

Fundamentals of the ESA



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Purposes of the ESA

16 U.S.C. § 1531(b)

“[T]o provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species”

Section 4 – Listing

16 U.S.C. § 1533

ESA's protections flow from “listing.”

- Endangered — “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).
- Threatened—“likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

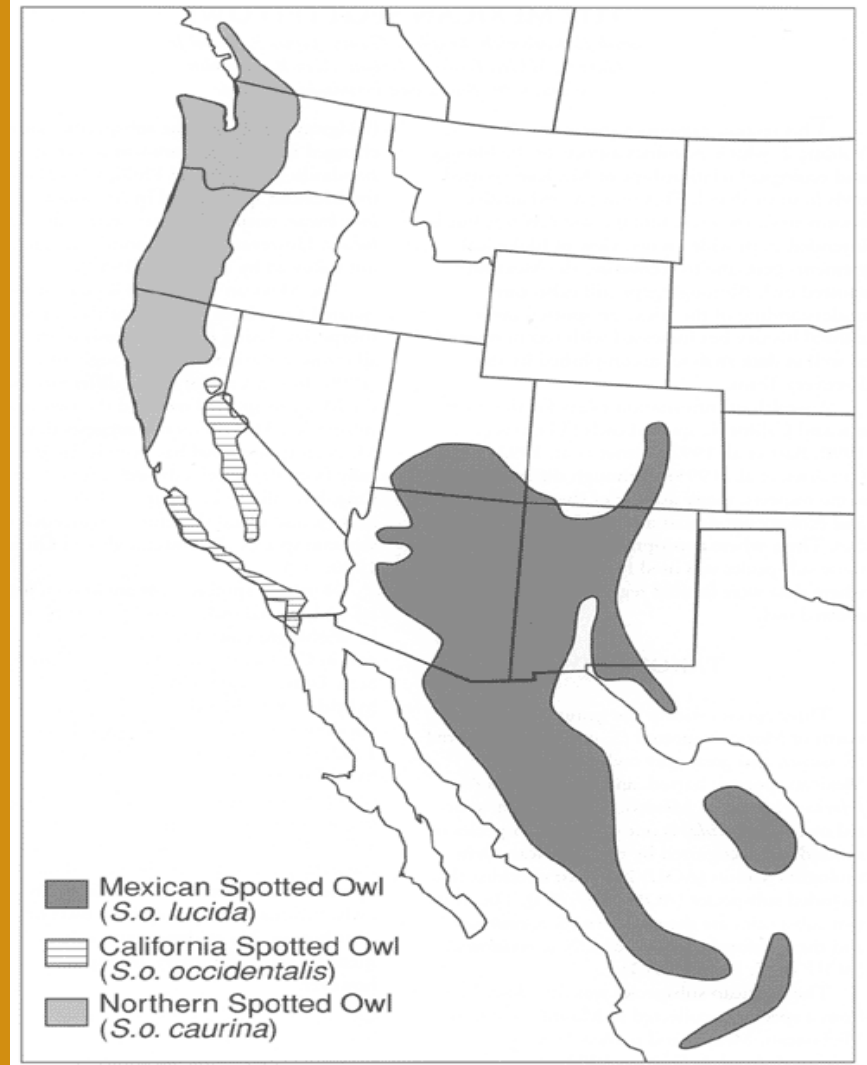
Section 4 – Listing

Critical habitat—“specific areas within the geographical area occupied by the species . . . [which are] essential to the conservation of the species and . . . which may require special management considerations or protection.”
16 U.S.C. § 1532(5).

Mexican Spotted Owl (*Strix occidentalis lucida*)



Photo Credit – Center for Biological Diversity



Credit – Robin Miller

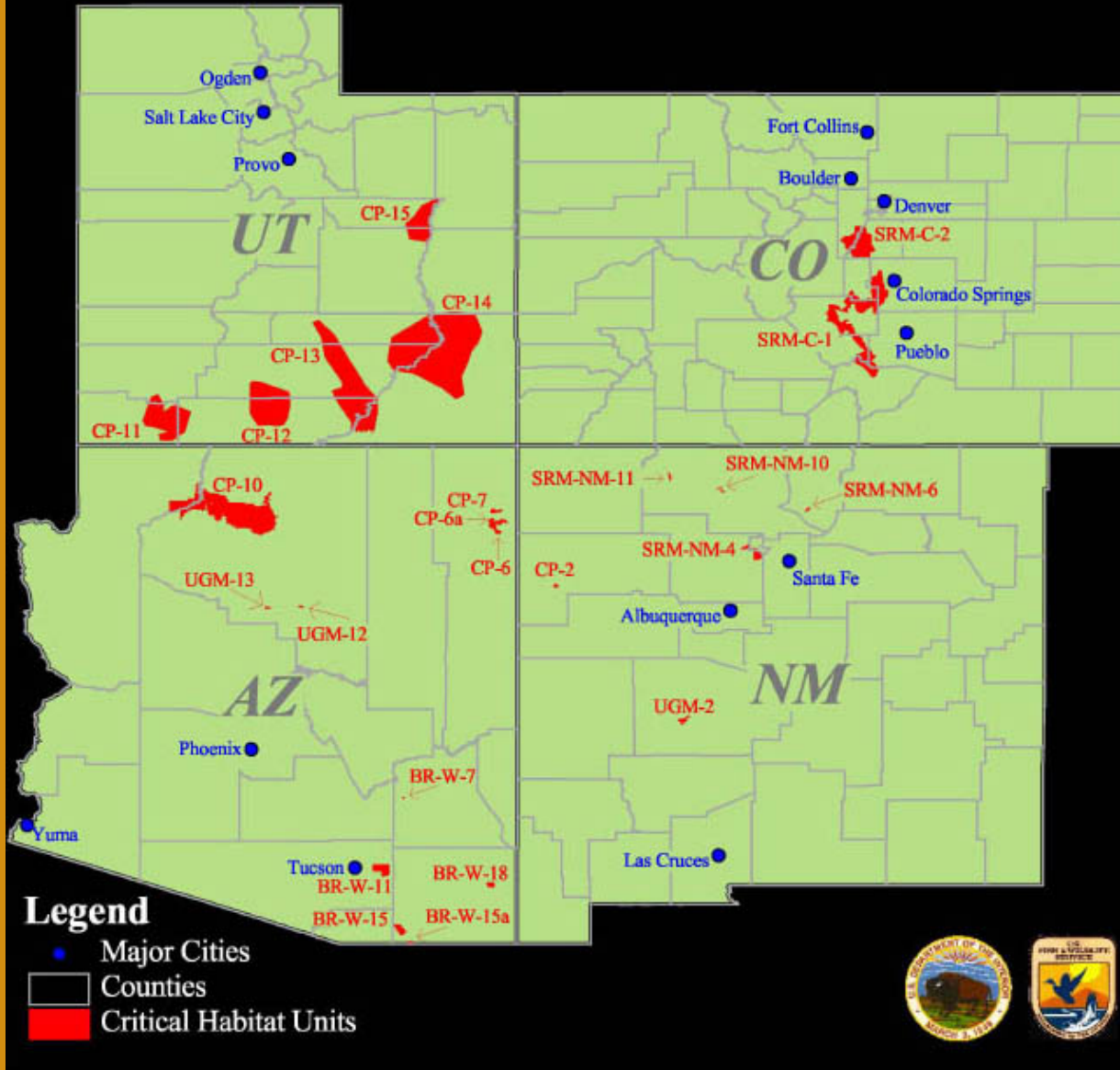
Mexican Spotted Owl – Listing History

- 1989—CBD submits petition to list Mexican spotted owl as endangered
- March 16, 1993—FWS lists the owl as threatened
- June 25, 1993—De-listing petition from Apache County, AZ
- Aug. 16, 1993—De-listing petition from Coalition of Arizona/New Mexico Counties for Stable Economic Growth

- Sept. 23, 1993—FWS rejects Apache County de-listing petition
- 1994—FWS rejects Coalition de-listing petition
- 1994—CBD sues for critical habitat designation
- 1995—FWS designates 4.6 million acres of national forest as critical habitat
- 1996—Timber industry brings NEPA challenge to critical habitat designation

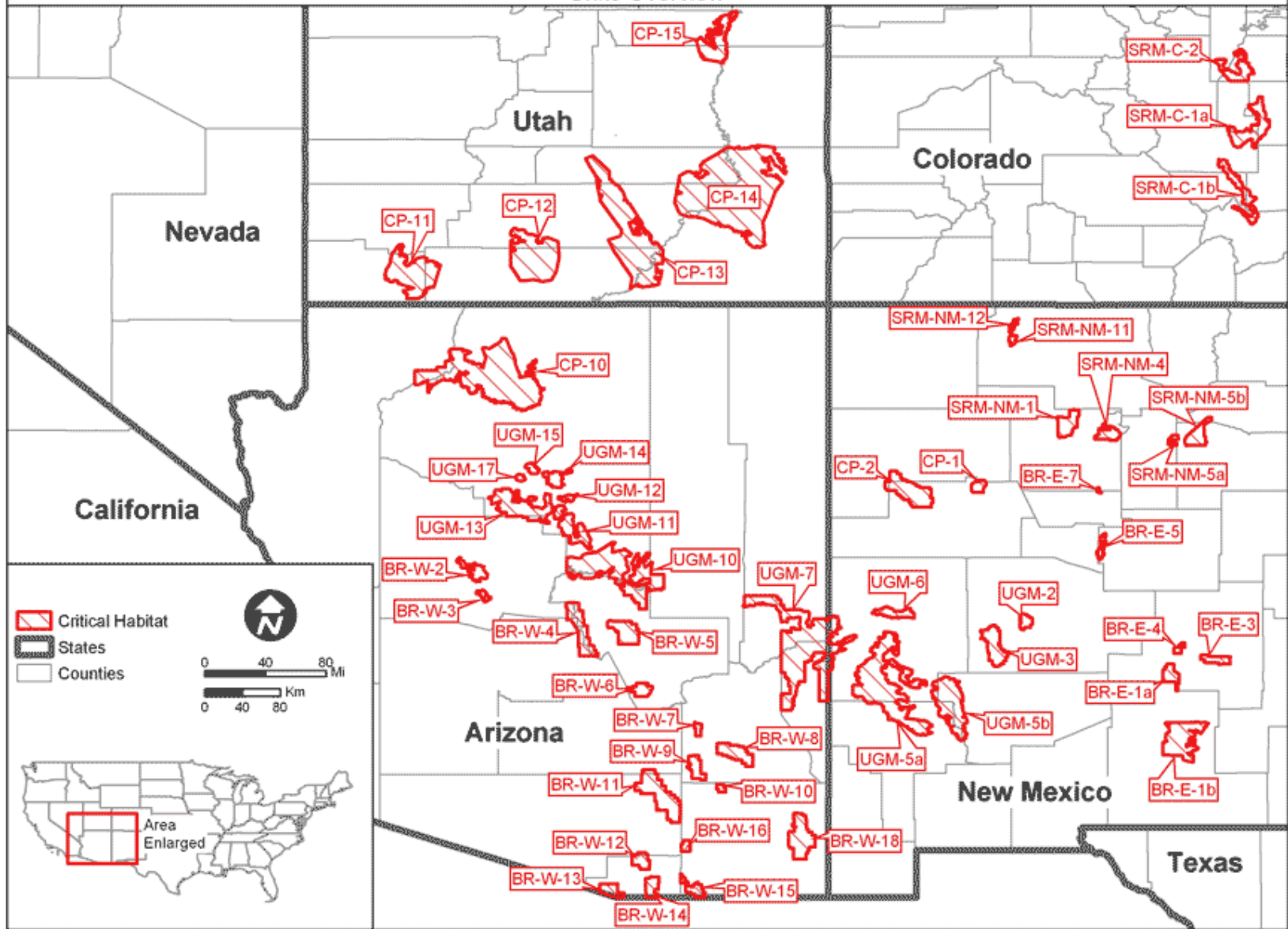
- 1997—FWS withdraws critical habitat designation
- 1999—CBD sues to have critical habitat re-designated
- 2000—Judge orders re-designation of critical habitat
- Feb. 2001—FWS designates critical habitat but excludes all national forest lands
- Aug. 2001—CBD filed suit challenging FWS's omission of the “best habitat” for the owl

Critical Habitat for the Mexican Spotted Owl (*Strix occidentalis lucida*)



- 2003—Judge orders FWS to redesignate critical habitat
- Aug. 2004—FWS expands critical habitat to 8.6 million acres of federal lands in AZ, NM, CO, and UT
- Arizona Cattle Growers Association challenges 2004 designation
- 2008—District judge upholds 2004 designation
- 2010—9th Circuit upholds 2004 designation

General Locations of Critical Habitat for the Mexican Spotted Owl Units Overview



Section 4 – Recovery Plans

16 U.S.C. § 1533(f)

- Non-enforceable guidelines for recovery
- Must include “to the maximum extent practicable”:
 - (i) Site-specific actions
 - (ii) Objective, measurable criteria for delisting
 - (iii) Time and cost estimates

Recovery Plan
for the
Mexican Spotted Owl
(*Strix occidentalis lucida*)

Plan de Recuperacion
del Tecolote Moteado Mexicano



December 1995



**DRAFT RECOVERY PLAN FOR THE
MEXICAN SPOTTED OWL,
FIRST REVISION
(*Strix occidentalis lucida*)**



Original Approval: October 16, 1995

Southwest Region
U.S. Fish and Wildlife Service
Albuquerque, New Mexico

June 2011

Approved: DRAFT Date: _____
Regional Director, Region 2
U.S. Fish and Wildlife Service

Approved: DRAFT Date: _____
Regional Director, Region 6
U.S. Fish and Wildlife Service

Section 9 – The “Take” Prohibition

16 U.S.C. § 1538(a)(1)(B), (C)

- Prohibits the “take” of any endangered species by “any person”
- Extended by regulation to most threatened species
- “Any person” includes private parties and government agencies
- Does not apply to listed plants, except on Federal lands

16 U.S.C. § 1632(19)

“The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”

50 C.F.R. § 17.3

“Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”

Section 7(a)(1) – Duty to Conserve

16 U.S.C. § 1536(a)(1)

- Imposes an affirmative duty to conserve endangered and threatened species on all Federal agencies
- Agencies have discretion as to how to fulfill section 7(a)(1) obligations.
- Enforcement limited to cases of “total inaction.”

Section 7(a)(2) – Consultation

16 U.S.C. § 1536(a)(2)

Agencies must consult with FWS or NMFS to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”

If the project “may affect” listed species or critical habitat, consult. 50 C.F.R. § 402.14.

“Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

Colorado Env'tl. Coal. (D. Colo. Oct. 18, 2011)

“Highly unlikely” effects trigger consultation

16 U.S.C. § 1536(a)(2)

“In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”



Decision Memo

Arizona Minerals Inc. –
 Hardshell Mineral Exploration Project
 USDA Forest Service
 Sierra Vista Ranger District – Coronado National Forest
 Santa Cruz County, Arizona
 Township 23 South, Range 16 East, Section 4

The Coronado National Forest (CNF) received a request from Arizona Minerals Inc. a.k.a. Wildcat Silver (Proponent) for approval of a Plan of Operations (PoO) to implement a minerals exploration program on National Forest land at their Hardshell Mine project in the Patagonia Mountains. The project area is located within the Sierra Vista Ranger District in Santa Cruz County, Arizona, about 6 miles southeast of the town of Patagonia, Arizona.

Decision

It is my decision to approve mineral exploration, associated activities, and reclamation practices described in the Plan of Operations (PoO) dated 03/10/2011 submitted by Arizona Minerals Inc. for the Hardshell Project. The PoO and maps are available on the Coronado National Forest website. The exploration project will be a continuation of the currently ongoing drilling activity on their adjacent private land, which has been operating since the latter part of 2010 in the same manner as this current project described in the PoO. Drilling operations will be completed in less than 11 months from the date of this decision.

Access:

Access to the exploration area is from the town of Patagonia by way of Harshaw Road, a county road, also identified as National Forest System roads 49 and 58. Access within the project area is via Forest Roads (FR) 5521 and 4687 which run in and out of both the Proponent's private land and on CNF land (see attached map). As described in the PoO approximately 3,900 feet of temporary low standard access road will be constructed on CNF land to provide vehicle access to the drill sites. The proponent may also conduct maintenance on approximately 7,500 feet of Forest System roads FR 5521 and 4687 within the project area.

Drilling:

Drilling operations on CNF land could be ongoing around the clock, in 12-hour shifts, seven days per week and could continue for up to 300 days. The drilling operations will be conducted using as many as four drill rigs, to complete up to fifteen holes on CNF land to maximum depths of 2500-ft deep with a maximum 8-inch surface collar diameter. Each drill site or pad will be approximately 40 ft x 50 ft in size, including a drilling mud pit or sump having the dimensions of up to 10 ft x 15 ft x 8 ft deep. A



Image Credit – U.S. Forest Service

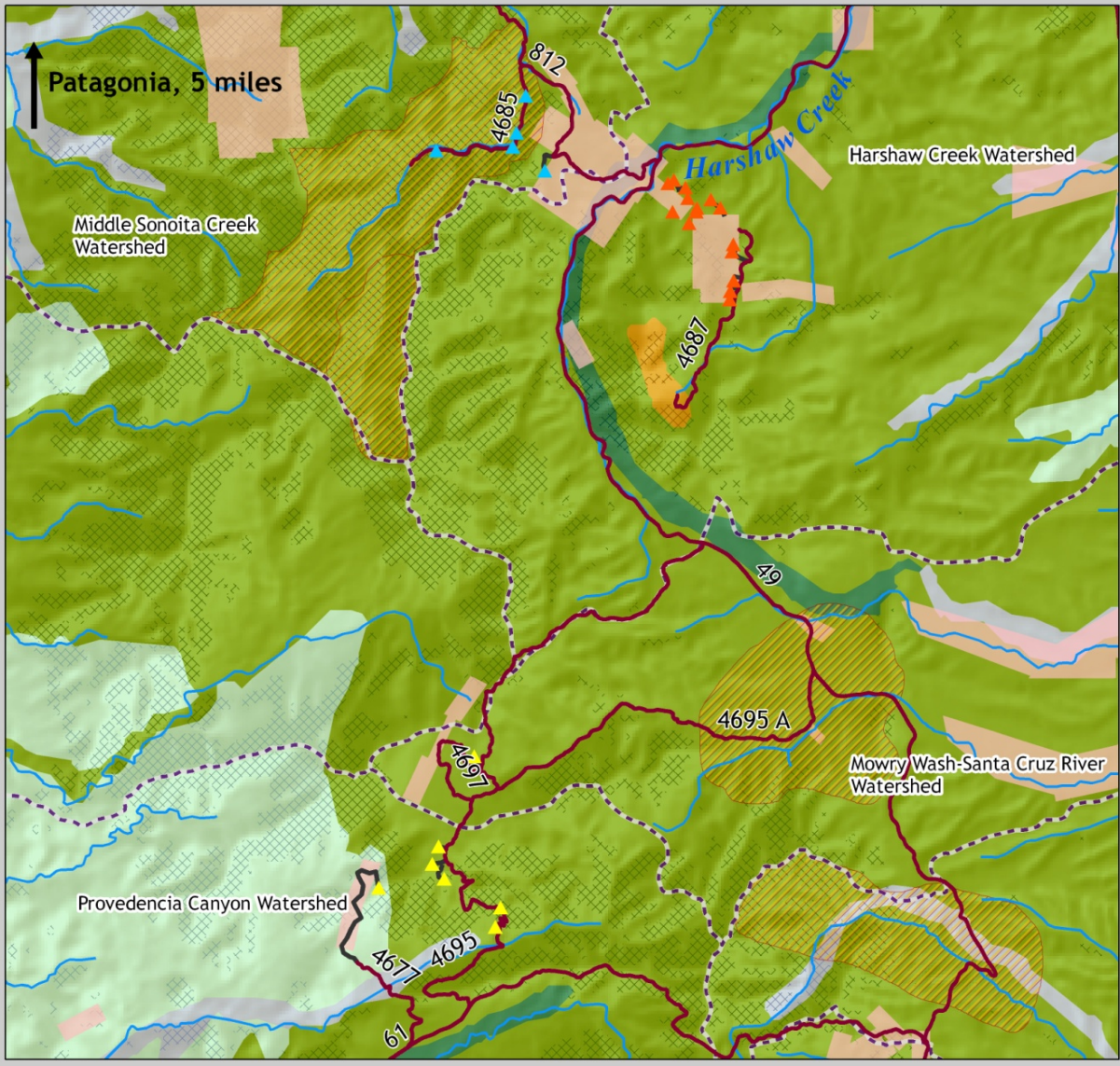


Photo Credit – Glen E. Goodwin



Photo Credit – PARA Watchdogs

Mineral Exploration in the Patagonia Mountains



- Affected FS Roads
 - Proposed New Roads
 - Watershed Boundaries
 - Mexican Spotted Owl Protected Activity Center
 - Private In-holdings
- Proposed Drill Sites**
- Sunnyside Exploration
 - Hardshell Mine Exploration
 - Oz Exploration
- FS Vegetation**
- Broadleaf Woodland (Evergreen)
 - Chaparral
 - Deciduous Riparian
 - Desert Grassland
 - Higher Ecosystem Extensions

Cartography by Louise Misztal
Sky Island Alliance, 12/9/2011

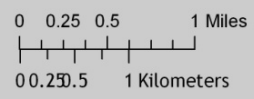
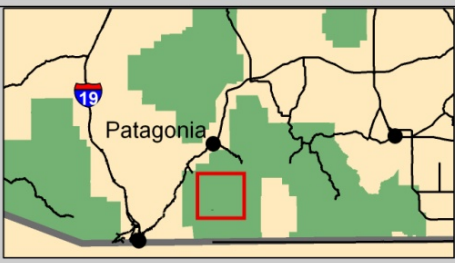




Photo Credit – Donnie Fenn

50 C.F.R. § 402.13 – Informal consultation

- All discussions, correspondence, etc., between agencies
- Formal consultation is not required if
 - (1) Not likely to adversely affect listed species
 - (2) Written concurrence from FWS or NMFS
- Formal consultation is required if agency determines the action is likely to adversely effect listed species

50 C.F.R. § 402.14 – Formal consultation

- Initiated by the Federal agency
- FWS/NMFS provides a “biological opinion”
- Reasonable and prudent alternatives to prevent jeopardy/adverse modification
- Direct, indirect, and cumulative effects
- 7(a)(1) conservation recommendations
- Incidental take statement with reasonable and prudent measures to mitigate adverse effects

50 C.F.R. § 402.12 – Biological Assessment

Hardshell Exploration Drilling Biological Analysis

4

Mexican Spotted Owl and Designated Critical Habitat

Mexican spotted owl (MSO) nest and roost primarily in close-canopy forest or rocky canyons. A wider variety of forest conditions are used for foraging than used for roosting. In southern Arizona, oak woodlands are commonly used. In addition to these areas, MSO inhabit a variety of canyons. The one common character among these canyons is steep to vertical rock walls.

Mexican spotted owl critical habitat (U.S. Fish and Wildlife Service 2004) is limited to areas that meet the definition of protected and restricted habitat, as described in the Recovery Plan.

Protected habitat includes all known owl sites and all areas within mixed conifer or pine-oak habitat with slopes greater than 40% where timber harvest has not occurred in the past 20 years. Restricted habitat includes mixed conifer forest, pine-oak forest, and riparian areas outside of protected habitat. Protected Activity Centers (PAC) have been established at all known MSO sites on the Forest.

The zone of noise impacts from the proposed drilling and road construction/maintenance activity, defined as the limit where noise from heavy equipment operation is indistinguishable from baseline noise, would be 6,400 feet. This calculation is based on the highest possible equipment noise (99 dB) and the standard noise attenuation rate for "soft site" conditions (unpacked earth) of 7.5 dB per doubling of distance (US DOT 1980). Topography, vegetation and atmospheric conditions between the noise source and the receptor can reduce noise levels but these noise reduction factors can vary greatly and are often impossible to quantify. Therefore, we did not take these factors into account in this analysis, which likely results in predicted noise levels that are higher than actual noise levels.

The nearest MSO PAC, where the species is most likely to be found, to the project area is approximately 2 miles away. As such, the PAC would not be within the zone of noise impacts resulting from heavy equipment use. Consequently, the proposed action would have no effect to MSO.

Although the project area is within designated critical habitat, the constituent elements of critical habitat are lacking. Within mixed-conifer, pine-oak, and riparian forest types these elements include the following:

- A range of tree species, including mixed conifer, pine-oak, and riparian forest types, composed of different tree sizes reflecting different ages of trees, 30% to 45% of which are large trees (dbh \geq 12")
- A shade canopy created by the tree branches covering 40% or more of the ground
- Large (dbh \geq 12") dead trees (snags)

Canopy cover within the project area is generally <40%, trees are mostly small diameter (\leq 10" dbh), and there are few snags $>$ 10" dbh. Habitat within the project area is generally unsuitable for MOS. The proposed action would have no effect to designated critical habitat.

FS concludes "no effect" for Mexican spotted owls

- 2 miles from PAC
- Constituent elements of critical habitat not present

FS's "No Effect" Determination

"No effect" determination was erroneous
because

(a) PAC was within noise radius of the drilling

(b) Constituent elements of critical habitat
present

(c) FS did not consider effects of night-time
lighting

The Section 7 Claims

- By relying on its erroneous “no effect” determination:
 1. FS failed to consult with the FWS in violation of section 7(a)(2).
 2. FS failed to insure against jeopardy and adverse modification in violation of section 7(a)(2).
- FS failed to rely on the best scientific and commercial data available in violation of section 7(a)(2).

Section 11 – Initiating a Citizen Suit

- 16 U.S.C. § 1540(g)—authorizes citizen suits to enjoin violations
- Notice—60 days notice to the FS is required
- Authorizes an award of attorneys' fees and costs
- Standing
- Remedies

Preliminary Injunctions

The common law test:

1. Likely to succeed on the merits
2. Likely to suffer irreparable harm
3. Balance of equities tips in favor of an injunction
4. Injunction is in the public interest

Winter v. NRDC, 555 U.S. 7 (2008)

Section 10 – Non-Federal Action

16 U.S.C. § 1539

- Incidental take permit for private parties
- Requires a habitat conservation plan
- Generally much more time intensive than Section 7

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