WESTERN MINING ACTION PROJECT

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Bureau of Land Management
Ray Land Exchange Project
Attn: Mike Werner, Project Manager
BLM Arizona State Office
One North Central Ave., #800
Phoenix, AZ 85004-4427

Dear Mr. Werner:

Pursuant to the BLM's November 2017 public notice, this letter contains the comments on the Ray Land Exchange/Plan Amendment Draft Supplemental Environmental Impact Statement (DSEIS) by the Center for Biological Diversity (the Center), Sierra Club Grand Canyon Chapter (Sierra Club), WildEarth Guardians, and the Arizona Mining Reform Coalition (collectively, the Center), by and through their undersigned attorney. These comments supplement, adopt, and incorporate by reference all previous comments submitted to the BLM by these groups regarding the Ray Land Exchange, including all comments, legal pleadings, and submittals to the BLM, Interior Board of Land Appeals, the federal District Court for the District of Arizona, and the Ninth Circuit Court of Appeals involving the previous administrative appeal and litigation brought by the Center for Biological Diversity and the Sierra Club, *et al*. over the previous Record of Decision (ROD) approving the Ray Land Exchange and associated Amendments to the Resource Management Plan (RMP) in Center for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633 (9th Cir. 2010).

The Center reserves the right to supplement these comments during the BLM's review process. This is especially of concern given BLM has yet to provide all of the documents requested in the Center's Freedom of Information Act (FOIA) request that was submitted on December 15, 2017 (requesting "All records mentioning, including, and/or referencing the appraisals and mineral potential reports, including the appraisals and mineral potential reports themselves, for the Selected Lands and Offered Lands associated with the proposed Ray Land Exchange."). Attachment A. Thus, at a minimum, the Center reserves the right to supplement/revise these comments upon receipt of all of the requested documents.

Due to the connection between the Land Exchange, DSEIS, and RMP Amendments, in addition to the need to comply with the Federal Land Policy Management Act (FLPMA) and the

National Environmental Policy Act (NEPA), all issues and concerns noted herein must be satisfactorily met in order for the RMP Amendments to be legal as well.

I. BLM Has Improperly Narrowed the DSEIS process.

At the outset, the DSEIS suffers from a fundamental error – an illegal and improper restriction on the scope of its analysis. "Because the Proposed Action for the Ray Land Exchange/Plan Amendment is largely unchanged from the proposal evaluated in the 1999 FEIS, and the supplemental environmental analysis for the SEIS is limited in scope, the BLM determined that additional scoping for the SEIS was unnecessary." DSEIS at 1. Such a unilateral restriction violates the basic requirements of NEPA and FLPMA, which require BLM to fully analyze all current conditions, alternatives, impacts, etc.

The original Final EIS and ROD were issued in 1999 and 2000. The environmental conditions of the selected and offered lands, the potential alternatives, the cumulative impacts of nearby activities, and other relevant environmental considerations have significantly changed during these years. Despite this, the DSEIS limits its analysis to only issues it believes the Ninth Circuit ordered to be reviewed in its 2010 decision. "Because this document is intended to provide only the supplemental analysis that the court requested, no new alternatives were considered, and thus no new lands may be added to the exchange." DSEIS "Dear Reader" Introduction at 2. NEPA and FLPMA, however, contain no such self-imposed restriction on the analysis of alternatives, impacts, and other required reviews.

Thus, BLM must undertake a full revision of the DSEIS, subject to full public comment under NEPA, without this restriction.

II. NEPA's Supplementation Requirement Applies Where, As Here, Environmentally Significant Agency Action Remains.

An agency "shall" supplement an EIS when an "agency makes substantial changes in the proposed action" or "significant new circumstances or information" arises that is relevant to the proposed action's environmental impacts. 40 C.F.R. § 1502.9(c)(1)(i)-(ii). Agencies are required to apply a "rule of reason" to a decision whether or not to prepare a supplemental EIS. Marsh v. Or. Natural Resources Council, 490 U.S. 360, 373-74 (1989). Underlying all of NEPA's procedural requirements is the mandate that agencies take a "hard look" at all of the environmental impacts and risks of a proposed action.

NEPA regulations "make plain that at times supplementation is required." Marsh, 490 U.S. at 372. As the court noted in Marsh, "[i]t would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse effects, once unequivocally removed, to be restored prior to the completion of agency action." Id. at 371. Accordingly, "when the remaining governmental action would be environmentally significant," the duty to supplement applies. Id. at 372; *see also* CEQ Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981) (Question 32) ("As a rule of thumb, if the proposal has not yet been implemented . . . EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.").

Since Marsh, the Supreme Court has reaffirmed that "supplementation is necessary" when there "remains 'major Federal action' to occur." Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 73 (2004) ("SUWA") (*quoting* Marsh, 490 U.S. at 374); *see also* Or. Natural Res. Council Action v. U.S. Forest Serv., 445 F. Supp. 2d 1211, 1222 (D. Or. 2006) ("The Supreme Court's decision in Marsh contemplates that there must be federal action *remaining* to occur, not necessarily 'ongoing'") (emphasis in original). The Court found that no federal action remained with respect to a BLM land use plan, because the approval of that plan was the proposed action at issue, and "that action is completed when the plan is approved." SUWA, 542 U.S. at 73.

Here, unlike a completed land use plan, BLM is analyzing a specific agency action that has yet to take place: a proposed land exchange with ASARCO. This is not a "complete" action; it still has yet to occur as illustrated by the agency's current DSEIS process and that no acres or interests have exchanged ownership to date. As outlined in these comments and acknowledged in the DSEIS, there have also been significant new circumstances and information since the FEIS was issued in the late 1990's. Whether it is the appraisal information, which has yet to be made public, ASARCO's changes in its plans for the offered parcels, two new listed endangered species and designated critical habitat, increased recreational use of parcels that would be exchanged to ASARCO, or other changes that are noted in the DSEIS, it is evident that without properly supplementing its NEPA analysis the agency will not have "the best possible information to make any necessary substantive changes in its decisions regarding the proposal." CEQ Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981) (Question 32). Even if a court decision does not require BLM to go back and re-do its EIS analysis in full, the lapse of nearly twenty years and changes in the proposed action or significant new circumstances/information requires BLM to comply with NEPA's supplementation requirements for this major Federal action that has yet to occur.

III. The DSEIS Illegally Assumes that ASARCO Has a Right to Mine and/or Permanently Occupy the Selected Public Lands.

Similar to the legal errors in the original FEIS and ROD, the DSEIS is based on the mistaken assumption that "ASARCO holds valid mining claims on most of the Selected Lands." DSEIS "Dear Reader" Introduction at 2. No evidence is provided to support this statement. Based on this unsupported assumption, the DSEIS analysis concludes that, pursuant to the 1872 Mining Law, ASARCO has "a statutory right, consistent with other laws and departmental regulations, to enter federal lands open to location and entry, for the purposes of mineral prospecting, exploration, development, and extraction." Id.

The DSEIS then concludes that "some form of mining on the Selected Lands is likely, and that a No Mining alternative is not within the range of feasible alternatives." Id. This unsupported assumption is found throughout the DSEIS. For example, in the summary of impacts to Water Resources, the DSEIS says that: "Based on the assumption that the foreseeable uses of the Selected Lands would occur whether the land exchange takes place or not, there are not anticipated to be significant impacts on water resources outside the range already analyzed in the 1999 FEIS." DSEIS at ES-4.

Yet, under the Mining Law, only claims that have shown to be valid provide this "statutory right" to permanently develop and occupy public lands. Except for limited rights to explore for minerals (not at issue here), absent the discovery of a valuable mineral deposit on a mining claim,

the claim is not valid, and the claimant holds no rights under the Mining Law to use or occupy the claim:

> Thus, although a claimant may explore for mineral deposits before perfecting a mining claim, without a discovery, the claimant has no right to the property against the United States or an intervenor. 30 U.S.C. § 23 (mining claim perfected when there is a "discovery of the vein or lode"); *see also* Cole v. Ralph, 252 U.S. 286, 295–96 (1920); Waskey v. Hammer, 223 U.S. 85, 90 (1912) (noting that discovery is "a prerequisite to the location of the claim"); Am. Colloid Co. v. Babbitt, 145 F.3d 1152, 1156 (10th Cir.1998) ("Before one may obtain any rights in a mining claim, one must 'locate' a valuable deposit of a mineral."); Mineral Policy Ctr. v. Norton, 292 F.Supp.2d 30, 48 (D.D.C. 2003) ("'A mining claim does not create any rights against the United States and is not valid unless and until all requirements of the mining laws have been satisfied.'" (quoting Skaw v. U.S., 13 Cl. Ct. 7, 28 (1987))).

Freeman v. U.S. Dep't of Interior, 37 F.Supp.3d 313, 319-20 (D.D.C. 2014). As such:

> [U]npatented claims amount to a potential property interest, since it is the discovery of a valuable mineral deposit and satisfaction of statutory and regulatory requirements that bestows possessory rights. *See* Ickes v. Underwood, 141 F.2d 546, 548–49 (D.C. Cir. 1944) (until there has been a determination that there has been a valuable discovery, claimants had only a gratuity from the United States); Payne v. U.S., 31 Fed. Cl. 709, 711 (1994) (rejecting plaintiff's argument that in the absence of a challenge to validity, the court must take at face value their assertion that claims are supported by an adequate mineral discovery).

Id. at 321. "[A] mining claimant has the right to possession of a claim ***only*** if he has made a mineral discovery on the claim." Lara v. Secretary of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987) (emphasis added).

Accordingly, use and occupancy of mining claims for ancillary development activities (e.g., processing facilities, waste disposal) on lands not covered by valid claims, like all other uses of public land, are not governed by the Mining Law. Rather, these uses are governed by the full range of public land statutes applicable to the appropriate agency (i.e., such as FLPMA's discretionary authorities). "Before an operator perfects her claim, because there are no rights under the Mining Law that must be respected, BLM has wide discretion in deciding whether to approve or disapprove of a miner's proposed plan of operations." Mineral Policy Center, 292 F.Supp.2d at 48. As held by the Interior Board of Land Appeals: "Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit and, absent such a discovery, denial of a plan of operations is entirely appropriate." Great Basin Mine Watch et al., 146 IBLA 248, 256 (1998), 1998 WL1060687, *8.

The administrative record clearly demonstrates that the vast majority of these unpatented lode mining claims on the Selected Lands do not contain sufficient mineralization to constitute a discovery, and are therefore not valid. According to the 1999 FEIS, the "foreseeable uses" of the lode claims on the selected lands are primarily for waste rock/overburden disposal, solution-extraction facilities, haul roads, and other ancillary facilities. FEIS at 2-14, -15, and referenced Tables and Figures; *see also* DSEIS at 35-38. Although it is somewhat difficult to ascertain from Figure 2-7, it appears that only a small fraction of these lode claims will be actually utilized for

mining (i.e., extraction). *See also* Real Estate Appraisal, Table of Parcel Descriptions and "Anticipated Use," at 14. According to the BLM's Appraisal for the Exchange:

> **Most of the [selected] land is considered "mine support," that is, non-mineralized property** best suited for uses ancillary to the mine, such as overburden piles or buffer between actual mine use and surrounding lands.
>
> **Most of the mineral estate land contains no viable economic minerals**, and is determined to have value only for reunification with the surface.
>
> Some of the lands, parcel numbers RM-6.4, a portion of RM-10, and portions of CB-1, 3, and 4, are mineralized. ... Where the discounted cash flow analysis indicates a value exceeding the mine support conclusion -- $150/acre -- the mining scenario is the highest and best use. ... [W]here the mining analysis indicates less than $150/acre, mine support is the maximally productive use.

Real Estate Appraisal, Selected Federal Land and Minerals In Pinal and Gila County, Arizona, ASARCO Ray Land Exchange, June 1998, at 2 (emphasis added). Thus, according to the BLM, only these few latter parcels (or portions thereof) are sufficiently mineralized to warrant a further review of the mining economics.

In the additional analysis, parcels that did not evidence sufficient mineralization to support actual mine extraction were labeled "mine support" and were given a value of $150/acre. Based on this BLM analysis, out of the entire selected lands, only parcels RM-6.4 (0.02 acres), RM-10 (portions totaling 68.00 acres), CB-1 (portions totaling 77.50 acres), CB-3 (portions totaling 7.00 acres), and CB-4 (portions totaling 25.00 acres), have arguably any potential value for economic mineralization. Real Estate Appraisal at 39-46. Thus, only roughly 178 out of 10,975 total selected lands acres can even conceivably support actual mining.

It should be noted, however, that most of even these lands have been determined to be lacking economic mineralization upon further review. For example, the appraiser for the selected lands noted ASARCO's position that the RM-10 portions would not sustain an economic mine. The CB-1 parcel similarly failed: "Project feasibility then fails by a wide margin at any reasonable copper price forecast; a price well in excess of $2.00 per pound in current dollars would be required to yield a 15% internal rate of return." June 16, 1998, Letter from Gerald P. Halmbacher, Certified Appraiser, to Shawn Redfield, BLM Chief Appraiser, Arizona State Office, at 1. Overall, the grand total appraised value for the selected lands, both mineral and surface estates, is only $1,292,000 – hardly evidence of valuable mineral deposits and a "right" to develop all the parcels.

Without evidence that each and every claim is valid under the Mining Law, the entire basis for the DSEIS is legally flawed. Relatedly, the DSEIS's assertion that "some form of mining on the Selected Lands is likely" is without any evidentiary support, as no mining has been proposed, and BLM cannot pre-determine whether any such mining would comply with FLPMA and the other federal and state public land and environmental laws and regulations.

IV. BLM Cannot Transfer Presidentially-Decreed Federal Water Rights and Property to ASARCO.

As stated in the 1999 FEIS and in the DSEIS, "12 springs (Alice Spring Nos. 1 and 2; Upper Ash Spring; Kane Spring No. 4; Anderson Spring; Unnamed Spring; Ash Spring Nos. 1, 2, and 3; Upper Ash Spring Development; Kane Spring Development; and Anderson Spring Development) are located on the parcels (see Figure 3.3-1) (showing Selected Land parcels). The number and locations of these have not changed since the 1999 FEIS (ADWR 2009a)." DSEIS at 60. The 1999 FEIS stated that:

> Five federal reserved rights (Public Water Reserve No. 107) would be withdrawn by BLM from ADWR's records. Seven other surface water rights claims would transfer to Asarco, including three associated with stockponds on the Copper Butte Parcels and four associated with springs on RM-18.

1999 FEIS at 2-28 (Table 2-7). Most of these springs are on Selected Parcel RM-18, which is proposed as a "Buffer" parcel (DSEIS Figure 2.2-1). One spring ("Velma Spring") is on Selected Parcel CB-1. 1999 FEIS at 3-23 (Table 3-9). Thus, BLM's proposed alternative, transferring these Selected Lands to ASARCO, would necessarily eliminate BLM's water rights on these lands.

BLM, however, cannot eliminate these water rights, especially the waters and surrounding lands withdrawn under Public Water Reserve #107. Springs and waterholes on public land in the West are reserved for public use by PWR 107, which was created by a 1926 President Calvin Coolidge Executive Order.

> [I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

Executive Order of Apr. 17, 1926 (Addendum), *quoted in* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 966 (9th Cir. 2006). Clearly, if these lands and waters were "withdrawn from settlement, location, sale, or entry" by the President, BLM cannot exchange-away them to a private company.

> "The purpose of the reservation was to prevent monopolization of water needed for domestic and stock watering purposes." U.S. v. City & Cnty. of Denver, 656 P.2d 1, 32 (Colo. 1983); *see also* U.S. v. Idaho, 959 P.2d 449, 453 (Idaho 1998) ("The purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stock watering").

Great Basin Mine Watch, 456 F.3d at 966. The reserved water rights and associated land withdrawals were promulgated under the authority of Section 10 of the Stock-Raising Homestead Act of 1916, 39 Stat. 865 ("SRHA"), which provided that withdrawn "lands containing water holes or other bodies of water needed or used by the public for watering purposes . . . shall, while so

reserved, be kept and held open to the public use for such purposes . . .."[1] As the Interior Department stated shortly thereafter: "The above order was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes." Selections, Filings, or Entries of Lands Containing Springs or Water Holes, Circular No. 1066, 51 I.D. 457, 1926 I.D. LEXIS 45, **1-2.

Because these lands and waters are still reserved under the Presidential withdrawal, they "shall, while so reserved, be kept and held open to the public use for such purposes." Transferring these lands/waters to ASARCO violates the Presidential directive that they must all be "held and kept open to the public use."

> Assuming that the water is a spring and is on public land it would be subject to the Executive Order of April 17, 1926, establishing Public Water Reserve No. 107. The Executive Order withdrew all springs and water holes on public lands and the surrounding acreage. It was designed to preserve for the general public lands containing water holes and other bodies of water needed or used by the public for water purposes.

Desert Survivors, 80 IBLA 111, 115 (1984), 1984 WL 51633, **4 (BLM required to consider and protect PWR 107 waters). The Interior Department has held that: "the purpose for reserving public springs and water holes was to prevent monopolization of the public lands by withdrawing from settlement, location, sale or entry the lands surrounding important springs and water holes on the public lands." Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, 1983 WL 187400, **2. These reserved waters are to be used for the purposes of the reservation – i.e. public watering uses. *See* U.S. v. Idaho, 959 P.2d at 453 (affirming PWR 107 reserved rights).

Indeed, BLM has recently gone to court to defend its PWR 107 water rights. In U.S. BLM v. Berthelmess Ranch Corporation, 386 P.3d 952 (Montana 2016), BLM successfully defended its PWR 107 water rights in a state water proceeding. "[I]t is well established that the SHRA and PWR 107 provide a valid basis upon which the federal government can support claims to reserved water rights." Id. at 961.

In addition to creating federal reserved water rights, PWR 107 also withdrew from sale and entry all lands within a certain area surrounding the reserved springs—precluding transferring-away or development on these lands that would interfere with the "public uses" protected by PWR 107. Regarding the lands withdrawn by PWR 107, if the lands had been surveyed by 1926, PWR 107 reserved the "smallest legal subdivision," or 40 acres, around the spring. If the lands were unsurveyed in 1926, PWR 107 withdrew all lands "within one quarter of a mile of every spring or waterhole" or a circle encompassing roughly 300 acres.

BLM is under an obligation to ensure that federal reserved water rights and withdrawn lands are not impaired, used, or appropriated by private interests such as ASARCO to the detriment of the purposes for which the rights were created. In the seminal decision of Cappaert v. U.S., 426 U.S. 128 (1976), the Supreme Court rejected a challenge by private appropriators and the State of

[1] Although the SRHA and the underlying authority of the President to withdraw such lands pursuant to the Pickett Act of 1910, 36 Stat. 847, was repealed by FLPMA in 1976, withdrawals (such as PWR 107) made pursuant to those authorities remain in force. 43 U.S.C. § 1701 note (c).

Nevada to federal protection of reserved lands and waters that would be impacted by groundwater pumping. Federal reserved water rights and lands are federal property and are "superior to the rights of future appropriators." Cappaert, 426 U.S. at 138. "[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Id. at 143. "Where reserved rights are properly implied, they arise without regard to equities that may favor competing water uses. *See* Cappaert v. U.S., 426 U.S. 128, 138-39." Colville Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985).

BLM cannot disregard its duty to protect such federal property. "Only Congress, and not an executive branch agency, can authorize the disposition of federal property." High Country Citizens Alliance v. Norton, 448 F.Supp.2d 1235, 1248 (D. Colo. 2006) (Interior Department illegally allowed the private appropriation and use of a federal reserved water right to the detriment of the reserved water right) *citing* Gibson v. Chouteau, 80 U.S. 92, 99 (1871). *See also* Lake Berryessa Tenants' Council v. U.S., 588 F.2d 267, 271 (9th Cir. 1978) (federal agency "cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."). BLM is under an obligation to prevent any impairment or loss of the PWR 107 reserved water rights and surrounding withdrawn lands, both under PWR 107 itself (and the SRHA) as well as the general duty to not dispose of federal property without appropriate authorization. BLM has failed to do that here.[2]

Even if not yet formally adjudicated, springs are reserved under PWR 107 and are entitled to all the protections afforded adjudicated PWR rights. "The [PWR 107] Order has withdrawn all lands containing springs and water holes . . . regardless of whether the water source has been the subject of an official finding as to its existence and location." Interior Department, Federal Water Rights of the Nat'l Park Serv., Fish and Wildlife Serv., Bureau of Reclamation, and the Bureau of Land Mmgt., 1979 WL 34241, *587 (June 25, 1979); *see also*, BLM v. Barthelmess Ranch, 386 P.3d at 962 (BLM is not required to submit claims for its PWR 107 water rights in order for them to be valid, as they have been in existence since they were created in 1926).

Consequently, BLM cannot approve any alternative that involves the transfer of federal water rights and the surrounding withdrawn lands, such as the proposed alternative in the 1999 FEIS and DSEIS.

V. The Proposed Land Exchange Does Not Serve the Public Interest.

In FLPMA, "Congress declares that it is the policy of the United States that . . . the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a). The land exchange provisions of FLPMA specifically state that: "A tract of public land or interests therein may be disposed of by

[2] BLM has recognized this duty elsewhere in Arizona. In one recent case, BLM/DOI challenged Arizona's failure to protect federal reserved water rights from groundwater pumping. *See*, United States' Opening Brief in Robin Silver, M.D.; United States of America, U.S. Department of the Interior Bureau of Land Management, et al. v. Sandra A. Fabritz-Whitney, et al., Superior Court, County of Maricopa, Arizona, No. LC2013-000264-001DT (Sept. 13, 2013), ER 114-134; United States' Consolidated Reply Brief in same case (filed Nov. 18, 2013), ER 99-113. These documents, on file with the Arizona BLM, are incorporated and included in the administrative record for this case.

exchange . . . where the Secretary determines **that the public interest will be well served by making the exchange**." 43 U.S.C. § 1716(a) (emphasis added). "Section 206 of FLPMA and its implementing regulations permit the Secretary of the Interior or his designee to dispose of public lands in exchange for non-federal lands only on condition that the public interest will be served by the trade." Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1180, n. 8 (9th Cir. 2000).

BLM's public interest assessment must include consideration of the burden as well as the benefits that might flow from a land exchange. City of Santa Fe, 103 IBLA 397 (1988). The public interest test is at the heart of Congress' directive to the federal land agencies to protect public—rather than private—concerns in every exchange. Federal courts have strictly applied this mandate to protect the public. In National Audubon Society v. Hodel, 606 F. Supp. 825 (D. Alaska 1984), the court invalidated the Interior Department's public interest review as failing to consider "a substantial risk of significant short and long term injury to [an area's environmental] qualities," and that the potential harm to wildlife populations outweighed any benefit from the exchange. Id. at 843.

BLM is required to make a determination that a proposed land exchange "is in the public interest." 43 C.F.R. §§ 2200.0-6, 2201.7-1(a). Indeed "Section 206 of FLPMA forbids land exchanges unless the 'public interest will be well served.'" Ctr. for Biological Diversity v. U.S. DOI, 623 F.3d 633, 640 (9th Cir. 2010); 43 U.S.C. § 1716(a). This determination requires that BLM give "full consideration" to securing important objectives that include "[p]rotection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access . . .." 43 C.F.R. § 2200.0-6.

The BLM's determination is guided by a two-pronged test. 43 C.F.R. § 2200.0-6(b)(1)-(2). First, BLM must ensure that retaining the resource values and interests of the Federal lands or interests that are proposed for conveyance are not more than the resource values of the non-Federal lands or interests and the public objectives they would serve if acquired. 43 C.F.R. § 2200.0-6(b)(1). Second, BLM must determine that the intended use of the conveyed Federal lands will not significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. 43 C.F.R. § 2200.0-6(b)(2). BLM must support this finding with rationale in the administrative record.

Additionally, "lands or interests to be exchanged shall be of equal value or equalized in accordance with the methods set forth in § 2201.6 of this part." 43 C.F.R. § 2200.0-6(c). To safeguard the public interest, the authorized officer "shall reserve such rights or retain such interest as needed and shall otherwise restrict the use of Federal lands to be exchanged, as appropriate." 43 C.F.R. § 2200.0-6(i). This may include provisions in the conveyance documents that impose restrictions on the use and/or development of lands conveyed out of Federal ownership. Id.

Due to BLM's improper narrowing of the DSEIS process, as discussed above, BLM is not taking all the public interest determination factors into consideration as the law requires. *See* DSEIS at 9 (excluding without support the option of BLM acquiring additional parcels instead of cash payment). BLM needs to show on the record that it is in the public interest to accept a cash payment should the parcel values be unequal. Currently, there is no information as to why and how this conclusion achieves the public interest. 43 U.S.C. § 1716(a); 43 C.F.R. § 2200.0-6. BLM must contrast the cash payment option with the options of acquiring additional parcels in exchange and/or

by reducing the acres of lands that are slated to be exchanged to ASARCO to make this public interest determination.

Another problem with the BLM's narrowing of the DSEIS process is that it continues to include the Casa Grande Parcels as part of the exchange—even though they are no longer of any use to the proponent. DSEIS at 35; DSEIS Appendix C at i ("ASARCO has sold the surface estate to the Casa Grande Parcels (CG-1, CG-2, and CG-3) and therefore has no foreseeable use of those parcels."). BLM needs to provide analysis on how keeping these three parcels as part of the exchange serves the public interest.

Plans for other parcels have also changed over the course of nearly twenty years. For example, "ASARCO has [also] selected a different site for a future tailings storage facility and therefore, foreseeable uses for Parcel RM-18 have been changed from a combination of 'Production, Operation and Support'; 'Transition'; and 'Buffer' to 100% 'Buffer'." DSEIS Appendix C at i. This change undercuts BLM's rationale for exchanging this parcel and, in light of RM-18's high resource values, requires BLM to freshly analyze the public interest in exchanging this parcel in full or any portion thereof. FEIS at 2-18 (dismissing the Hackberry Alternative), 3-14-15, 3-23-24, 3-29, (acknowledging that RM-18 contains, among other things, "a substantial number of archaeological sites," bat habitat, Category II desert tortoise habitat, the most springs and surface water of any parcels to be exchanged, including of those offered, as well as federal reserved rights). As noted above, it is also clearly not in the public interest to exchange-away lands and waters withdrawn/reserved under PWR 107 (such as those on R-18 and CB-1).

There have also been a number of changes to wildlife habitat and potentially other values on the lands and interests that ASARCO would obtain as a result of this proposal. The Gila chub, which was listed in 2005, has 16 acres of critical habitat in RM-7. Attachment B (map of Gila chub critical habitat); DSEIS at 42 (noting presence of Gila chub critical habitat). Exchanging the mineral rights for this parcel would remove Section 7(a)(2) ESA consultation, which could lead to mitigation and/or minimization efforts that could safeguard this Gila chub critical habitat from activities ASARCO would undertake. BLM is not obtaining any acres of Gila chub critical habitat to offset the loss of relinquishing the mineral rights to this parcel that contains such habitat. A consistent theme of the public interest in trading away "BUFFER" parcels and areas rings especially true here given the critical habitat that is at stake. Because RM-7, or at least the Gila chub critical habitat in this parcel, would be used as "BUFFER," we do not understand how the exchange is in the public interest in light of this habitat's importance to this imperiled species. DSEIS at 42 (none of the parcels to be obtained contain Gila chub critical habitat), 146 (stating no mining activities are to occur in the Gila chub habitat). How is the public interest served by removing federal oversight of minerals that underlay imperiled fish critical habitat?

Additionally, the public lands in this area are seeing increased use and pressure. DSEIS at 108, 110, Appendix D, Cumulative Projects for Ray Area at 2 (noting that OHV and recreation use/pressure is expected to increase in the region and has increased for CB and CH parcels since the late 1990's). Given the expected increase in public recreational use on lands slated to be exchanged and the offered parcels remoteness from population centers, this needs to be re-analyzed as part of BLM's public interest determination. This also highlights the public interest in keeping areas, like the Granite Mountain Wilderness Inventory Unit intact and available for such designation versus exchanging them to a private company that would undertake actions permanently removing wilderness characteristics from such lands. DSEIS at ES-6. Increased recreational pressure, as

BLM has documented, means fewer opportunities for those seeking solitude as well as fewer places where the landscape can be a refuge for wildlife from the human disturbance and impacts on public lands.

The agency also failed to adequately protect the public interest in the details of the Exchange. The following analysis serves to highlight areas where the public interest would not be "well served." BLM regulations state that the agency "shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate." 43 C.F.R. § 2200.0-6 (i). However, even where deed restrictions could greatly improve a land exchange and protect values on public land to be traded, the agency seldom attaches such conditions, usually protesting that they would alienate the interests of the private party. The bottom line as to what constitutes an acceptable proposal is almost always established by the private proponent. BLM's failure to consider significant deed restrictions during the Ray process illustrates this point well.

The public interest rationale offered by the BLM in the FEIS (and now carried forward to the DSEIS) is not supported by the record. The improved management associated with acquiring the offered lands is marginal and the public interest rationale collapses completely when the adverse consequences of the exchange are considered. Following is a parcel by parcel analysis of the "improved management" facilitated by the acquisition of each property:

> Gila River parcel at Cochran: BLM attempts to argue that this 320-acre acquisition is notable because it is within the White Canyon resource conservation area (RCA). However, unlike National Conservation Areas such as Gila Box and San Pedro, RCA designations do not provide any substantive protection or establish meaningful planning requirements. Moreover, the BLM land in this area is isolated and checkerboarded (not to mention most of it is withdrawn to the Bureau of Reclamation) and in fact the majority of the adjacent land is either privately owned or state trust land. Additionally, domestic livestock grazing will continue, degrading the riparian habitat that is claimed to be "high-value wildlife habitat." DSEIS at 30. In essence, this isolated parcel will be utilized to the benefit of one grazing permittee, and will provide little or no benefit to the public.
>
> Sacramento Valley parcel: This 120 acre property is located adjacent to the Warm Springs Wilderness area in western Arizona. The property, as depicted visually in the FEIS at Figure 2-2, will still be bordered by private land. In fact, the vast majority of lands within the Sacramento Valley are privately owned, and there is no need for the BLM to acquire any lands in this area. A more appropriate priority would be working towards acquisition of the many inholdings within the Wilderness area. Additionally, this property would be open to mineral claims and livestock grazing. If either of these came to pass, it would degrade the very values touted for exchange: Category I Desert Tortoise habitat and Black Mountains Herd Management Area. *See* FEIS at F-8 (noting that desert tortoises' "susceptibility to . . . livestock grazing, and mining continue to place extreme demands on some wild populations.") Like the Gila River parcel, this property will be utilized to the benefit of one grazing permittee, and will provide little or no benefit to the public.

Knisely Ranch Parcels: This consists of two inholdings and part of another inholding, totaling 160 acres, within the Mount Tipton wilderness in western Arizona. The parcels would continue to be used for domestic livestock grazing. These parcels should be purchased by BLM with LWCF funds.

Tomlin parcels: Totaling 314 acres, these three parcels are located in the southern portion of the Hualapai Mountains in western Arizona. One parcel is located on the Big Sandy River. However, these inaccessible lands would be grazed by livestock, and land ownership along the Big Sandy (which the BLM determined was not "suitable" for Wild and Scenic River status) is extremely fragmented; thus its acquisition will not aid in improving "resource management efficiency."

McCracken Mountains parcel: Made up of ten largely inaccessible parcels totaling 6,384 acres, the McCracken properties are also in western Arizona. While the BLM promotes these offered lands as being within the McCracken desert tortoise Area of Critical Environmental Concern (ACEC), the BLM's recent de-designation of portions of the White Canyon ACEC in order to facilitate this exchange demonstrate BLM's lack of commitment to these important areas. This land would continue being grazed, thus once again the trade would be largely for the benefit of one permittee while degrading the desert tortoise habitat that is used in attempt to justify the exchange. In addition, the area would be open to mineral entry.

It appears that, as with the agency that proposed the land exchange at issue in National Audubon Society v. Hodel, BLM is preparing a public interest determination based on the accrual of purported resource protections from the trade that are in fact grossly overstated.

The BLM only proposes to recommend withdrawal of two of the offered land parcels from mineral entry. Opening the vast majority of the remaining offered lands to mineral entry is clearly not in the public interest. The fact that BLM has preliminarily concluded that these "open" lands do not have high mineral value does not mean that mining claimants may not seriously degrade these lands in the future. In addition, for any of the lands proposed to be withdrawn, the fact that the Exchange is not dependent on the withdrawal actually taking place seriously undermines any arguments for public benefit—especially since mineral claimants may locate claims starting just 91 days after the Exchange is finalized, potentially prior to segregation and withdrawal. *See* 43 C.F.R. § 2201.9(b).

Regarding the offered lands, BLM claims that acquisition of the offered lands will enable the agency to "achieve several public lands management objectives," including improvement of "resource management efficiency," acquisition of lands "that will consolidate ownership patterns within wilderness and special management areas" and acquisition of lands "with fewer encumbrances and higher resource values." However, most of the above objectives were **already being met on the selected lands**, especially the Copper Butte/Buckeye and Chilito/Hayden lands. Compared with the offered lands, most of the selected lands are in areas where BLM ownership predominates. Because the selected lands are largely consolidated to begin with, by trading them out of public ownership BLM is needlessly worsening "checkerboarding" and decreasing "resource management efficiency."

The Copper Butte lands present the most outrageous example of this Pyrrhic victory. Notably, the BLM had previously taken separate actions to first de-designate portions of the White Canyon ACEC within Copper Butte and then amend the Phoenix and Safford RMPs to switch the land's status from "retention" to "disposal." Additionally, Copper Butte lands provide access and are immediately adjacent to the White Canyon Wilderness and several other popular recreation areas, are an Arizona Game and Fish Department priority reintroduction site for bighorn sheep, are along proposed routes for the Arizona Trail, and lie within an RCA. CB-2 also contains 300 acres of the Granite Mountain Wilderness Inventory Unit. DSEIS at ES-6. Swapping over 3,000 acres of these lands to ASARCO to facilitate open-pit copper mining adjacent to a designated Wilderness area clearly does not serve the public's interest.

Overall, BLM cannot argue that the Exchange's facilitation of mineral development on the selected lands is in the public interest—especially when such potentially devastating impacts would not be allowed if the land remained in public ownership. Regarding the overall Exchange, FLPMA regulations also require BLM to consider a number of specific factors in determining whether or not a proposed exchange is in the public interest. These factors include: the need to achieve better management of federal lands, the needs of state and local residents, protection of fish and wildlife habitats, cultural resources, watersheds, and wilderness and aesthetic values, enhancement of recreation opportunities and public access, consolidation of lands, and promotion of multiple use values. 43 C.F.R. § 2200.0-6(b). These requirements must be documented by written findings and supporting rationale.

Adding to the fact that acquisition of the offered lands will provide marginal public interest benefits, this land exchange will facilitate an open-pit copper mine which will have disastrous impacts for large segments of both people and wildlife, many of which are addressed in the land exchange regulations at 43 C.F.R. § 2200.6(b):

> Fish and Wildlife Habitats/Watersheds: Expanded mining will consume enormous amounts of surface and ground water, resulting in less water to the already beleaguered Gila River. Less water means less chance for recovery of populations of endangered species dependent on the river, such as the Gila topminnow and Southwestern willow flycatcher. This direct impact to one of the most important rivers in the Southwest, and its concomitant impact to the many plants, animals, and fish dependent on this habitat, greatly outweighs any marginal benefits that will be achieved through acquisition of the offered lands.
>
> The needs of State and local economies/expansion of communities: Although jobs will be created by the Ray mine expansion, the Copper Butte pits' supply of copper is estimated to last only eight years, less than one quarter of the average adult's working years. Instead of helping the people of the Kearney/Hayden/Winkelman area and the state of Arizona move towards more sustainable economies, the proposed mining projects only perpetuate the boom and bust cycle that has devastated the state's natural heritage and assured the instability and marginality of its rural communities.
>
> Fulfillment of public needs: Copper prices vary widely. Thus, opening yet more open pit copper mines is not fulfilling any public needs, is creating an even more

> volatile and unstable industry, and is actually hurting the mining industry by unnecessarily driving copper prices even lower.

In addition, for a land exchange to be in the public interest the intended use of the selected lands may not "significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands." 43 C.F.R. § 2200.0-6(b)(2). Here, the DSEIS assumes, albeit invalidly, that ASARCO intends to use the selected lands to expand an open-pit copper mine. The DSEIS, however, has not explained how activities related to the operation of an open-pit copper mine will not conflict with BLM's management objectives on the public lands that will be adjacent to the selected lands.

A public interest determination for a land exchange must be based on a reasonable consideration of relevant factors. Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1064 (9th Cir. 2010). Here it is clear that the BLM based its public interest decision on its erroneous assumption that the only reasonably foreseeable use of the selected lands would be for mining development. Since such an assumption is invalid, the BLM's public interest review is similarly invalid.

Lastly, the DSEIS states that: "A public interest determination as required by Section 206(a) of FLPMA will be addressed in the forthcoming Final SEIS." DSEIS at 9. This fundamental decision required by FLPMA, and required to be analyzed under NEPA, should have been subject to public review in the DSEIS. Accordingly, the DSEIS must be revised with this analysis and submitted for public review.

VI. For the Exchange to Be In the Public Interest, the Offered Lands Must Never Be Opened for Mineral Entry.

Regarding ASARCO's Offered Lands, the DSEIS states that: "No impacts to mineral resources on the Offered Lands are anticipated under the Proposed Action or any alternatives." DSEIS at ES-5. Yet BLM does not propose to segregate and then withdraw all these lands from mineral entry under the Mining Law. Under BLM regulations, these lands will be open for mineral entry shortly after the lands are exchanged and become public. Even if these future "open" lands do not have high mineral value (something the record does not affirmatively show with detailed mineral examinations) it does not mean that mining claimants may not seriously degrade these lands in the future. In addition, even if some lands are proposed to be withdrawn, the fact that the Exchange is not dependent on the withdrawal actually taking place seriously undermines any arguments for public benefit—especially since mineral claimants may locate claims starting just 91 days after the Exchange is finalized, potentially prior to segregation and withdrawal.

> Subject to valid existing rights, non-Federal lands acquired through exchange by the United States automatically shall be segregated from appropriation under the public land laws and mineral laws until midnight of the 90th day after acceptance of title by the United States, and the public land records shall be noted accordingly. Except to the extent otherwise provided by law, **the lands shall be open to the operation of the public land laws and mineral laws at midnight 90 days after the day title was accepted** unless otherwise segregated pursuant to part 2300 of this title.

43 C.F.R. § 2201.9(b) (emphasis added). To accomplish this, the DSEIS should acknowledge the need for immediate segregation upon title transfer and initiate actions to accomplish this accordingly. Unless the Exchange is based on the legally-binding requirement that all of the Offered Lands are segregated (at a minimum) during the 90-day window after title is accepted by the federal government (and then permanently withdrawn from mineral entry), any assertions that the Exchange is "in the public interest" are unsupportable.

VII. Failure to Adequately Analysis All Direct, Indirect, and Cumulative Impacts.

Under NEPA, the DSEIS must fully review all direct, indirect, and cumulative environmental impacts of the Project. 40 C.F.R. §§ 1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. Id. § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Id. § 1508.8(b). Types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. Cumulative effects are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

The DSEIS fails to provide any meaningful analysis of the cumulative impacts of all past, present, and reasonably foreseeable future activities/actions. In a leading mining and NEPA case dealing with two mining projects, the Ninth Circuit held that, even though the two mines were not "connected actions" under NEPA, the NEPA review document for each mine had to fully review the cumulative effects/impacts of the two mines together on the regional environment. Great Basin Mine Watch v. Hankins, 456 F.3d 955, 968-74 (9th Cir. 2006). In its cumulative impact analysis, an agency must take a "hard look" at all actions:

> [A]nalysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. . . . Without such information, neither the courts nor the public . . . can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of Western Shoshone v. U.S. Dep't of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

The Ninth Circuit has repeatedly faulted the federal land agencies' failures to fully review the cumulative impacts of mining projects. In the most recent case, vacating BLM's approval of a mine, the court stated that "'in a cumulative impact analysis, an agency must take a 'hard look' at *all* actions that may combine with the action under consideration to affect the environment.'" Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1104 (9th Cir. 2016) (emphasis in original) (quoting Te-Moak Tribe). BLM violated NEPA because it "did not 'identify and discuss the

impacts that will be caused by each successive project, including how the combination of those various impacts is expected to affect the environment.'" Id. at 1105, quoting Great Basin Mine Watch, 456 F.3d 973-74.

In Great Basin Mine Watch, the Ninth Circuit required "mine-specific . . . cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region. Id. at 972-74. The agency cannot "merely list other [projects] in the area without detailing impacts from each one." Id. at 972. *See also* ONRC v. Goodman, 505 F.3d 884, 893 (9th Cir. 2007).

In addition to the fundamental cumulative impacts review requirements noted above, NEPA regulations also require that the agency obtain the missing "quantitative assessment" information. 40 C.F.R. § 1502.22. "If there is 'essential' information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b)." Native Village of Point Hope v. Jewell, 740 F.3d 489, 499 (9th Cir. 2014). Here, the adverse impacts from the Exchange and related mining when added to other past, present, or reasonably foreseeable future actions is clearly essential to BLM's determination (and duty to ensure) that the projects comply with all legal requirements and minimizes all adverse environmental impacts.

BLM's discussion of the cumulative impacts is contained in DSEIS Appendix D, entitled "Cumulative Projects for Ray Area." In discussing the "Reasonably Foreseeable Future Projects and Resource Conditions in the General Vicinity of the Ray Mine," in Appendix D, BLM merely provides a short description of other mining projects, local population impacts, and other activities that will have cumulative impacts. **No detailed analysis of cumulative impacts is provided.**

Thus, under the Ninth Circuit precedent noted above, BLM failed to fully consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the area on water and air quality including ground and surface water quantity and quality, recreation, cultural/religious, wildlife, transportation/traffic, scenic and visual resources, etc. At a minimum, this requires the agency to fully analyze the cumulative impacts from the projects listed in Appendix D, as well as other mining, grazing, recreation, energy development, construction, population/development, roads, etc., in the area.[3]

Regarding the impacts from the foreseeable uses of the Selected Lands, the DSEIS mistakenly fails to provide any detailed analysis of the mining and related operations that are likely on these lands. Instead, Appendix C, entitled "Asarco Foreseeable Uses of Ray Selected Lands Report," merely lists which parcels are projected for mining uses, with a short discussion of the likely operations. No detailed analysis of the environmental impacts from these activities is provided, in violation of NEPA's mandate that BLM take the required "hard look" at these impacts.

[3] As just one example, the DSEIS acknowledges that the Army Corps of Engineers is currently reviewing the proposed Ripsey Wash Tailings Impoundment, with an "Expected Implementation" of "Spring 2018," but no details or analysis of impacts are provided. DSEIS Appendix D at 3.

VIII. BLM Failed to Accurately Value the Minerals and Waters in the Selected Lands and Include All Appraisal Information in the DSEIS.

The DSEIS notes that new appraisals have been done for the Selected Lands, but none of that information is contained in the DSEIS. Under NEPA, the public has the right to comment upon such significant information. At a minimum, this information is critical to determining the full scope of alternatives as well as whether the exchange meets the equal-value and public-interest requirements under FLPMA. As noted above, the Center has requested all appraisal information pursuant to FOIA and reserves the right to supplement these comments upon receipt of all of the requested information. However, the public should not have to submit FOIA requests for such critical information, and the DSEIS should be reissued for public review after this information is included in the revised Draft.

IX. BLM Must Analyze a Reasonable Range of Alternatives.

In addition to the proposed agency action, every EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" to that action. Ctr. for Biological Diversity, 623 F.3d 633, 642 (9th Cir. 2010) (citing 40 C.F.R. § 1502.14(a)). The alternatives analysis is "'the heart of the environmental impact statement.'" Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114, 1121 (9th Cir. 2008) (quoting 40 C.F.R. § 1502.14). "The existence of reasonable but unexamined alternatives renders an EIS inadequate." Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998). Accordingly, NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Below are additional reasonable alternatives that would better serve the public interest while still being consistent with the stated purpose and need.

Reasonable Alternative: Equal Acreage and Interests Exchanged.

The proposed action would transfer 8,196 acres of BLM-administered public lands and 2,780 acres of federally owned subsurface to ASARCO in return for just over 7,000 acres going into the public domain. DSEIS at ES-1, 19. This alternative shortchanges the public in terms of net land, with ASARCO obtaining 3,517 more acres and interests than the public gets back in return. Rather than eliminating this disparity, the other action alternatives further accentuate the imbalance by reducing the acreage and interests BLM would receive. DSEIS at 30-31, 34. For example, the Copper Butte Alternative, which would provide ASARCO with 9,161 acres, would provide BLM with only 5,601 acres. DSEIS at 34. Even if BLM had kept the acreage it would receive under the proposed alternative the same for the other two action alternatives, the public would still see a shortfall of nearly two thousand acres. There is no rational reason for why the public should suffer a net loss of land as a result of this exchange.

Accordingly, a perfectly reasonable alternative is one where the public receives equal acreage and interests to that which ASARCO obtains. Should additional parcels be offered, they need to contain values that are being lost as a result of the exchange such as, but not limited to, inholdings in wilderness areas, wildlife habitat and corridors, water or archeological resources, as well as recreational and scenic values. Merely that ASARCO may not currently own such parcels and interests beyond what is currently offered is not a convincing rationale for dismissing this alternative. ASARCO has the means and ability to acquire such lands for it to obtain the public

lands and interests it seeks. Moreover, as discussed below, there are easy ways to reduce the amount of acres and interests that ASARCO would acquire (such as excluding buffer parcels from the exchange) that would achieve a more equal exchange and better suit the public interest.

Reasonable Alternative: Reduce the Acreage and Interests ASARCO Receives and Not The Amount the Public Receives.

Another reasonable alternative is the inverse of the action alternatives—an alternative where BLM obtains *more* acreage and interest than those that it exchanges to ASARCO. This alternative would even better meet the public interest by obtaining more lands and interests while still meeting the stated purpose and need. This alternative could reduce the amount of acres and interests ASARCO would obtain below the amount BLM would receive under the proposed alternative (7,304 acres), require ASARCO to offer up additional parcels, or be a combination of the two. Additional offered parcels need to contain values that are being lost as a result of the exchange such as, but not limited to, inholdings in wilderness areas, wildlife habitat and corridors, water or archeological resources, as well as recreational and scenic values.

Reasonable Alternative: Mineral Withdrawal for All Parcels BLM Would Obtain from ASARCO to Protect Resource Values.

BLM touts the values of the offered lands, such as being wilderness inholdings and providing important wildlife habitat, including critical habitat, for species like the southwestern willow flycatcher, Category I and II Desert Tortoise Habitat, and desert bighorn habitat. DSEIS at 30. Yet, only a few hundred acres are planned to be segregated and then permanently withdrawn. As a result, the very values of these offered lands would not be secure. The minimal offered acreage that would be segregated and then permanently withdrawn further exacerbates the disproportionality in the exchange (under any of the action alternatives), as ASARCO would further consolidate its ownership of surface and subsurface, while BLM would not.

The proposed trade ignores agency direction regarding split estates. BLM's Land Exchange Handbook discourages land exchange proposals that would create split estates noting that the "surface estate is subservient to the mineral estate, and unless the mineral rights attached to a property have been subordinated, mineral development will take precedence over surface uses and could cause significant conflicts." H-2200-1 Land Exchange Handbook (Public) (2005), 1-11.

Here, only 6,384 acres (McCracken Mountains parcels) of the offered lands are full estate. Nine-hundred and twenty acres are surface estate only, which includes the very parcels that provide what BLM considers some of the most important wildlife habitat. *Compare* DSEIS at 20 (listing surface only estates that would be acquired) with DSEIS 30 (values of the offered parcels). Having public ownership of only the surface estate for these 926 acres would leave important wildlife habitat subject to the whims of the owner(s) of the dominant mineral estate. The Handbook notes that when considering a trade proposal the agency "must carefully evaluate the need for the non-Federal land being considered for acquisition, uses contemplated and potential conflicts or risks when making a determination concerning the mineral estate. **This evaluation is especially important in situations where the non-Federal lands are subject to a third-party mineral interest**." Id. (emphasis added).

Further, because fee ownership is more desirable and valuable than split estate, the consolidation of ASARCO's interests exacerbates the inequality in this exchange—whether it be the overall loss of public acres and interests or questions as to the parity in value between the selected and offered parcels.

Excuses such as an expectation of low mineral potential or ACEC coverage do not dispense with the need to analyze this alternative (and indeed require it to protect the public interest under FLPMA). *See* FEIS at 7-33 (BLM's response to comments). Technology and management decisions and directions can change, which means the very values for which these parcels would be obtained would be at risk. If the parcels BLM would obtain are indeed of such little mineral import, segregating and withdrawing them as part of the exchange would not be controversial. It would, however, significantly further the public interest by permanently protecting the values BLM claims these parcels provide.

Further, if these lands are not segregated/withdrawn, they will be "free and open to exploration and purchase" under the Mining Law. 30 U.S.C. § 22.[4] Under DOI/BLM's interpretation of the Mining Law, this creates a right of access to any claims on these opened lands —thereby nullifying or adversely affecting the very resource values BLM asserts its ownership will protect.

Reasonable Alternative: All Buffer Interests and Acres Remain in BLM Management.

BLM needs to analyze a reasonable alternative that would maintain BLM management over all acres and parcels that are classified as "Buffer." At a minimum, there must be analysis of an alternative that maintains BLM management over the 95% of "Buffer" acres and parcels that would not be subject to surface disturbance. DSEIS at 36 (defining buffer parcels).

Buffers are "areas that would not be subject to direct mining activity, resulting in less than 5% surface disturbance. Potential uses . . . include but are not limited consolidation of ASARCO ownership and buffering neighboring land owners from mining operations." DSEIS at 36; DSEIS Appendix C at 1 (ASARCO's definition, which aligns with BLM's). **Significantly, 50% of the lands that ASARCO would acquire are buffers**. DSEIS at 36; DSEIS at Appendix C ASARCO Foreseeable Uses of Ray Selected lands Report of December 19, 2013. A buffer alternative, however, would keep 50%, or 5,512 acres, of the proposed exchanged lands public. Even if the 5% that would be disturbed is removed, BLM management would remain over 5,236.4 acres.

Consolidation of ownership and buffering neighboring land owners from mining is not a convincing rational for cleaving off thousands of valuable public lands. ASARCO and BLM admit that the nature of buffer parcels and acres is that they are limitedly used—if at all. It is these very parcels, however, that provide the most important habitat for wildlife species, including sensitive species like the Sonoran desert tortoise, contain valuable water resources and archeological sites, federal reserved water rights, as well as host high visual resources, among other things. *E.g.* DSEIS at 42, 51-52, 60-64,118-19, 122-24; FEIS at S-4, 3-59-61, 4-8-12, 4-15, 4-17. Moreover, neither BLM nor ASARCO propose any conservation easements on these lands once they would be privatized, even though that is a reasonable alternative that would be in the public interest.

[4] Although there is a current moratorium against new patent applications under the Mining Law, that moratorium must be renewed each year via the appropriations process and is not permanent.

ASARCO's interest in obtaining valuable public lands that would not be subject to mining and related activities does not outweigh the significant public interest in keeping such prized lands in public hands.

Reasonable Alternative: All of Parcel RM-18 Remaining in BLM Management.

Another reasonable alternative that BLM must consider is retaining federal ownership of RM-18. The fact that much of RM-18 is withdrawn and protected by Presidential Order as detailed above further supports this alternative. This alternative reflects a significant change in ASARCO's plans as this parcel is now proposed use is as 100% buffer. BLM has acknowledged RM-18 has values of high public interest. Indeed, these values were the reason BLM previously considered the "Hackberry Alternative," which would have kept 1,530 acres of this parcel in BLM management. FEIS at 218. "The purpose of this alternative was to retain in federal ownership a substantial number of archeological sites, several intermittent springs, and Category II desert tortoise habitat." FEIS at 218. At the time, BLM dismissed this alternative because ASARCO would be using the parcel for a tailings impoundment and other mine related activities, so keeping it in federal management meant both ASARCO and BLM would have to comply with federal laws and regulations. FEIS at 218; DSEIS at 139, Appendix C at i.

ASARCO's intentions for RM-18 have drastically changed. ASARCO now plans to use "a different site for a future tailings storage facility and therefore, foreseeable uses for Parcel RM-18 have been changed from a combination of 'Production, Operation and Support'; 'Transition'; and 'Buffer' to 100% 'Buffer'". DSEIS Appendix C at i, 13. Accordingly, BLM needs to consider a reasonable alternative that would keep the entirety of RM-18 in BLM management. This alternative would avoid BLM deciding to transfer rights that it may not dispense at will. At a minimum, this alternative would cover the 95% of the parcel that would be left undisturbed per it being categorized as 100% buffer.

Reasonable Alternative: Exclusion of the CG Parcels As ASARCO No Longer Has A Foreseeable Use for Them.

As discussed above in the public interest section, another change since 1999 is that ASARCO no longer owns the surface estate to the Casa Grande Parcels (CG-1, CG-2, and CG-3). ASARCO no longer has a "foreseeable use for those parcels" and consequently, there must at least be an alternative where they are excluded from analysis. DSEIS Appendix C at i. In light of ASARCO's lack of plans for these parcels, dispensing with these interests does not further BLM's stated purpose and need. Due to the disparity in acres and interests that would be exchanged between BLM and ASARCO, this alternative cannot be combined with a reduction of offered lands and parcels as seen under the Buckeye and Copper Butte alternatives. It is most appropriate for BLM to exclude these parcels from being exchanged under all action alternatives and any alternative it may select.

X. BLM and FWS Did Not Take a Hard Look at Wildlife and/or Comply with the ESA.

During the course of nearly 20 years a number of things have changed that call for a re-analysis of the wildlife analysis. Instead, BLM provides a conclusory sentence that "[g]eneral wildlife and migratory bird habitat on the Selected and Offered Lands has not changed since the 1999 FEIS and the previous impact assessments are considered appropriate." DSEIS at ES-3. Yet,

environmental conditions have changed, whether it is increased recreational use, extended droughts, continued information gathering (e.g. as directed in the BLM Desert Tortoise Rangewide Management Plan requires, 1999 FEIS Appendix F), or other changes that are applicable to the wildlife impacts the proposed exchange would have. Accordingly, BLM must take the required "hard look" of all current conditions, impacts, and alternatives on wildlife and their habitat. BLM cannot rely on an unsupported statement that the wildlife impact assessment from two nearly decades ago remains accurate without providing evidentiary support and analysis to back that conclusion up. BLM and FWS must also address inadequacies with their ESA compliance and analysis for two species that have been listed and received designated critical habitat since 1999.

ESA Legal Background

The ESA is both procedural and substantive. The ESA sets out a substantive duty for agencies to ensure that their actions do not jeopardize the continued existence of threatened or endangered species or destroy or adversely modify endangered species' designated critical habitat. 16 U.S.C. § 1536(a)(2). The ESA's definition of critical habitat includes "specific areas within the geographical area occupied by the species, at the time it is listed in accordance with [section 4 of the ESA], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Thus, by the definition of habitat being designated as critical habitat it is "essential to the conservation of the species" and "may require special management considerations or protection." Id. The ESA also prohibits the "take" of threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B) & (G).

Section 7 of the ESA requires that each federal agency (the "action agency") "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 listed species' designated critical habitat. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.1(a) (implementing Section 7). Agencies are required to use the best scientific and commercial data available for this consultation. 16 U.S.C. § 1536(a)(2).

To assist action agencies in complying with this provision, Section 7 and its implementing regulations set out a detailed consultation process for determining the impacts of the proposed agency action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402 *et seq*. When an action agency determines that an action it proposes to take "may affect listed species or critical habitat," that agency must prepare a biological assessment ("BA") on the effects of the action. 50 C.F.R. §§ 402.12, 402.14(a); 16 U.S.C. § 1536(c). If, after preparing a BA, the agency determines that the proposed action is "not likely to adversely affect" any listed species or critical habitat, then the agency need not initiate formal consultation with the FWS. 50 C.F.R. § 402.14(b)(1).

The process of determining whether formal consultation may be required is referred to as "informal consultation," which is described in implementing regulations as follows:

> Informal consultation is [a] . . . process that includes all discussions, correspondence, etc., between the [FWS] and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the [FWS], that

> the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

50 C.F.R. § 402.13.

To conduct ESA-compliant consultation, agencies must also analyze the "entire" agency action. Conner v. Burford, 848 F.2d 1441, 1452-53 (9th Cir. 1988) (citing 16 U.S.C. § 1536(b)(3)(A)); Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1155 (D. Ariz. 2002). This means that a biological opinion's (or BA's) analysis of effects to listed species and critical habitat "must be coextensive with the agency action." Conner, 848 F.2d at 1458; Greenpeace v. Nat'l Marine Fisheries Serv., 80 F. Supp. 2d 1137, 1143 (W.D. Wash. 2000) (agency "must prepare a . . . biological opinion equal in scope" to action consulted upon); Rumsfeld, 198 F. Supp. 2d at 1156 ("breadth and scope of the analysis must be adequate to consider all the impacts"). Accordingly, courts strike down biological opinions (BOs) and BAs that fail to perform a comprehensive analysis of the entire action, including analyses that omit key areas or impacts. *See, e.g.*, Conner, 848 F.2d at 1453-54 (analysis of entire agency action for oil and gas leasing must also include impacts from development); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 902-03 (9th Cir. 2002) (overturning Forest Service's Section 7 analysis because it omitted key geographic area affected by proposal). Further, in designating an "action area" for analysis, the agency must consider "*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; Native Ecosystems Council, 304 F.3d at 902 (emphasis added).

The requirement that agencies must analyze the "entire" agency action "does not permit the incremental-step approach" of consultation because "biological opinions must be coextensive with the agency action." Sw. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1142 (S.D. Cal. 2006) (citing Conner, 848 F.2d at 1457-48) (internal quotations and citations omitted); *accord* Rumsfeld, 198 F. Supp. 2d at 1155; Greenpeace, 80 F. Supp. 2d at 1143-44. "[T]he ESA requires that all impacts of agency action – both present *and* future effects on the species – be addressed in the consultation's jeopardy analysis." American Rivers v. U.S. ACOE, 271 F. Supp. 2d 230, 225 (D.D.C. 2003) (emphasis in original).

In addition, the ESA and FWS regulations require every agency to ensure that "any action [the agency] authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species." 50 C.F.R. § 402.01. The regulations define "action" to include any "action[] directly *or indirectly* causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (emphasis added). The effects of the agency action which must be evaluated include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." Id. "Indirect effects" include effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." Id. These direct and indirect effects must be considered together with a separate category of impacts known as "cumulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." Id.

Courts have repeatedly found that impacts are "reasonably certain to occur"—and thus must be analyzed under the ESA as "indirect effects" in a BA or BO—where federal actions induce private or off-site development. For example, when considering the potential effects of the

operation of a military base, a court required the U.S. Army to consider the indirect impacts caused by groundwater pumping required by its operation and people the base *attracted* to the area. Rumsfeld, 198 F. Supp. at 1139. *See, e.g.*, Fla. Key Deer v. Paulison, 522 F.3d 1133, 1144-45 (11th Cir. 2008) (finding FEMA's flood insurance program may cause jeopardy to endangered Florida key deer by encouraging development); Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency, 345 F. Supp. 2d 1151, 1173-74, 1176 (W.D. Wash. 2004) (Section 7 consultation on FEMA flood insurance program must address harmful impacts of induced property development in flood zone because "development [was] reasonably certain to occur as a result of" the program, even though FEMA did not "authorize, permit, or carry out the actual development that causes the harm."); Sierra Club v. U.S. Dep't of Energy, 255 F. Supp. 2d 1177, 1187-89 (D. Colo. 2002) (agency consultation concerning approval of right-of-way must address indirect impacts of a mine the construction of which was made possible by the right-of-way); Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985) ("To require [an agency] to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose" under the ESA); Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976) ("indirect effects" of highway construction include "the residential and commercial development that can be expected to result from the construction of the highway.").

Consultation must also consider the value of critical habitat for recovery. Gifford Pinchot v. U.S. Fish and Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004). As the Ninth Circuit noted in that case, "it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species survival." Id. at 1069. The court determined that the Fish and Wildlife Service's regulation on "destruction or adverse modification" was in violation of the ESA because it read out the value of critical habitat being for more than just the survival but for the *recovery* of a listed species. Id. at 1070-72. "Conservation is a much broader concept than mere survival. The ESA's definition of conservation speaks to the recovery of a threatened or endangered species." Id. at 1071-72 (quoting Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441-42 (5th Cir. 2001) (footnotes and internal quotations omitted).

BLM Fails to Comply with the ESA Concerning Acuña Cactus.

The acuña cactus was listed as endangered in the fall of 2013. Fish & Wildlife Serv. Endangered and Threatened Wildlife and Plants; Endangered Species Status for Echinomastus erectocentrus var. acunensis (Acuña Cactus) and Pediocactus peeblesianus var. fickeiseniae (Fickeisen Plains Cactus) Throughout Their Ranges, 78 Fed. Reg. 60608 (Oct. 1, 2013). The critical habitat designation was made in August 2016. Fish & Wildlife Serv. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Acuña Cactus and the Fickeisen Plains Cactus, 81 Fed. Reg. 55266 (Aug. 18, 2016). Acuña cactus was listed as endangered due to risks from habitat destruction resulting from development that fragments and isolates populations, past mining operations, illegal collection, and perhaps drought-induced mortality. Id.; BA at 22. In the BA for the proposed project, BLM concluded, and FWS concurred, that "[t]he proposed action may affect, but is not likely to adversely affect acuña cactus individuals with or without an MPO." BA at 30.

Although critical habitat for the acuña cactus is not designated within any of the parcels that are subject to this proposal, there are parcels with suitable acuña cactus habitat, meaning that the species could, in fact, be present within the proposed project area. BA at 23. The BA acknowledges that RM-18, CH-1, CH-5 and all five of the Copper Butte parcels contain the same

soil as mapped for the now designated Mineral Mountain critical habitat unit. BA at 23. These parcels are also in the species' elevation sweet spot: 1,198-3,773 feet. BA at 23. With the proper soil and elevation ranges being present on eight parcels that would be exchanged to ASARCO, it is improper for BLM to rely on the 1999 FEIS, in which only one of these parcels, CB-1, was surveyed for the cactus. BA at 23. If any of these eight parcels are home to acuña cactus, this is a critical fact that affects the value and public interest of the proposed exchange. Clearly if any of these selected parcels contain the acuña cactus, the species would benefit by BLM retaining management control as section 7 of the ESA would continue to apply and require agency actions that conserve the species. Even though GIS is a useful tool to help identify features and habitat, it is not an end-all-be-all. To fully ensure that the exchange would not jeopardize the species parcel-specific surveys are necessary.

In making the "may affect, but is not likely to adversely affect" determination, BLM also improperly placed significant emphasis on RM-18 being "identified for buffer use and very little, if any, foreseeable mining uses would occur." BA at 30. This rationalization makes the identical mistake that BLM made in the 1999 FEIS, which is that it must analyze the difference between the no action and action alternatives because there *are* differences in what would happen under an MPO and what would happen where the lands are conveyed out of federal management. If RM-18 remained under federal management that could very likely change operations that may occur on this parcel. For example, BLM and FWS would still have to comply with the ESA (section 7) and would be able to impose mitigation, minimization, and avoidance as part of this process to protect acuña cactus. Consultation and such protections, however, would not occur should RM-18 be conveyed to ASARCO, particularly since no land protections or conservation easements are proposed on the lands that would be privatized.

The shortfalls discussed above in this section must be cured in order for BLM and FWS to properly comply with section 7 of the ESA and, to properly support a conclusion of "may affect, but not likely to adversely affect."

BLM Fails to Comply with the ESA Concerning Gila Chub.

Gila chub's listing as endangered was also accompanied with the designation of critical habitat. Fish & Wildlife Serv. Endangered and Threatened Wildlife and Plants; Listing Gila Chub as Endangered with Critical Habitat, 70 Fed. Reg. 66664 (Nov. 2, 2005). "Gila chub are highly secretive, preferring quiet, deeper waters, especially pools, or remaining near cover including terrestrial vegetation, boulders, and fallen logs." Id. at 66665. The listing concluded that "Gila chub has been eliminated from approximately 85 to 90 percent of its formerly occupied habitat." Id.; BA at 25. Notably, "[a]ll 29 populations [in habitat that had been occupied within 5 years of 2005] are considered small, isolated, and subject to some form of threat" with "nonnative species [] present in 27 of the populations." 70 Fed. Reg. 66664. The listing broke down the occupied habitat into four different categories to reflect the state of the population. Category 3 is "[u]nstable-threatened – Gila chub are rare, have limited distribution, predatory or competitive nonnative species are present, or the habitat is modified or threatened." Id. at 66665-66. Over half of the Gila chub locations provided in the listing were classified as Category 3, unstable-threatened. Id. at 66666-67. Mineral Creek/Devil's Canyon (Gila River) was classified as unstable-threatened due to fire, grazing, and nonnative species. Id. at 66666; BA at 24. BLM's BA and FWS concurrence determined that "the proposed action may affect, but is not likely to adversely affect Gila chub with or without the land exchange." BA at 31.

The primary threats to Gila chub are predation by and competition with nonindigenous organisms, including other fish species, bullfrogs, and crayfish as well as habitat degradation resulting from surface water diversions and groundwater pumping and withdrawals. Id. at 66664; BA at 24. Despite Mineral Creek being designated as unstable-threatened, it "contains one or more of the primary constituent elements [for Gila chub habitat], including perennial pools, the necessary vegetation that provides cover, and adequate water quality."

The analysis for Gila chub is particularly troubling regarding indirect impacts and the heavy discounting of the importance of critical habitat for the species' recovery. BLM's indirect impacts analysis relies on its conclusion that there would not be direct impacts to RM-7, the parcel which contains critical habitat. The reliance on there not being direct impacts to conclude there will not be indirect impacts is not analysis of *indirect* impacts and improperly narrows the area of analysis to merely RM-7 parcel critical habitat instead of the entirety of the Gila chub critical habitat in Mineral Creek that stands to be affected. *See* BA at 30 ("Indirect impacts to Gila chub and its designated critical habitat from mining disturbances are not anticipated because there are no foreseeable mining uses identified for the RM-7 parcel.).

As a result, BLM and FWS have not analyzed indirect impacts such as groundwater drawdown. The DSEIS admits groundwater drawdown impacts on surface water are foreseeable, yet, there is no analysis in the BA—or elsewhere—discussing the indirect effects water drawdown would have on the already unstable-threatened Gila chub critical habitat in RM-7 and the entire stretch of such habitat in Mineral Creek. DSEIS at 43 ("foreseeable open pits could cause a groundwater cone of depression Perennial surface waters (streams, springs, and wetlands) could be impacted (dewatered) because they depend on underlying shallow water table(s).").

The failure to analyze the impacts from groundwater drawdown is also problematic for the cumulative impacts analysis. The DSEIS admits that "[c]umlative impacts to groundwater resources may occur if groundwater pumping for Resolution Copper were to occur in the Mammoth groundwater sub-basin." *E.g.* DSEIS at 43. Despite this concession, there is no analysis of what this means for Gila chub and their critical habitat. Consequently, both BLM's BA and FWS' concurrence are not ESA compliant.

Compounding the deficient impacts analysis is the diminishment of Mineral Creek critical habitat's importance for the recovery of Gila chub. FWS classified Mineral Creek—as well as over half of the designated Gila chub critical habitat—as unstable-threatened. Such vulnerable habitat does not justify agency decisions that further write-off the habitat's importance for the species' recovery. Rather, it requires agencies to be even more protective to ensure further habitat lost is not incurred as such habitat, by definition, is "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). Where, as here, over half of the designated critical habitat is gravely imperiled, classified as unstable-threatened, it is inconsistent with ESA's conservation mandate to minimize the importance of such habitat. *See* BA at 25-26 ("The impoundment, Mineral Creek, and Devil's Canyon contain populations of non-native fishes, including sunfish, that are predatory on Gila chub and which would make it unlikely that a population of Gila chub is currently present in Mineral Creek on parcel RM-7.").

Furthermore, by writing off the critical habitat on RM-7, the BA and FWS' concurrence are inconsistent with the 2005 Final Rule that established the critical habitat. The de facto conclusion

the agencies reach here is that this habitat is *not* essential to Gila chub conservation even though the reasons they point to are the very ones the 2005 Final Rule acknowledged are responsible for the unstable-threatened classification. This appears to be an end-run around the regulations, rules, and procedures that apply to revising a final rule for critical habitat. To reach this conclusion, FWS needs to fully comply with the rules and regulations of the ESA and the Administrative Procedure Act and not through a BA and concurrence letter.

CONCLUSION

Thank you for the opportunity to submit these comments on behalf of the Center for Biological Diversity (the Center), Sierra Club Grand Canyon Chapter (Sierra Club), WildEarth Guardians, and the Arizona Mining Reform Coalition. Please include the undersigned in all public notices, alerts, etc. regarding these issues. Please include the below-named representatives of these groups as well.

Sincerely,

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December 15, 2017

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Re: Freedom of Information Act Request, Ray Land Exchange

Dear BLM Officials:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"), from the Center for Biological Diversity, Arizona Mining Reform Coalition, and the Sierra Club, Grand Canyon Chapter (collectively "Conservation Groups" or "Groups"), by and through their undersigned attorney.

The Center for Biological Diversity ("the Center") is a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process. The Center is actively involved in endangered species and habitat protection issues nationwide, and has more than 61,000 members throughout the United States and the world.

Arizona Mining Reform Coalition ("AMRC" or "Coalition") is a non-profit corporation that works in Arizona to improve state and federal laws, rules, and regulations governing hard rock mining to protect communities and the environment. AMRC works to hold mining operations to the highest environmental and social standards to provide for the long term environmental, cultural, and economic health of Arizona. Group members of the Coalition include: Apache – Stronghold, Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Dragoon Conservation Alliance, Earthworks, Environment Arizona, Groundwater Awareness League, Maricopa Audubon Society, Patagonia Area Resource Alliance, Save the Scenic Santa Ritas, Grand Canyon Chapter of the Sierra Club, Sky Island Alliance, Spirit of the Mountain Runners, Tucson Audubon Society, and the Valley Unitarian Universalist Congregation.

The Sierra Club is one of the nation's oldest grassroots organizations, whose mission is "to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments." Sierra Club has more than 2.7 million members and supporters with 60,000 in Arizona as part of the Grand Canyon (Arizona) Chapter. Its members have long been committed to protecting and enjoying the Coronado National Forest and have a significant interest in the proposed Rosemont Mine and related activities.

Both the Center and the Sierra Club were plaintiffs in *Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633 (9th Cir. 2010), the original lawsuit challenging the initial Ray Land Exchange, and the decision which BLM is purportedly responding to in the recently issued Draft Supplemental EIS/Plan Amendment for the Ray Land Exchange ("DSEIS"), https://eplanning.blm.gov/epl-front-office/projects/nepa/82268/125222/152668/Ray_Land_Exchange-Plan_Amendment_Draft_Supplemental_EIS_11-10-2017.pdf

REQUESTED RECORDS

The Conservation Groups request the following records from the Bureau of Land Management, Arizona State Office, Tucson Field Office, and Gila District Office (collectively "BLM"):

> **All records mentioning, including, and/or referencing the appraisals and mineral potential reports, including the appraisals and mineral potential reports themselves, for the Selected Lands and Offered Lands associated with the proposed Ray Land Exchange. These appraisals and reports are referenced on pp. 9-10 of the recently released DSEIS.**[1]

This includes, but is not limited to, the documents referenced in the DSEIS on pp. 9-10 as BLM1998a, BLM 2014a, BLM 1997, BLM 1998b, and BLM 2012b.

For this request, the term "all records" refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well

[1] This FOIA request does not include the previous Draft and Final EISs done for the Ray Exchange, nor the new DSEIS, as those documents are in the possession of the Conservation Groups.

as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

If a record responsive to this request is publicly available on the internet, and in lieu of emailing such record to the undersigned, BLM may provide, via email to the undersigned and within the time requirements of FOIA, an accurate and current working website link to such record.

Because this request includes specific named BLM-produced documents, and documents specifically referenced in the DSEIS (i.e., BLM1998a, 2014a, BLM 1997, BLM 1998b, and BLM 2012b) we expect that the time to produce these documents will be minimal. Other documents that may be responsive to this request, which may entail additional search time, may be produced in a phased approach, subject to the time requirements of FOIA.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

Should you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:
1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material.

Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation. If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and electronically transmit the non-exempt portions of such records to my attention at the address above within the statutory time limit. 5 U.S.C. § 552(b).

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."). "Readily accessible" means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B).

We ask that you please provide all records in an electronic format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or Excel spreadsheet; or (2) for files that are in .PDF format, without any "portfolios" or "embedded files." Portfolios and embedded files within files are not readily accessible. *Please do not provide the records in a single, or "batched," .PDF file.* We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Conservation Groups access to government records without the payment of fees. Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ... ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. The Conservation Groups Qualify for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). BLM FOIA regulations at 43 C.F.R. § 2.45(a)(1) – (2) establish the same standard.

Thus, BLM must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 43 C.F.R. § 2.48(a)(1)-(4). As shown below, the Conservation Groups meet each of these factors.

A. The Subject of This Request Concerns "The Operations and Activities of the Government."

The subject matter of this request concerns the operations and activities of BLM related to the appraisals and mineral potential reports that have been, or will be, utilized and/or relied upon by the BLM in reviewing and potentially approving the proposed Ray Land Exchange. This FOIA will provide the Conservation Groups and the public with crucial insight into government activities pertaining to the Exchange. It is clear that federal agency management of public lands and minerals is a specific and identifiable activity of the government, in this case the executive branch agency, BLM. *Judicial Watch*, 326 F.3d at 1313 ("[R]easonable specificity is all that FOIA requires with regard to this factor") (internal quotations omitted). Thus, the Conservation Groups meet this factor.

B. Disclosure is "Likely to Contribute" to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public. Disclosure of the requested records will allow the Conservation Groups to convey to the public information about the proposed Exchange. Once the information is made available, the Groups will analyze it and present it to their members and supporters totaling over 1 million people and the general public in a manner that will meaningfully enhance the public's understanding of this topic. Thus, the requested records are likely to contribute to an understanding of BLM operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons' Understanding of the Exchange.

The requested records will contribute to public understanding of federal management of public lands and minerals, and if that oversight is consistent with BLM's mission "to sustain the health, diversity, and productivity of America's public lands for the multiple use and enjoyment of present and future generations." As noted in the DSEIS, all exchanges under the Federal Lands Policy and Management Act ("FLPMA")(Section 206(a)) must serve the public interest. As explained above, the records will contribute to public understanding of this topic.

Activities of the federal government generally, and specifically the exchanging of valuable public lands, are areas of interest to a reasonably broad segment of the public. The Groups will use the information it obtains from the disclosed records to educate the public at large about the Exchange. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how … management strategies employed by the BLM may adversely affect the environment.").

Through the Groups' synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying "public" to require a sufficient "breadth of benefit" beyond the requester's own interests); *Cmty. Legal Servs. v. Dep't of Hous. & Urban Dev*., 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester's "work by its nature is unlikely to reach a very general audience," "there is a segment of the public that is interested in its work").

Indeed, the public does not currently have an ability to easily evaluate the requested records, that are not currently in the public domain – *e.g.*, on the BLM's website for the Exchange, https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=122769

See Cmty. Legal Servs. v. HUD, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations… ."

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of the Exchange. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about federal management of public lands and minerals. *See* BLM, *Our Mission*, https://www.blm.gov/about/our-mission (last visited Dec. 14, 2017). In this connection, it is immaterial whether any portion of the Center's request may currently be in the public domain because the Groups request considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Groups are not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of government activities pertaining to the Exchange as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about the values of the Selected and Offered Lands. The records are also certain to shed light on BLM's compliance with its own mission and FLPMA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Groups meet this factor as well.

II. The Groups Have a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA. In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's

understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on the Trump's administration's attack on public lands utilizing information obtained by the Center from federal agencies, including BLM. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.5 million members and supporters. Three times a year, the Center sends printed newsletters to more than 61,443 members. More than 259,900 people have "liked" the Center on Facebook, and there are regular postings regarding protection of public lands and endangered species. The Center also regularly tweets to more than 55,000 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

The same is true for the AMRC and Sierra Club. For example, AMRC's informational publications supply information not only to the membership of each member of the Coalition, but also to the memberships of many other conservation organizations, locally as well as nationally. The Coalition's informational publications continue to contribute information to public media outlets, as well. Members of the Coalition regularly provide e-mail alerts, which is sent to thousands of people, and the web pages of the groups, which is accessed several thousand times each month. Information concerning the USFS's management of public lands and protection of species will likely be disseminated through all of these means. *See Forest Guardians v. DOI*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities."). *See also Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1038, 1040 (D.Idaho, 2004) (court used evidence of past analysis of complicated grazing management strategies to grant fee waiver associated with request for similar information). These websites for the Sierra Club and the Coalition and its members include: http://www.azminingreform.org/, http://www.sierraclub.org/arizona, http://www.biologicaldiversity.org/.

Public oversight and enhanced understanding of BLM's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Groups need not show how they intend to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Groups to show how they distribute information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Groups.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Groups' role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.5 million

members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

Similarly, the AMRC/Coalition, and Sierra Club-Grand Canyon Chapter, are non-profit public interest organizations that have no commercial interest generally, and specifically have no commercial interest in the requested information. *See, generally*, the above cited websites. Application of the statute to this request compels the conclusion that a fee waiver is appropriate. Congress intended that FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation*, 835 F.2d at 1284 (*quoting* 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)).[2]

IV. Conclusion

For all of the foregoing reasons, the Groups qualify for a full fee waiver. We hope that BLM will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

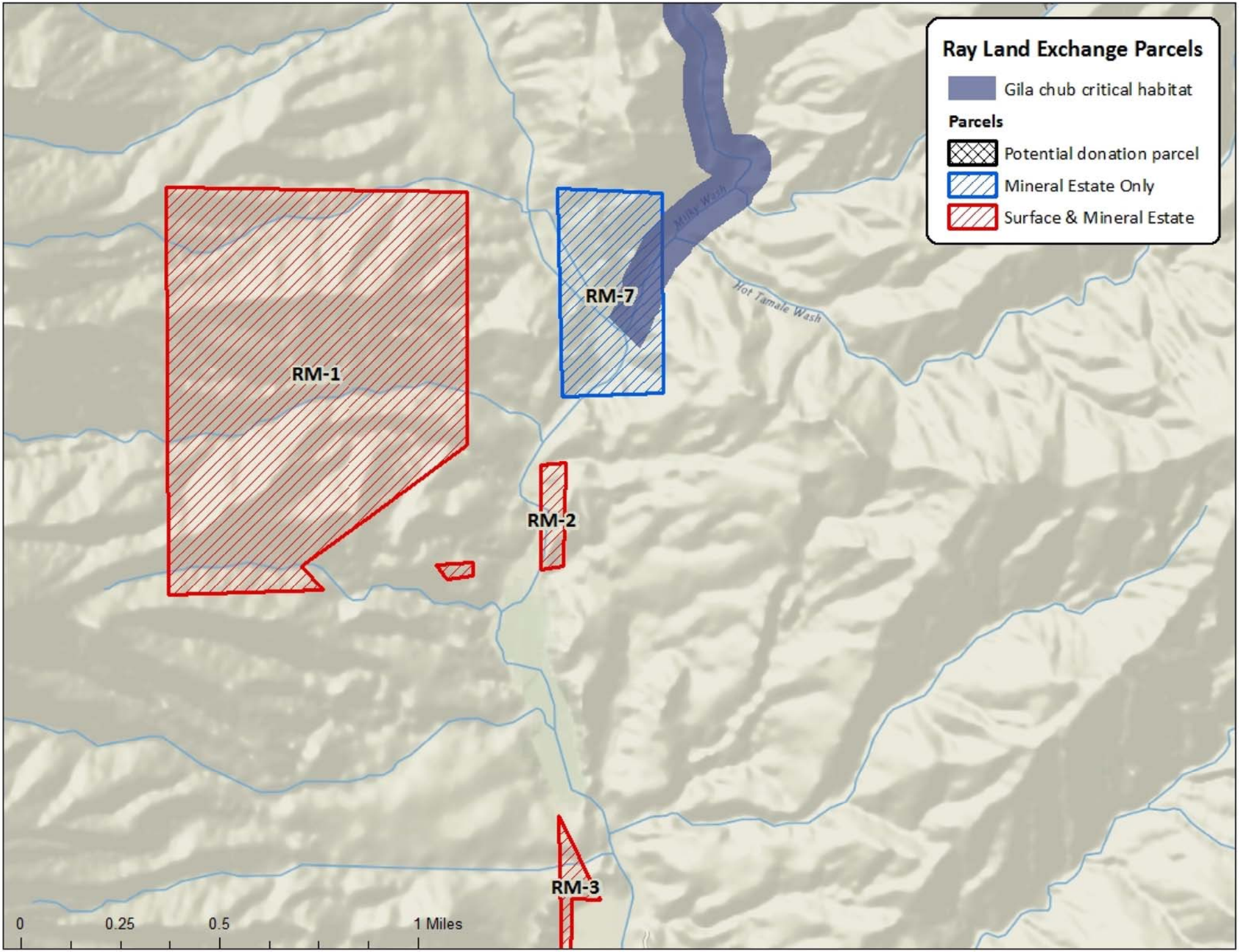
To avoid duplication, BLM may coordinate and respond via the above-named FOIA officers. All records and any related correspondence should be sent to my attention at my email address (wmap@igc.org). If you have any questions, please contact me at my email address.

Sincerely,

Roger Flynn
Director and Managing Attorney
Western Mining Action Project
P.O. Box 349
Lyons, CO 80540
wmap@igc.org

Attorney for the Requesting Conservation Groups

[2] This request is submitted by the attorney for the Groups, from the Western Mining Action Project (WMAP), so any question regarding the commercial interest of WMAP is irrelevant. WMAP is not the requester itself. In any event, WMAP is a 501(c)(3) non-profit organization, with no commercial interest in the requested information.


Ray Land Exchange Parcels
Gila chub critical habitat
Parcels
Potential donation parcel
Mineral Estate Only
Surface & Mineral Estate
RM-1
RM-2
RM-3
RM-7
Milky Wash
Hot Tamale Wash
0
0.25
0.5
1 Miles