

**A SUBMISSION PURSUANT TO
ARTICLE 14 OF THE NORTH AMERICAN
AGREEMENT ON ENVIRONMENTAL COOPERATION**

**SUBMITTED TO:
THE SECRETARIAT OF
THE COMMISSION FOR ENVIRONMENTAL COOPERATION**

**BY:
EARTHLAW**

**ON BEHALF OF:
THE SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY
and
DR. ROBIN SILVER**

I. INTRODUCTION

Pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), the Southwest Center for Biological Diversity and Dr. Robin Silver hereby present the following submission to the Secretariat of the Commission for Environmental Cooperation (CEC). The Submitters seek a finding that the United States is failing to effectively enforce its National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d, with respect to the United States Army's operation of Fort Huachuca, Arizona.

II. STATEMENT OF FACTS

A. The Rare San Pedro Riparian Ecosystem

The San Pedro River is Arizona's last free-flowing river and home to one of the Southwest's most precious and rare ecosystem. The River originates in the foothills of the Sierra San Jose, the Sierra Los Ajos, and the Sierra Mariquitos in the northern part of Sonora, Mexico. It flows north for 140 miles to its confluence with Arizona's Gila River. The San Pedro River is located within the 3,700 square-mile San Pedro River basin. The San Pedro basin encompasses a rich streamside habitat, surrounding desert and grassland plains, and rugged mountains that form the perimeter of the basin. The Upper San Pedro basin, located in southeastern Arizona, is the watershed for the San Pedro River and its major tributary, the Babocomari River. **See** Frank Putman, Kim Mitchell & Greg Bushner, Arizona Department of Water Resources, **Water Resources of the Upper San Pedro Basin, Arizona**, 1-3 (1988) (Exhibit 1); **see also** Map of San Pedro River (Exhibit 2).

The San Pedro River System contains the most extensive surviving expanse of the cottonwood/willow gallery or broadleaf riparian forest, one of the rarest forest types in North

America. This endangered forest serves as a significant corridor for migratory birds that winter in Mexico and breed during the summer months in the United States and Canada.

The San Pedro valley has a wide diversity of animals. Four hundred-eighty-nine species of birds, mammals, fish, amphibians and reptiles reside in or near the San Pedro. Twenty-four of the species are so rare they need federal or state protection. Rare and imperiled species include the southwest willow flycatcher, yellow-billed cuckoo, green kingfisher, gray hawk, northern beardless tyrannulet, Sanborne's long-nosed bat, Mexican long-tongued bat, Gila chub, desert sucker, longfin dace, spikedace, and loach minnow. The San Pedro has retained about 75% of its native flora -- a very high proportion for the Southwestern United States.

In 1988, the United States established the San Pedro Riparian National Conservation Area to protect the riparian habitat, and the wildlife, scientific, educational and recreational resources of the San Pedro ecosystem. Arizona-Idaho Conservation Act, Pub. L. No. 100-696, Title I, 102 Stat. 4571 (1988). In the words of the United States Senate Report on the bill that created the Conservation Area:

The river is frequented by an outstanding diversity of wildlife. It serves as a corridor for the entrance of many Mexican species into the area, including raptors such as the gray hawk, Harris hawk, zone-tailed hawk, black hawk, and aplomado falcon, which are only rarely seen in the United States.

S. Rep. No. 525, 100th Cong. at 2 (1988).

In August of 1996, the American Bird Conservancy designated the Conservation Area as a Globally Important Bird Area, "to recognize the River's importance to millions of migrating neotropical birds as well as many rare breeding birds." Bureau of Land Management Announcement, at 1 (Exhibit 3). The San Pedro's selection was featured at the North American Free Trade Agreement conference in Montreal, Canada, on August 1, 1996. This is the first international designation of its kind in the United States. The United States Bureau of Land Management commented that "[c]hoosing the San Pedro [as a Globally Important Bird Area] illustrates the vital link that the river provides in the migration of birds between their breeding grounds in Canada and Alaska and their wintering habitat in Mexico and South America." **Id.**; **see also** CEC Press Release, *Environment ministers identify first North American important bird areas*, (Exhibit 4).

B.Fort Huachuca's Groundwater Pumping Threatens the San Pedro River

Fort Huachuca is a 73,344 acre military base in Cochise County, Arizona. Most of the population in the area surrounding Fort Huachuca lives in the adjacent city of Sierra Vista, the largest city in the San Pedro basin. Military personnel assigned to Fort Huachuca along with their dependents account for almost half of the area's population.

In 1988, Congress directed the United States Army to transfer its United States Information System Command (USAISC) unit from Fort Huachuca to Fort Devens, Massachusetts, and to transfer a United States military intelligence school from Fort Devens to Fort Huachuca. The Defense Base Closure and Realignment Act of 1990 (BRAC 90) amended the 1988 directive allowing the USAISC unit to remain in Fort Huachuca, but moving the military intelligence school to Fort Huachuca. Accordingly, the Army has significantly increased the number of people assigned to Fort Huachuca. This expansion also resulted in a corresponding increase in off-base population. As the population continues to increase, the water demand upon the limited water resources of the Upper San Pedro basin will increase. The Department of the Army, in its' analysis concerning Fort Huachuca for the BRAC Commission, "did not involve the increasing effects of expanding Fort Huachuca on the pumping of groundwater from the San Pedro aquifer." **Declaration of John B. Nerger**, 2 (October 25, 1996) (Exhibit 23).

The Upper San Pedro basin is divided into two smaller basins: the Sierra Vista sub-basin and the Allen Flats sub-basin. **Supra**, Putman, Mitchell & Bushner, at 2,3 (Exhibit 1). Groundwater from the regional aquifer of the Sierra Vista sub-basin is essentially the sole water supply for the cities of Sierra Vista, Tombstone, Palominas, Benson, Hereford, Bisbee and Fort Huachuca. The groundwater system and the San Pedro River are part of the same hydrologic system. **See** Robert J. Glennon and Thomas Maddock, III, *In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surface Water*, 36 Arizona Law Review 567, 574 (Explaining general principles of hydrogeology of the San Pedro River Basin system) (Exhibit 5).

Increased pumping from the aquifer that sustains the River threatens to dewater the San Pedro and destroy the unique ecosystem that is dependent on it. Because a hydrologic connection exists between the Sierra Vista sub-basin and the San Pedro River, groundwater withdrawals impact stream flows. As the stream level decreases, the riparian nature of the area becomes threatened. A riparian ecosystem requires a sufficient stream level. Studies show that without intervention and regulation, unfettered groundwater withdrawal will compromise the entire San Pedro Riparian Area. Peter Schwartzman, Masters Thesis, University of Arizona, **A Hydrogeologic Resource Assessment of the Lower Babocomari Watershed, Arizona** , at 174-5 (1990) (Exhibit 6). As the United States Council on Environmental Quality stated in 1981:

[H]uman overdraft of groundwater is now the major desertification force at work in this area ... The area faces potentially severe water supply problems. The overdraft situation could effectively exhaust the nearby aquifer by the year 2020 ... The upper San Pedro River could run dry - just as the Santa Cruz did - in the years ahead if massive groundwater overdrafting continues.

David Sheridan, Council on Environmental Quality, **Desertification of the United States**, at 66, 70 (U.S. Government Printing Office) (1981) (Exhibit 7).

In 1970, the Department of the Army assessed the long-range surface and groundwater supplies at Fort Huachuca. The study specifically stated that the Army should not increase its groundwater pumping until new water sources were found. The report concluded:

The ground water in the area of the post [Fort Huachuca] well field is overdrawn, and a large cone of depression has been formed in the water table. Water levels in the area of influence . . . have continued to decline and will continue until and unless pumping is reduced.

Summary of Ground Water Supply Conditions, Fort Huachuca, Arizona, Department of the Army, Sacramento District, Corps of Engineers, Sacramento, California, at 12 (July 1970) (emphasis added) (Exhibit 8).

As groundwater levels decline, a "cone of depression" in the aquifer forms, lowering the water level in a roughly circular pattern around withdrawal wells. Increased pumping increases the radius of this cone of depression. As the radius increases, the watertable in adjacent areas will decline as the cone of depression expands outward, searching for a source of capture.

The cone of depression increases in size until a source of capture is found. If there are no sources of capture, the cone continues to grow in radius and depth. When pumps cannot reach the watertable, they pump air instead of groundwater. According to Maddock and Lord, there are only two sources of capture within the Sierra Vista sub-watershed: the San Pedro River and the evapotranspiration process in the riparian area. Letter to Defense Base Closure and Realignment Commission, from Dr. Thomas Maddock, III and Dr. William B. Lord, at 3, (May 14, 1993) (Exhibit 9).

It is undisputed that there is a cone of depression under Sierra Vista and the Fort Huachuca main installation. As this cone seeks a source of capture and continues to grow, it threatens to intercept water from the San Pedro River. When a cone of depression intercepts a stream bed, the stream becomes a losing stream. In a losing stream, water flows from the river to the aquifer. **See supra**, Glennon and Maddock, at 587 (discussing capture in the Upper San Pedro River) (Exhibit 5).

Studies indicate that groundwater levels within the Sierra Vista Sub-basin aquifer have stabilized. Nevertheless, hydrologists are very concerned that the cone of depression has intercepted mountain runoff that historically augmented the River. **Supra**, Maddock & Lord, at 3 (Exhibit 9). The aquifer appears stable only because it is capturing recharge flows from higher elevations. As a result, the San Pedro River, once classified as a gaining stream, is now losing water to the Sierra Vista sub-basin.

Dr. Thomas Maddock III, acting head of the Department of Hydrology at the University of Arizona, and Dr. William B. Lord, Professor of Agricultural and Resource Economics, expressed their concerns on the increase groundwater withdrawal expected from the proposed population expansion at the Fort:

The authors have concluded that increased development of the ground-water in the Sierra Vista Sub-Watershed, as could occur with the transfer of additional Army personnel to Fort Huachuca, would further intensify the risk to the San Pedro National Conservation Area... Unfortunately, continued groundwater pumping to support dwindling irrigation and the growing Sierra Vista and Fort Huachuca area threatens to reduce the flow of the San Pedro, to the detriment of the riparian area...

An expansion of the base by 5,000 personnel... yields a prospective increase of 2,500 acre-feet annually and pushes the water deficit to 13,730 acre-feet per year.

Supra, Maddock & Lord, at 1-2 (Exhibit 9) (emphasis added).

In late 1993, the Department of Interior's Field Solicitor, Fritz Goreham, summed up Interior's understanding of the cumulative impact of development in the valley:

There is no doubt that pumping in the Sierra Vista area already has a significant indirect impact on the flow of the San Pedro... **Even though the cumulative cone of depression in that area has not intercepted the stream, the cumulative cone of depression in that area is intercepting underground recharge which historically augmented and supported the stream.**

Letter to Deputy Director, Larry Linser, Arizona Department of Water Resources, from Fritz Goreham, Office of the Solicitor, U. S. Department of the Interior, at 4, (November 17, 1993) (Exhibit 10) (emphasis added).

In April 1994, the Phoenix Field Solicitor's Office for the U.S. Department of the Interior wrote to the Arizona Department of Water Resources (ADWR), stating that the:

indirect impact on the river will get worse, and it is possible that as the collective cone of **depression spreads, serious irreparable damage could occur.** Given the uncertainties of the situation, we cannot place great confidence in your assertion that the "groundwater pumped in the Sierra Vista/Fort Huachuca area has an insignificant impact on the appropriable surface water of the San Pedro."

Letter to Deputy Director, Larry Linser, ADWR, from Mr. William Swan, Phoenix Field Office, U.S. Department of the Interior, 1, (April 15, 1994) (Exhibit 11) (emphasis added).

The San Pedro River and its associated ecosystem are absolutely dependent on water. It appears that the cumulative impacts of the base expansion pose a significant risk to the San Pedro's ecosystem and to the Conservation Area. The cumulative effects of the Army's actions will also harm the San Pedro ecosystem by preventing the restoration of parts of the ecosystem that have already been damaged. In sum, as recently expressed by the U.S. District Court of Arizona: "If the pumping in Sierra Vista-Fort Huachuca . . . remains unchanged, in time, the perennial

reaches of the upper River will become intermittent and flows will occur only during floods." **Southwest Center, et al. v. William Perry, et al**, Order at 5, CIV 94-814 TUC ACM (July 8, 1996) (Exhibit 12) (Case regarding the San Pedro River and consultation requirements under the Endangered Species Act); **see also** Letter to Thomas King, Judge Advocate, U.S. Army Intelligence Center and Fort Huachuca, from Sam Spiller, State Supervisor, Fish and Wildlife Service, at 2 (June 21, 1995) (Exhibit 13) ("Hydrologic studies in the upper San Pedro Basin clearly demonstrate that if current rates of groundwater pumping . . . remain unchanged or increase, and the effects . . . are not mitigated, perennial reaches of the upper River will, in time, become intermittent and flows will occur only during flood events").

C.The Promised, But Never Produced, NEPA Analysis

The National Environmental Policy Act (NEPA) requires the United States Army to consider the environmental impacts of increasing the number of personnel assigned to Fort Huachuca on the environment. NEPA requires the Army to identify, analyze, and mitigate those impacts. 32 C.F.R. § 188.4(b)(1)(binding on Army); **see Sierra Club v. Penfold**, 857 F.2d 1307, 1312 & 1312 n.9 (9th Cir. 1988) (EIS must contain "a full and fair discussion of significant environmental impacts, a discussion of mitigation measures and an evaluation of cumulative impacts"). NEPA regulations define "cumulative impacts" as:

the 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 action. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (Council on Environmental Quality NEPA regulations). The Army is required to prepare a full and fair analysis and discussion of the impacts the base expansion will have on the environment.

The most significant impacts of the Fort Huachuca base expansion are expected to occur in the future. These effects will be "cumulative" within the meaning of NEPA and its implementing regulations. Fort Huachuca is the "single most important element" of the area's economy and, according to the 1980 census, about 57% of Sierra Vista's workforce was employed in civil service or military positions related to the Fort. **Vista 2000**, Overview, at 9 (Exhibit 14). Any cumulative impacts analysis must include not only the impacts of the Army's "past, present, and reasonably foreseeable future actions," but also the "past, present, and reasonably foreseeable future actions" of other entities in the San Pedro valley. Because the Army's actions affect all of those other entities, the key part of any environmental analysis of the Army's actions is the cumulative impacts analysis.

In 1992, the Army prepared an environmental analysis of impacts of expanding Fort Huachuca. **Final Supplemental Environmental Impact Statement (FSEIS)**, 5-24 (Exhibit 15). In that document, the Army split off the required "analysis of current and future impacts on a

cumulative basis," promising to include the cumulative analysis in a "separate Master Plan [Environmental Impact Statement]." **Id.** The Army stated that Fort Huachuca "is currently preparing" the Master Plan and projected that the cumulative impacts analysis of Army actions at Fort Huachuca would "be available for public review in 1993." **Id.**

The analysis was never prepared. In 1995, the Army stated that it expected to have a draft EIS on the Master Plan in October 1995 and the final programmatic document in April 1996. **Cochran Affidavit**, at ¶ 7, (Exhibit 16). Once again, the Army postponed its plans. In April 1996, the Army stated that the "[p]reparation of the Master Plan began in August 1994, and is currently underway and is expected to be completed in draft form and distributed for public comment pursuant to the requirements of NEPA on or around August 1, 1996." **Federal Defendant's Cross Motion for Summary Judgment**, at 7, Civil No. 94-814 TUC ACM (D. Ariz.) (April 12, 1996) (Exhibit 17). This representation is again erroneous. The Army did not complete the Master Plan EIS by August 1, 1996, and the Army may not complete the analysis until after the end of the year. **Mark Hughes Declaration**, at ¶ 2, (Exhibit 18).

Although the Army has not completed the required, detailed analysis of cumulative impacts, the FSEIS admits that the base expansion will potentially have cumulative impacts on air quality, water resources, generation of solid waste, cultural resources, biological resources, noise, and socioeconomics. **Supra, FSEIS**, at 5-24 to 5-26 (Exhibit 15). The Army has not analyzed the cumulative impacts of the base expansion on the San Pedro River, the San Pedro Riparian National Conservation Area, the riparian ecosystem, the wildlife that lives in that ecosystem, the federally listed threatened and endangered species in the San Pedro corridor, or the San Pedro aquifer.

NEPA and its implementing regulations also require the Army to analyze and discuss whether they have taken all practicable means to avoid or minimize the environmental harm caused by the base expansion, and if not, why not. This discussion should be part of any analysis of the cumulative impacts of the base expansion.

On July 7, 1994, the Southwest Center for Biological Diversity and Dr. Robin Silver brought a claim under NEPA in the United States District Court of Arizona to compel the Army to complete the required cumulative impact analysis.

On August 30, 1995, Senior U.S. District Judge Alfredo C. Marquez filed a Memorandum Opinion granting Summary Judgment in favor of the Army. **See Memorandum Opinion**, CIV 94-598 TUC ACM (D. Ariz.) (August 30, 1995) (Exhibit 19). Judge Marquez dismissed Plaintiffs' claims because under BRAC 90, NEPA claims must be brought within 60 days of an "agency's act or failure to act." Judge Marquez found that the claim was "barred by the statute of limitations under the BRAC 90." **Id.** at 22. This procedural ruling barred the Submitters from compelling the Army to complete the NEPA analysis by a court order, even though the Court agreed that the Army's analysis was insufficient. Accordingly, the court agreed the Army was violating NEPA but refused to provide Plaintiffs relief on procedural grounds.

III. ARGUMENT

Article 5(1) of the NAAEC provides that "each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action" The applicable definition of an "environmental law" specifically includes "any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, . . . through . . . the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas." NAAEC, Article 45(2). The NEPA falls within this definition. 42 U.S.C.A. 4321 declares the Congressional purpose of creating NEPA as:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Accordingly, the United States must effectively enforce NEPA under the NAAEC, unless such enforcement falls within an exception to the NAAEC.

The NAAEC provides an exception to the general Article 5(1) duty. It states:

A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of the Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.

This exception does not apply in this case. There is no indication that the Army has discretion not to comply with NEPA. Nor is there any indication that the Army did not have the resources to properly perform NEPA. The U.S. District Court for the District of Arizona found that the Army is violating NEPA:

This Court is convinced that the Defendant's [the Army] **cumulative impact analysis was incomplete, as a matter of law.** The pertinent regulations explicitly require that the growth generated by an agency action be contemplated and that potential impacts be discussed in relation to their magnitude. It is hard to imagine anything more obvious than the impact of Sierra Vista's continued growth on the nearby San Pedro River and the federally protected and managed Riparian Area and species there. **This Court finds that the Army's FSEIS fails to satisfy the requirements of the NEPA as it fails to supply cumulative impact analysis on the River, the Riparian Area, and the associated ecosystem.** The uniqueness and close proximity

of the River and the Riparian Area and the magnitude of the possible impact mandates a more comprehensive and detailed investigation which the Army has failed to perform despite the fact that regulation requires environmental impacts to be discussed in proportion to their significance. Failure to address these major areas frustrates the intent of the NEPA to promote informed decisionmaking.

Id. at 20-21 (Exhibit 19) (emphasis added).

Since Plaintiffs' suit was dismissed, the Court's conclusion that the Army was violating NEPA is completely unenforceable. Yet, the District Court's conclusion that the Army was violating NEPA was well-founded. In its own words, the 1992 FSEIS discusses the cumulative impacts of the Army's actions at Fort Huachuca only in "general terms." **Supra, FSEIS** at 5-24 (Exhibit 15). According to the FSEIS, this is because the Army planned to do the required detailed analysis of cumulative impacts in "a separate Master Plan EIS." **Id.** Correctly recognizing the extensive nature of the cumulative impacts of Army actions on the San Pedro valley, the Army anticipated that the "major emphasis" of the Master Plan EIS would be "the analysis of current and future impacts on a cumulative basis." **Id.**

NEPA requires that "[i]mpacts shall be discussed in proportion to their significance." 40 C.F.R. § 1502.2(b). Yet, the 1992 FSEIS devotes a mere two sentences to "biological resources" - - one sentence to on-post impacts and the other reiterating that the Army deferred the required analysis to the Master Plan EIS:

Increased range use has the potential to significantly impact the sensitive biological resources at Fort Huachuca. The separate Master Plan EIS, combined with other studies and biological commitments on the installation, will provide safeguards to reduce impacts to insignificant levels.

Supra, FSEIS at 5-25 (Exhibit 15). The cumulative "socioeconomic" impacts of the Army, the largest employer in southern Arizona, are dealt with in four sentences. **Id.** at 5-25 to 5-26. There is no discussion of the Army's admitted impact on the San Pedro River or on the National Conservation Area. **Id.** at 5-24 to 5-26. This section is just what the Army said it was -- a discussion in "general terms" -- and nothing more. It is not the cumulative impacts analysis required under NEPA.

The Army's obligations are not discretionary under NEPA, nor BRAC 90 and therefore, the United States has not exercised discretion with respect to enforcement. Nor, is the Army's failure to produce a Master Plan the result of a "bona fide decision to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities."

The United States Army itself recognized its obligations under NEPA, as evidenced by the approach the Army undertook in assessing their actions. Discussing cumulative impacts of the Army's actions -- obviously the most important and extensive environmental impacts -- in a separate document such as the Master Plan EIS would have given the Army sufficient room to

deal with those impacts adequately and in the required detail. The problem is that the Army never produced this document.

The United States' lack of enforcement of NEPA will have a devastating effect upon the San Pedro River, the internationally recognized San Pedro Riparian National Conservation Area, the riparian ecosystem, the wildlife that lives in that ecosystem, and the San Pedro aquifer.

IV. SUBMITTERS SATISFY THE REQUIREMENTS OF ARTICLE 14

Article 14 of the NAAEC provides that "[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. " NAAEC, Art. 14(1). Submitters bring their Submission pursuant to this provision.

A.This Submission Satisfies All of the Criteria of Article 14(1)

Article 14(1)(a) - The Submission is written in an acceptable language (English). **See Procedures for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation** at 3.2.

Article 14(1)(b) - The Submitters are: the Southwest Center for Biological Diversity and Dr. Robin Silver.

The Southwest Center for Biological Diversity (SWCBD) qualifies as a "non-governmental organization" under the NAAEC, Article 45(1). SWCBD is a nonprofit corporation with its principal office in Tucson, Arizona. SWCBD is actively involved in species and habitat protection throughout the Southwest and in the San Pedro River corridor. SWCBD has members that regularly visit the San Pedro River ecosystem. SWCBD's members and staff have educational, scientific, informational, research, moral, spiritual, and recreational interests in the San Pedro River basin, and also enjoy the biological, recreational and aesthetic values in the San Pedro River corridor.

Dr. Robin Silver is an "individual" under NAAEC Article 14(1). Dr. Silver is an Arizona resident, a wildlife photographer, an amateur biologist and naturalist, and a leader in efforts to protect the Southwest's native ecosystems. Dr. Silver owns property in the San Pedro River basin. Dr. Silver spends considerable time recreating, photographing and studying the San Pedro River basin area. Dr. Silver regularly and routinely disseminates information about the impact of human activities on Southwestern ecosystems, including the San Pedro River and its associated ecosystem. Dr. Silver has worked for many years to protect and restore the San Pedro River and its associated ecosystem.

The United States Army's continuing failure to analyze and discuss the cumulative environmental impacts of the Fort Huachuca expansion has contributed to a lack of public understanding concerning the environmental impacts of the base population expansion and to the Army's failure to properly mitigate the cumulative environmental effects from the expansion.

The Army's failure to analyze and discuss the cumulative impacts of their action and to mitigate those impacts will harm the fish, wildlife, and riparian vegetation of the San Pedro ecosystem.

The educational, scientific, and aesthetic, conservation, informational, and recreational interests of the Submitters are being, and will continue to be, adversely affected and irreparably injured by the United States Army's continuing failure to analyze, discuss, and address the cumulative environmental impacts of the base population expansion.

Article 14(1)(c) - The Submitters believe this Submission and its Exhibits provide sufficient information to allow the Secretariat to review this Submission. However, if the Secretariat would like additional documentary evidence, the Submitters will provide whatever information the Secretariat requests.

Article 14(1)(d) - This Submission is aimed solely at promoting the enforcement of the National Environmental Policy Act. The Submitters have no ties to any industry and have no commercial interests.

Article 14(1)(e) - On March 11, 1996, Earthlaw as the legal representative of the Submitters, sent a letter to President William J. Clinton; Secretary of Defense, William J. Perry; Secretary of the Army, Togo D. West, Jr.; Senate Majority Leader, Robert Dole; and, Speaker of the House of Representatives, Newt Gingrich. The letter, which is attached as Exhibit 20, informed these relevant authorities of the United States that the Submitters believe that the Army's failure to complete an environmental impact statement for the expansion of Fort Huachuca, Arizona, violates the United States' obligations under the NAAEC. **See also** Exhibit 21 (Correspondence from SWCBD to the Commander of Fort Huachuca, September 3, 1994). The letter further informed these authorities that unless the Submitters received a response within ten working days, they would view the failure to respond as a rejection of their concerns. Submitters received a response on June 24, 1996, from the Environmental Protection Agency on behalf of President Clinton. The response states that the "Army maintains it is currently analyzing the potential environmental effects of their operations..." Letter to Dawn McKnight, Earthlaw, from William Nitze, Assistant Administrator, United States Environmental Protection Agency, Office of International Affairs (June 24, 1996) (Exhibit 22). This has been a recurrent response from the Army over the past two years, and since 1993, it is demonstrably false.

Article 14(1)(f) - All of the Submitters reside in the territory of the United States.

Accordingly, this Submission satisfies all of the criteria of Article 14(1) of the NAAEC.

B. This Submission Satisfies the Criteria of Article 14(2)

If the Submission meets the criteria of Article 14(1) of the NAAEC, the Secretariat shall determine whether the Submission merits requesting a response from a NAFTA Party. NAAEC Art. 14(2). As is discussed below, this Submission also satisfies the criteria of Article 14(2). Accordingly, the Secretariat should request a response to this Submission from the United States.

Article 14(2)(a) - This Submission alleges substantial harm to the Submitters. **See** the description of the Submitters, **supra**, under the discussion of Article 14(1)(b). The Submitters are vitally interested in the protection of the San Pedro River, the San Pedro Riparian Conservation Area and its ecosystem and wildlife.

Article 14(2)(b) - The study of this Submission will raise matters whose further study will advance the goals of the NAAEC. This Submission highlights Submitters' broader concerns with the protection and conservation of North American biodiversity. The San Pedro ecosystem has gained international recognition for its vital role in the migration of 250 species of birds from Mexico to Canada and more than 100 breeding species. Unmitigated and excessive pumping of water from the San Pedro aquifer poses a significant threat to this continent's biodiversity. This is a matter which should be of concern to the Council of the Commission for Environmental Cooperation. **See e.g.** NAAEC Art. 10(2)(i) & (j). **See also CEC Discussion Paper: Conserving North American Biodiversity; Environmental Conservation, 1996 Annual Program, P96-01.01 Habitat and Species: Cooperation in the Conservation of North American Birds** (San Pedro National Riparian Area significant part of the CEC annual program as an Important Bird Area).

Article 14(2)(c) - Submitters have pursued private remedies in the United States court system and have received no redress. Further, this action is not currently pending in any domestic court. The Article states that the Secretariat shall be guided by whether "private remedies available under the Party's law have been pursued." The Article does not require that Submitters exhaust all available domestic remedies. Submitters have pursued domestic remedies without success.

Article 14(2)(d) - This submission is not drawn exclusively from mass media reports.

Accordingly, the Secretariat should determine that this Submission satisfies the requirements of Article 14(2). The Secretariat should request a response to this Submission from the United States under Article 14(3). As detailed above in Submitters' Argument, even though the District Court of Arizona agreed that the United States is in violation of NEPA, no redress of the grievances was afforded. The United States is hiding behind a procedural ruling, which required the Submitters to learn of the Army's violation within 60 days and file their complaint with the court. The sustainability of the San Pedro ecosystem is at stake, and the future is not promising. The Secretariat should request the Council to allow it develop a factual record for this Submission and to present the factual record to the Council for a vote.

V.CONCLUSION

Dr. Jeff Price, Director of the U.S. Important Bird Area Program for the American Bird Conservancy aptly captured the importance of the San Pedro River and Riparian Area:

The San Pedro is the largest and best example of riparian woodland remaining in the southwestern United States. As such, it contains a unique assemblage of avian species. The San Pedro also forms a corridor between Mexico and the United States and helps funnel millions of

neotropical migratory birds north to their breeding grounds in the U.S. and Canada. Specifically, it contains the densest remaining breeding populations of the western race of the yellow-billed cuckoo, a subspecies declining throughout its range. The San Pedro also harbors 40 percent of the breeding habitat for the gray hawk in the United States.

Supra, Bureau of Land Management Announcement, at 2 (Exhibit 3).

The San Pedro River is a resource of national and international significance. The greatest threat facing this precious and delicate area is groundwater pumping. It cannot be disputed that the Army's actions at Fort Huachuca have cumulative impacts on the regions' groundwater, the San Pedro River, and the National Riparian Area. Those impacts are serious, and under U.S. law the Army must examine them. A U.S. District Court has agreed the Army is in violation of the law, but has afforded the Submitters no relief. Rather, Submitters complaint was dismissed on procedural grounds.

The Submitters are more than willing to discuss any aspect of this Submission with the Secretariat at its earliest convenience. Additionally, the Submitters stand ready to submit any supplemental information the Secretariat should desire to help it in its consideration of this Submission.

Dated: November 14, 1996 Respectfully submitted,

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