feasible" and "deemed necessary for the approval of the selected action"). TNF deferred the identification of mandatory, concrete mitigation actions until future monitoring reveals harmful effects to the creek, even though such effects have already occurred. These mitigation measures—and TNF's reliance on them—do not satisfy 36 C.F.R. § 228.8.

144. Because of these violations—(1) impairment of fisheries and wildlife habitat and (2) violation of Arizona water appropriation laws, despite feasible alternatives and notwithstanding the FEIS's flawed mitigation measures—TNF's approval of the mining plan of operations violated 36 C.F.R. § 228.8. The approval decision was arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA. 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Against Neil Bosworth, the U.S. Forest Service, and Thomas Vilsack under the APA, 5 U.S.C. §§ 701–706

Violation of the National Environmental Policy Act
Failure to take a hard look at impacts to Pinto Creek

145. The Conservation Groups re-allege and incorporate the allegations made in each of the preceding paragraphs.

146. NEPA requires federal agencies to take a "hard look" at the environmental impacts of a proposed project and provide a "detailed statement" of impacts associated with a federal decision. 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 350.

147. TNF violated this requirement in two ways.

148. *First*, TNF failed to determine why Capstone's pumping resulted in such dramatic degradation of Pinto Creek's hydrology. Prior owners operated the mine and the Peak Well field without significant effects on the

creek's riparian habitat, but Capstone's pumping has caused and continues to cause dramatic reductions in flows. While the sheer volume of water pumped—approximately 3,500 gallons per minute—is highly significant, the difference between Capstone's pumping and prior operators' pumping indicates that TNF overlooked important information. In particular, TNF should have investigated potential hydrological connections between the creek and one or more Peak Well field wells. It was arbitrary and capricious for TNF to approve the mine's continued operation without determining—and disclosing to the public—the precise reasons for Capstone's devastating baseflow depletions.

149. *Second*, TNF unlawfully limited its analysis of impacts from the mine's pumping to the arbitrarily defined aquifer drawdown area, even though it knew that adverse effects extended beyond that area. That constrained analysis caused TNF to ignore impacts to wildlife, riparian habitat, and other resources along the downstream reaches of Pinto Creek where mine operations are dewatering, and will continue to dewater, the creek.

150. TNF's FEIS, ROD, and approval of Pinto Valley Mine's expansion were arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA. 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

Against Neil Bosworth, the U.S. Forest Service, and Thomas Vilsack under the APA, 5 U.S.C. §§ 701–706

Violation of the National Environmental Policy Act
Failure to identify and analyze effective mitigation measures

151. The Conservation Groups re-allege and incorporate the allegations made in each of the preceding paragraphs.

152. NEPA requires that an EIS "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives." 40 C.F.R § 1502.14(e) (2021). It must also discuss "[m]eans to mitigate adverse environmental impacts (if not already covered under § 1502.14(e))." *Id.* § 1502.16(a)(9) (2021).

153. TNF failed to obtain information critical to crafting and analyzing required mitigation measures that would minimize the impacts of subflow pumping on Pinto Creek. Among other things, TNF never determined what aspects of Capstone's pumping, other than volume, caused the massive observed and modeled reductions in baseflows. It thus lacked information central to determining how to effectively mitigate that effect. Indeed, TNF itself acknowledged that "additional data collection [was] necessary to better understand impacts and to inform appropriate mitigation of impacts." FEIS at J-126.

154. TNF failed to identify mandatory mitigation measures. Instead, it deferred the identification of such measures to a later time and simply required Capstone to "discuss and develop" measures "to the extent feasible" if subsequent monitoring "demonstrates effects from mine-related activities," ROD at 20; FEIS at 3-486–87, even though such effects were and are already occurring.

155. TNF failed to analyze whether the measures it identified would be effective in meeting its legal obligations under NEPA and other laws. It also failed to acknowledge that existing information showed that mine-related pumping was, in fact, already causing adverse effects to Pinto Creek—undercutting the legitimacy of a mitigation approach based on ecological triggers.

156. TNF's failure to identify and analyze reasonable mitigation measures in the FEIS and ROD was arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA. 5 U.S.C. § 706(2).

FOURTH CLAIM FOR RELIEF

Against Jeffrey Humphreys, the U.S. Fish and Wildlife Service, and Debra Haaland under the APA, 5 U.S.C. §§ 701–706

Violation of the Endangered Species Act
Unlawful action area

157. The Conservation Groups re-allege and incorporate the allegations made in each of the preceding paragraphs.

158. Under Section 7 of the ESA, FWS was required to fully analyze the "effects of the action"—meaning "all consequences to listed species or critical habitat that are caused by the proposed action." 50 C.F.R. § 402.02 (2021).

159. As part of that requirement, FWS was obligated to properly define the "action area" where anticipated effects would occur. Such action areas must include "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." *Id.* FWS was also required to "explain the 'scientific methodology, relevant facts, or rational connections linking the project's potential impacts' to the action area boundaries." *Nw. Env't*, 647 F. Supp. 2d at 1230 (quoting *Native Ecosystems Council*, 304 F.3d at 902).

160. FWS failed this standard. Its BiOp arbitrarily and capriciously excluded from analysis the portion of Pinto Creek outside of the modeled 5-

foot drawdown contour that is directly and indirectly harmed by the mine's pumping at the Peak Well field.

161. The erroneously defined action area renders the BiOp, and the agencies' Section 7 consultation as a whole, unlawful under the ESA. It undermined the BiOp by preventing a complete evaluation of adverse effects from the mine's pumping at the Peak Well field. As a result, the BiOp erroneously concluded that the approval decision would not jeopardize the western yellow-billed cuckoo, would not adversely modify or destroy the cuckoo's critical habitat, and would not adversely affect the southwestern willow flycatcher. These conclusions were arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA. 5 U.S.C. § 706(2).

FIFTH CLAIM FOR RELIEF

Against Jeffrey Humphreys, the U.S. Fish and Wildlife Service, and Debra Haaland under the APA, 5 U.S.C. §§ 701–706

Violation of the Endangered Species Act
Reliance on vague and unenforceable mitigation measures

162. The Conservation Groups re-allege and incorporate the allegations made in each of the preceding paragraphs.

163. Mitigation measures included in a biological opinion "must constitute a 'clear, definite commitment of resources,' and be 'under agency control or otherwise reasonably certain to occur.'" *Bernhardt*, 982 F.3d at 743

(quoting *Nat'l Wildlife Fed'n*, 524 F.3d at 936 & n.17). The proposed mitigation measures must involve "enforceable" obligations, *id.*, and must address threats to the listed species so as to satisfy the ESA's jeopardy and adverse modification standards, *Haaland*, 87 F.4th at 988–89. Mere monitoring, without requiring concrete actions to mitigate existing or predicted harm, "is not a proper way to mitigate adverse impact." *Rumsfeld*, 198 F. Supp. 2d at 1154 (rejecting agency's plan to identify mitigation later, based on monitoring results).

164. The BiOp's mitigation measures do not meet this standard. They consist only of monitoring and unspecified, voluntary future actions subject to Capstone's discretion. These measures "refer only to generalized contingencies or gesture at hopeful plans." *Bernhardt*, 982 F.3d at 743. They are precisely the kind of vague, undefined, and unenforceable mitigation provisions that courts consistently reject for violating the ESA, and they violate the ESA here.

165. Moreover, the mitigation measures are limited to the unlawfully constrained action area. Thus, any purported beneficial effects would not extend to the downstream portions of Pinto Creek that the mine's pumping is dewatering and will continue to dewater, where listed species and habitat occur.

166. FWS erroneously relied on the BiOp's mitigation measures in reaching its conclusions regarding jeopardy and adverse modification under the ESA. Those conclusions were arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA. 5 U.S.C. § 706(2).

SIXTH CLAIM FOR RELIEF

Against Neil Bosworth, the U.S. Forest Service, and Thomas Vilsack under the ESA, 16 U.S.C. § 1540(g)(1)(A)

Violation of the Endangered Species Act
Failure to Prevent Jeopardy and Adverse Modification

167. The Conservation Groups re-allege and incorporate the allegations made in each of the preceding paragraphs.

168. ESA Section 7(a)(2) prohibits action agencies, such as TNF, from undertaking actions that are "likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification of" their critical habitat. 16 U.S.C. § 1536(a)(2). TNF has an independent duty to meet its substantive Section 7 obligation to ensure its actions are not likely to jeopardize listed species or result in the destruction or adverse modification of designated critical habitat. *Id.*; *see Pyramid Lake Paiute Tribe*, 898 F.2d at 1415.

169. As explained above, FWS committed legal errors in its BiOp by analyzing an unlawfully constrained action area and by relying on vague and

unenforceable mitigation measures. TNF unreasonably relied on the flawed BiOp when issuing its ROD and approving the mine's plan of operations. Those approval decisions were therefore arbitrary, capricious, and unlawful as a violation of TNF's substantive duty under Section 7 of the ESA. *See, e.g.*, *Salazar*, 804 F. Supp. 2d at 1010.

170. TNF contributed to FWS's legal errors by, among other things, initially defining the flawed action area in its BA and formulating the meaningless mitigation measures that the BiOp incorporated. These errors compound TNF's unlawful reliance on the BiOp and underscore its violation of Section 7(a)(2).

PRAYER FOR RELIEF

WHEREFORE, the Conservation Groups request that the Court:

A. Declare that TNF's 2021 approval of Capstone's mining plan of operations for the Pinto Valley Mine violates the Forest Service Organic Act and its implementing regulations, set forth at 36 U.S.C. § 228.8.

B. Declare that TNF's FEIS and ROD are unlawful and in violation of NEPA's "hard look" and mitigation requirements.

C. Declare that TNF's BA, FWS's BiOp, and TNF's approval of the mining plan of operations are unlawful and violate the ESA.

D. Set aside and vacate TNF's FEIS and ROD.

E. Set aside and vacate TNF's BA and FWS's BiOp.

F. Set aside and vacate TNF 's approval of Pinto Valley Mine's mining plan of operations.

G. Enjoin all Defendants from enforcing or implementing the unlawful approval decisions.

H. Award the Conservation Groups fees and costs pursuant to 16 U.S.C. 1540(g)(4) and/or 28 U.S.C. § 2412.

I. Grant such other relief as the Court deems just and proper.

Respectfully submitted September 5, 2024.

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**pro hac vice forthcoming*