



October 25, 2013

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

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**Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act**

Dear Ladies and Gentlemen:

This letter provides notice of the Center for Biological Diversity and Maricopa Audubon Society's intent to sue the United States Department of Defense, the United States Army, and Fort Huachuca (collectively, "Army") for violating the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, pursuant to 16 U.S.C. § 1540(g). The Army's unreasonable delay in completing consultation with the United States Fish and Wildlife Service (FWS) regarding operations and activities at Fort Huachuca, Arizona violates the Army's substantive and

procedural ESA duties to ensure that its actions do not jeopardize the continued existence of endangered or threatened species or destroy or adversely modify the designated critical habitat of listed species. *Id.* § 1536(a)(2). In May 2011, Judge A. Wallace Tashima, sitting by designation for the United States District Court for the District of Arizona, ordered the Army to reinitiate and complete this consultation after invalidating the previously existing biological opinion. It has now been twenty-nine months since Judge Tashima's order, and the agencies have not completed consultation. Unless the Army fulfills its ESA consultation obligations within sixty days of receipt of this letter, the Center for Biological Diversity and Maricopa Audubon Society intend to file suit challenging the Army's unreasonable delay in federal district court.

## **Factual Background**

Fort Huachuca is a U.S. Army installation located adjacent to the town of Sierra Vista in Cochise County, Arizona. To sustain its operations and activities, Fort Huachuca pumps groundwater from the aquifer underlying Arizona's San Pedro River, a critical sanctuary for one of the world's most diverse assortments of birds, mammals, and plants. By intercepting water that would otherwise flow into the river, the Army's pumping reduces the river's flows, impacting species and habitat that depend on the river. Moreover, Fort Huachuca's economic expenditures foster growth throughout the Sierra Vista subwatershed, spurring off-base residential and commercial development requiring additional groundwater pumping that further depletes the river. The Army has recognized its actions are likely to adversely affect federally listed endangered species that depend on the San Pedro River, including the southwestern willow flycatcher, a migratory songbird, and the Huachuca water umbel, a semi-aquatic plant species. Similarly, the Army has recognized its actions may adversely affect designated critical habitat for the umbel and flycatcher. For those reasons, the Army has engaged in a series of formal consultations with FWS pursuant to section 7(a)(2) of the ESA.

FWS first issued a biological opinion regarding the effects of the Fort's activities in 1999. The 1999 biological opinion stated that Fort Huachuca's operations were not likely to jeopardize the umbel or flycatcher and were not likely to destroy or adversely modify designated critical habitat. Conservation groups challenged the biological opinion in court. In April 2002, U.S. District Court Judge Marquez concluded the 1999 biological opinion was arbitrary and capricious and violated the ESA. *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152-56 (D. Ariz. 2002). Judge Marquez rejected the biological opinion primarily because it relied on uncertain mitigation measures, some of which had not yet been developed. *Id.* at 1154-57.

As a result of Judge Marquez's decision, FWS and the Army reinitiated formal consultation pursuant to ESA section 7(a)(2). In August 2002, four months after the court's ruling, FWS issued its new biological opinion. Again, FWS determined that Fort Huachuca's activities would not jeopardize the Huachuca water umbel or the southwestern willow flycatcher or destroy or adversely modify designated critical habitat. In 2005, the Center for Biological Diversity and Maricopa Audubon Society filed suit to require the Army and FWS to re-consult regarding the Fort's impacts to listed species in light of changed conditions. *See Ctr. for Biological Diversity v. U.S. Dep't of Hous. & Urban Dev.*, No. Civ. 05-261-TUC-CKJ (D. Ariz.

May 31, 2005). The parties settled this claim, and the Army and FWS agreed to re-consult and issue a third biological opinion by July 2007.

In FWS's 2007 biological opinion, the agency limited its consultation to evaluating the effects of the Fort's ongoing and proposed operations for the next ten years, 2006 through 2016. FWS concluded that Fort Huachuca's operations during the ten-year period would not jeopardize the umbel or flycatcher or destroy or adversely modify the umbel or flycatcher's critical habitat. The Center for Biological Diversity and Maricopa Audubon Society challenged the 2007 biological opinion in court. In May 2011, Judge Tashima concluded that FWS's 2007 biological opinion violated the ESA and was arbitrary and capricious because: 1) the agency failed to consider the effects of the Fort's pumping on the recovery of the umbel and flycatcher; 2) the agency relied on uncertain and unidentified mitigation measures; and 3) the record failed to support FWS's "no jeopardy" and "no adverse modification" conclusions. See Ctr. for Biological Diversity v. Salazar, 804 F. Supp. 2d 987 (D. Ariz. 2011). The court entered a declaratory judgment directing FWS to reinitiate and complete formal consultation with the Army regarding the impacts of the Army's proposed, ongoing and future operations and activities at Fort Huachuca. It has now been twenty-nine months since the time of the court's ruling, and yet the Army and FWS have not completed the court-ordered consultation. During this time, the Army has continued to pump groundwater without a legal biological opinion in place. This pumping continues to diminish the San Pedro River's flows, destroying rich riparian habitat and likely jeopardizing the umbel and flycatcher, as well as destroying or adversely modifying the umbel and flycatcher's critical habitat.

### **Violations of the Endangered Species Act**

The Army is in violation of ESA section 7(a)(2) for failing to ensure through timely consultation with FWS that its operations and activities at Fort Huachuca, including its groundwater pumping, are not likely to jeopardize the Huachuca water umbel or southwestern willow flycatcher, or result in destruction or adverse modification of the umbel and flycatcher's critical habitat. Section 7 of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). These duties reflect "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978). By delaying completion of the court-ordered formal consultation for nearly two and a half years despite its ongoing operations and groundwater pumping, the Army has failed to meet its procedural obligations and failed to insure that its actions at Fort Huachuca are not causing jeopardy or adverse modification.

Courts apply a "reasonableness" standard when setting timetables for re-consultation after a court has invalidated and remanded an agency's biological opinion. See Env'tl. Def. Ctr. v. Babbitt, 73 F.3d 867, 872 (9th Cir. 1995). Here, the Army's delay far exceeds this reasonableness standard in light of the consultation deadlines provided in the ESA and in FWS's regulations. The ESA allows the action agency (in this case, the Army) 180 days to first

complete a biological assessment after FWS advises the action agency that endangered species are present. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). Then, once formal consultation has been “initiated” by the action agency’s submission of the biological assessment to FWS, the ESA allocates ninety days for the agency to complete consultation with FWS and prepare the biological opinion. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(c),(e),(h). FWS then has an additional forty-five days to submit the biological opinion to the agency, which terminates the consultation, for a total of 135 days. 50 C.F.R. § 402.14(e),(l).

If the Army and FWS had adhered to these deadlines, the agencies should have completed a biological opinion evaluating the effects of Fort Huachuca’s operations and activities on the umbel and flycatcher and their critical habitat by April 6, 2012. The agencies are now more than eighteen months past this deadline, and yet have not completed a biological opinion. The deadlines may be extended in certain circumstances, especially where, as is typical, “the project under review is not yet operational and no harm to any species or habitat is occurring.” S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv., No. S-06-2845, 2011 WL 1636235, at \*2 (E.D. Cal. Apr. 29, 2011). Here, by contrast, the Army has continued its operations and activities at Fort Huachuca “pursuant to a [biological opinion] that the court has found to be insufficient.” Id. In these circumstances, courts defer to the regulations’ conclusion “that 135 days is a reasonable period in which to complete a [biological opinion],” and place the burden on the agency “to show that a period of more than 135 [days] would be reasonable.” Id. The Army’s delay has far exceeded the regulatory deadlines and is unreasonable.

Moreover, the Army has demonstrated it is capable of completing re-consultation in a far more reasonable manner than the time it has taken in this case. In 2002, after Judge Marquez invalidated the Army’s 1999 biological opinion, the agencies were able to complete formal re-consultation four months from the time of the court’s opinion. Here, the Army has taken more than seven times that amount of time, yet has still not completed consultation.

For the past twenty-nine months, the Army has continued its operations and activities at Fort Huachuca—including the groundwater pumping that reduces the San Pedro River’s flows—without a legal biological opinion in place. The Army has acknowledged that its activities are likely to adversely affect the Huachuca water umbel and southwestern willow flycatcher, as well as the species’ designated critical habitat. Notwithstanding this admission, the Army has failed to complete formal consultation with FWS in a reasonable timeframe to address these threats, as it was ordered to do by the Arizona district court. By its excessive delay, the Army is in violation of the ESA for failing to fulfill its substantive and procedural duties to ensure that its actions do not jeopardize the continued existence of the umbel and flycatcher or destroy or adversely modify the umbel and flycatcher’s designated critical habitat. 16 U.S.C. § 1536(a)(2). The Army can remedy this violation by completing formal consultation and producing a lawful biological opinion with FWS within the next sixty days from the date of this letter. If the Army fails to do so, we intend to file a citizen suit seeking declaratory and injunctive relief, as well as attorneys’ fees and costs. Thank you for your attention, and please contact us if you have any questions.

Sincerely,



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