WESTERN MINING ACTION PROJECT

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Via Email

February 26, 2016

To: Cal Joyner, Regional Forester
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Southwestern Region
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RE: OBJECTION to the
Resolution Copper Mining Baseline Hydrological and Geotechnical Data Gathering Activities Plan of Operations
Final Environmental Assessment (EA), Draft Decision Notice (DN) and Finding of No Significant Impact (FONSI)

Responsible Official: Neil Bosworth, Forest Supervisor
Tonto National Forest

INTRODUCTION

Pursuant to 36 CFR Part 218, on behalf of Arizona Mining Reform Coalition (AMRC, Lead Objector), the Access Fund, Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Earthworks, Maricopa Audubon Society, Patagonia Area Resources Alliance, Save the Scenic Santa Ritas, the Sierra Club – Grand Canyon (Arizona) Chapter, and Tucson Audubon Society (Objectors or Coalition) file this Objection to the EA, Draft DN and FONSI issued by Neil Bosworth for the Resolution Copper Mining Baseline Hydrological and Geotechnical Data Gathering Activities Plan of Operations (Project) on or about January 15, 2016. *See* http://www.fs.usda.gov/detail/tonto/news-events/?cid=FSEPRD489408 and http://www.fs.usda.gov/project/?project=44494.

All of the Objectors filed comments on the Preliminary/Draft EA on or about April 10, 2015 and have fully participated in the Forest Service's (USFS) review of the Project. Pursuant to 36 CFR 218.8, the parties state that the following content of this Objection demonstrates the

connections between the April 10, 2015 comments (or "previous comments") for all issues raised herein, unless the issue or statement in the Draft EA arose or was made after the opportunity for comment on the Draft EA closed, as detailed herein. Pursuant to the Administrative Procedure Act, 5 U.S.C. §553-706, and USFS requirements, the Regional Forester's Office must provide a detailed response to each of the issues/objections raised in this Objection.

AMRC 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. Members of the Coalition include: The Grand Canyon Chapter of the Sierra Club, Earthworks, Save the Scenic Santa Ritas, Maricopa Audubon Society, Environment Arizona, the Dragoon Conservation Alliance, the Groundwater Awareness League, the Empire-Fagan Coalition, Concerned Citizens and Retired Miners Association, Concerned Climbers of Arizona, the Center for Biological Diversity, Sky Island Alliance, Tucson Audubon Society, and the Patagonia Area Resource Alliance.

The **Access Fund** is a national non-profit advocacy organization incorporated in 1991, with over 12,000 members. The organization is dedicated to keeping US climbing areas open and conserving the climbing environment. The Access Fund works with federal, state and local officials; climbers; climbing organizations; and land managers to develop and guide responsible use and sound climbing management policies for public and private lands. The Access Fund informs and educates climbers on the local impact of national policies, promotes and supports stewardship efforts and events, educates climbers on effective climbing management strategies and leave-no-trace ethics, and provides resources on how to manage and steward public and private lands.

The **Center for Biological Diversity** is a non-profit public interest organization with an office located in Tucson, Arizona, representing more than 775,000 members and supporters nationwide dedicated to the conservation and recovery of threatened and endangered species and their habitats. The Center has long-standing interest in projects of ecological significance undertaken in the National Forests of the Southwest, including mining projects.

The **Concerned Citizens and Retired Miners Coalition** is a group of citizens who: 1) reside in Superior, Arizona, or do not reside in Superior, Arizona, but are affiliated with relatives who are residents; 2) are retired hard-rock miners who previously worked in the now non-operational mine in Superior, Arizona, and were displaced due to mine closure or personal disability; or 3) are individuals who are concerned that important U.S. public recreational land will be conveyed to a foreign mining company for private use.

The **Concerned Climbers of Arizona** was organized in 2010 for the purpose of preserving climbing access and the climbing environment. The group advocates for continued recreational access to climbing area that are threatened by development or other forms of encroachment. Based in Phoenix, Arizona, the Concerned Climbers of Arizona is the primary group representing the interests of rock climbers in central Arizona.

Earthworks is a nonprofit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks stands for clean air, water and land, healthy communities, and corporate accountability. We work for solutions that protect both the Earth's resources and our communities.

The **Maricopa Audubon Society's** Mission is to protect the natural world through public education and advocacy for the wiser use and preservation of our land, water, air and other irreplaceable natural resources. Our members use many of the areas that would be affected for bird-watching, hiking and other activities that enjoy the natural world within the Oak Flat Watershed.

Sierra Club is one of the nation's oldest and most influential 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 2.4 million members and supporters with 35,000 in Arizona as part of the Grand Canyon (Arizona) Chapter. Our members have long been committed to protecting and enjoying the Tonto National Forest and have a significant interest in the proposed Resolution Copper Mine and related activities.

Save the Scenic Santa Ritas is a non-profit organization that is working to protect the Santa Rita and Patagonia Mountains from environmental degradation caused by mining and mineral exploration activities.

Tucson Audubon Society is a 501(c)(3) member-supported community organization established in 1949. The organization promotes the protection and stewardship of southern Arizona's biological diversity through the study and enjoyment of birds and the places they live. Tucson Audubon provides practical ways for people to protect and enhance habitats for birds and other wildlife.

As shown in more detail below, the USFS's review contained in the EA and attachments contains numerous legal and factual errors and as such should be revised in order to comply with federal law. In addition, any USFS plan to continue its review of the PoO must comply with federal law as detailed herein. At a minimum, an Environmental Impact Statement ("EIS") must be prepared, due to the potential for significant impacts from the Project alone, and especially when viewed with its cumulative impacts from other and/or related activities as well as connected actions. Whether the agency decides to revise the EA first, or directly prepare an EIS, the requirements noted herein must be met for either document. If the former, at a minimum, a revised Draft EA must be prepared, subject to full public comment.

THE PROPOSED PROJECT WOULD VIOLATE NUMEROUS FEDERAL AND STATE LAWS AND CANNOT BE APPROVED AS PROPOSED IN THE DRAFT DN.

As detailed herein, however, and as noted in the April 10, 2015 comments, the Project would violate numerous federal and state mining, public lands, environmental, wildlife, historic/cultural

preservation and related laws, regulations, and policies. As such, the USFS cannot approve the proposed Plan of Operations (PoO), as amended by any of the action alternatives. These laws (with their implementing regulations and policies) include, but are not limited to: the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), Forest Service Organic Act of 1897 (Organic Act), the 1872 Mining Law, the Surface Resources Act of 1955, the Mining and Minerals Policy Act of 1970, the Endangered Species Act (ESA), the Clean Water Act (CWA), the Clean Air Act (CAA), the Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (BGEPA), the National Historic Preservation Act (NHPA), the Federal Land Policy and Management Act (FLPMA), Arizona State wildlife, air, water, and related statutes, and Presidential Executive Orders related to wildlife, wetlands, and other resources potentially affected by the Project.

The remedy for these violations is for the USFS to not issue any Final DN that would authorize approval of any PoO for any action alternative reviewed in the EA (i.e., the USFS must deny/reject any such PoO), that does not fully comply with each and every law, regulation, policy, and Executive Order noted herein. The Regional Forester must remand the EA and Draft DN back to the Tonto National Forest with instructions to correct all errors noted herein before the USFS can consider approving any operations at the site.

THE TONTO NATIONAL FOREST MUST PREPARE A REVISED OR SUPPLEMENTAL DRAFT EA

For the reasons articulated herein, and in the previous comments, the EA is substantially inadequate and violates NEPA. The EA and Draft DN fail to take the requisite "hard look" at the Project. The EA is fundamentally flawed because of inaccurate and incomplete information that runs throughout the EA and presents an imbalanced analysis of the effects of the proposed Project. Critical and explanatory data, methodologies, and analysis are simply not provided; this failure goes to the heart of NEPA's requirements regarding full and transparent disclosure of issues so that the public can credibly comment on the proposal. As such, the remedy for these inadequacies is for the USFS to prepare and publish a revised Draft EA, or more appropriately a Draft EIS for public and agency comment.

Among other inadequacies noted herein, the EA fails to properly review all direct, indirect, and cumulative impacts (as well as connected actions), fails to properly review all reasonable alternatives, fails to conduct the required baseline analysis (and defers consideration of critical information until after the NEPA process is concluded), fails to conduct the proper mitigation analysis (including the effectiveness of all mitigation measures), presents significant new issues for which the public did not have the proper opportunity to comment upon before the close of the comment period on the Draft EA, and fails to adequately respond to public comments (including the April 10, 2015 comments of the Objectors), against the requirements of NEPA and the other laws noted herein.

ADDITIONAL OBJECTION ISSUES

I. THE EA'S CONSIDERATION OF THE RESOLUTION MINE AS A REASONABLY FORESEEABLE FUTURE ACTIVITY WAS NEVER SUBJECTED TO PUBLIC REVIEW

Although the scoping letter and Preliminary/Draft EA stated that the Resolution General Plan of Operations (MPO) and its associated mining, dewatering, processing plants, tailings disposal, drilling, pipelines and other facilities were "speculative" and were thus never analyzed by the agency and the public, the Final EA now says that the MPO is a "reasonably foreseeable future action" (RFFA) that must be considered under NEPA. EA at 3-10. *See also* EA Table 3-1, EA at 3-7 to -9 (listing the MPO as a RFFA with cumulative impacts to "Water, soils, vegetation, noxious weeds and invasive species, wildlife, recreation, visual, cultural, travel management, range, air quality, and noise" resources). While the EA allegedly purports to review the cumulative impacts from the MPO (albeit inadequately as detailed below), none of these considerations or impacts were even mentioned in the Draft EA. NEPA requires full public review – the agency cannot bring important new issues to light for the first time in a final EA to which the public was never given the opportunity to comment upon.

The USFS must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). The agency "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by [40 C.F.R. §] 1508.9(a)(1)." 40 C.F.R.§ 1501.4(b); *see also* 46 Fed. Reg. 18,026 (March 23, 1981) ("Forty Most Asked Questions Concerning CEQ's NEPA Regulations," answer to question 38: "Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public 'environmental documents' under Section 1506.6(b) and, therefore, agencies must give public notice of their availability."). *See also* 40 C.F.R § 1500.2 (federal agencies "shall to the fullest extent possible ... [e]ncourage and facilitate public involvement in the decisions which affect the quality of the human environment...."). Without the opportunity to comment upon what the agency now considers a major project with significant impacts, the fundamental intent of NEPA, and the public's rights, are violated.

II. THE EA FAILED TO FULLY ANALYZE ALL DIRECT, INDIRECT, AND CUMULATIVE IMPACTS

As noted above, the agency previously took the position that the Resolution General Plan of Operations (MPO) and its associated mining, dewatering, processing plants, tailings disposal, drilling, pipelines and other facilities were "speculative." The EA now says that the MPO is a "reasonably foreseeable future action" that must be reviewed under NEPA. As such, all impacts from the MPO must be fully reviewed. Under the NEPA, the USFS must fully review the impacts from all "past, present, and reasonably foreseeable future actions." These are the "cumulative effect/impacts" under NEPA. To comply with NEPA, the USFS must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 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. 40 CFR § 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. 40 CFR § 1508.8(b). Both 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 CFR § 1508.7. In a cumulative impact analysis, an agency must take a "hard look" at all actions.

> An EA's analysis 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. Dept. 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).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. Blue Mountains, 161 F.3d at 1214-15; Kern, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "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).

As the Ninth Circuit has further held:

> Our cases firmly establish that a cumulative effects analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past,

> present, and future projects." Klamath–Siskiyou, 387 F.3d at 994 (emphasis added) (quoting Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir.2004)). To this end, we have recently noted two critical features of a cumulative effects analysis. First, it must not only describe related projects but also enumerate the environmental effects of those projects. See Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide "adequate data of the time, place, and scale" and did not explain in detail "how different project plans and harvest methods affected the environment"). Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project. See Klamath–Siskiyou, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when "it only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007). Note that the requirement for a full cumulative impacts analysis is required in an EA, as well as in an EIS. See Te-Moak Tribe of Western Shoshone, 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).

In addition to the fundamental cumulative impacts review requirements noted above, NEPA regulations also require that the agency obtain the missing "quantitative assessment" information:

> When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.
> (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.
> (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is

> supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

40 CFR § 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 Project when added to other past, present or reasonably foreseeable future actions is clearly essential to the USFS' determination (and duty to ensure) that the Project complies with all legal requirements and minimizes all adverse environmental impacts.

"[W]hen the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect. The CEQ has devised a specific procedure for 'evaluating reasonably foreseeable significant adverse effects on the human environment' when 'there is incomplete or unavailable information.' 40 C.F.R. § 1502.22." Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549-550 (8th Cir. 2003) (emphasis in original).

Here, as shown herein, no quantitative data or analysis is provided, a direct violation of the Ninth Circuit's holding in Great Basin Mine Watch:

> The [agency] cannot simply offer conclusions. Rather, it must 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, so as to provide a reasonably thorough assessment of the projects' cumulative impacts.

456 F.3d at 974. The USFS cannot "merely list other [projects] in the area without detailing impacts from each one." Id. at 972. A "quantified assessment of their combined environment impacts" must be completed. Id.

> NEPA explicitly requires a cumulative impact analysis. A particular action may seem unimportant in isolation, but that small action may have dire consequences when combined with other actions. As we observed in Klamath–Siskiyou Wildlands Center, "[s]ometimes the total impact from a set of actions may be greater than the sum of the parts."

ONRC v. Goodman, 505 F.3d 884, 893 (9th Cir. 2007). *See also* Te-Moak, 608 F.3d at 606 (same).

Thus, in this case, the USFS failed to fully consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region on, at a minimum, water and air quality including ground and surface water quantity and quality, recreation, cultural/religious (including its duties under the National Historic Preservation Act), wildlife, transportation/traffic, scenic and visual resources, etc. At a minimum, this requires the agency to fully review, and subject such review to public comment in a revised draft EA or EIS, the cumulative impacts from all other mining, grazing, recreation, energy development, roads, etc., in the region.

As just one example, air quality, the EA admits that the area has exceeded the allowable NAAQS air quality standard for the Criteria Pollutant of Ozone. EA Table 3-12 (EA at 3-92); EA at 3-95. Yet no analysis has been done of the Ozone levels created or exacerbated by the Project's emissions, let alone the cumulative Ozone level caused by emissions of the other current and RFFAs when combined with the Baseline Project. Although emissions/levels of other Criteria Pollutants were analyzed (although not the cumulative impacts from these emissions), the EA never calculated the amount of Ozone generated by the Project, either alone or in combination with the other activities. This is despite admitting that Project emissions "could contribute to the formation of ground level ozone in the Project area." EA at 3-95.[1]

This is due to the "increase in emissions of NOx" from the Project. Id. "In the presence of sunlight, NOx and volatile organic compounds (VOCs) can react to form ground-level ozone."

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[1] According to the EPA:

> Tropospheric, or ground level ozone, is not emitted directly into the air, but is created by chemical reactions between oxides of nitrogen (NOx) and volatile organic compounds (VOC). Ozone is likely to reach unhealthy levels on hot sunny days in urban environments. Ozone can also be transported long distances by wind. For this reason, even rural areas can experience high ozone levels.
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> High ozone concentrations have also been observed in cold months, where a few high elevation areas in the Western U.S. with high levels of local VOC and NOx emissions have formed ozone when snow is on the ground and temperatures are near or below freezing. Ozone contributes to what we typically experience as "smog" or haze, which still occurs most frequently in the summertime, but can occur throughout the year in some southern and mountain regions.
>
> Ground level ozone- what we breathe- can harm our health. Even relatively low levels of ozone can cause health effects. People with lung disease, children, older adults, and people who are active outdoors may be particularly sensitive to ozone.
>
> Children are at greatest risk from exposure to ozone because their lungs are still developing and they are more likely to be active outdoors when ozone levels are high, which increases their exposure. Children are also more likely than adults to have asthma.
>
> Ozone also affects sensitive vegetation and ecosystems, including forests, parks, wildlife refuges and wilderness areas. In particular, ozone harms sensitive vegetation, including trees and plants during the growing season.
>
> Emissions from industrial facilities and electric utilities, motor vehicle exhaust, gasoline vapors, and chemical solvents are some of the major sources of NOx and VOC.

http://www3.epa.gov/ozonepollution/basic.html (viewed 2-13-16).

EA at 3-95. Although the EA calculates that the Project will emit 102.5 tons per year of NOx, and 8.6 tons/year of VOCs, EA Table 3-18 (EA at 3-95), and that NOx and VOC emissions contribute to Ozone, no analysis of Ozone levels was done. The agency simply concludes that due to the "temporary nature" of the Project, "no measurable increases in area ozone levels are likely." EA at 3-95. No supporting analysis is provided.

This is especially of concern due to the likely, but unexamined, formation of Ozone from the other projects in the area that will undoubtedly result in increased NOx and VOC emissions (and thus Ozone formation) such as construction on, and use of, Highway 60, access to and operations at Red Top, Copper King, Omya Limestone Quarry, Imerys Perlite Mine and the other projects listed in Table 3-1, including the Resolution MPO.

The fact that Ozone is the only Criteria Pollutant that has exceeded, or almost exceeded, the NAAQS every year since 2008 (Table 3-12), yet the Ozone level is the only Criteria Pollutant **not** analyzed in the EA, is troubling to say the least (although the cumulative emissions from the other current and RFFA activities was also never done for these pollutants). The agency cannot approve the Project unless it can ensure that **all** of the NAAQS will be met, pursuant to the Clean Air Act, Organic Act and Part 228 regulations. The USFS must ensure that each "Operator shall comply with applicable Federal and state air quality standards, including the requirements of the Clean Air Act (42 U.S.C. 1857 *et seq*.). 36 C.F.R. § 228.8 (a). That has not been done here. Contrary to the USFS's position, there is no exemption from these requirements for "temporary" violations of the NAAQS.

It should be noted that the fact that Arizona may issue an air quality permit for the Project does not satisfy the USFS's duties. The USFS cannot defer to a state permitting process that never underwent the rigorous public and agency review requirements in NEPA.

> A non-NEPA document – let alone one prepared and adopted by a state government- cannot satisfy a federal agency's obligations under NEPA. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 726 (9th Cir. 2009). The Ninth Circuit rejected as "without merit" arguments that a federal agency may avoid its NEPA duties where a "facility operates pursuant to a state permit under the Clean Air Act." Klamath-Siskiyou, 387 F.3d at 998.

The Forest Service cannot comply with NEPA, let alone its duty to ensure that all air quality standards will be met at all times under the Clean Air Act, 1897 Organic Act, the National Forest Management Act (NFMA), and the 36 CFR Part 228 regulations, when it has not fully analyzed the Ozone levels that may result from the Project and other activities.

A. The EA/EIS Fails to Fully Review the Cumulative Impacts from Resolution's Proposed Main Mine (MPO)

The agency admits that the Resolution MPO is a proposed a large-scale mine in the area, and specifically within the "Cumulative Effects Analysis Area" for the Baseline Project. EA Figure

3-1, EA at 3-5. Yet, outside of a few brief acknowledgments that the Tailings Storage Facility (TSF) for the MPO is proposed to be located in the same area as the Baseline Project, no detailed analysis of the MPO facilities has been done. Instead, the EA admits that the MPO impacts "will be addressed in a subsequent EIS." EA at 3-10.

The EA justifies its failure to review any cumulative impacts from the Main Mine on its belief that:

> In the EIS for the MPO, alternatives may be developed that do not conform to the proposed facilities and disturbance figures presented in the MPO. So, while development of Resolution's deep copper ore body is reasonably foreseeable, some of the features (e.g., the tailings storage facility) may ultimately be in a different location, configured differently, or constructed with a different process.

EA at 3-10. Yet, the agency admits that **"the Forest Service has assumed that the facility location and configuration will be as proposed in the MPO."** Id. (emphasis added). Thus, because all of the MPO facilities are currently proposed and "reasonably foreseeable," the agency must analyze their impacts.

The failure of the EA to analyze the impacts from the MPO is also based on the position that the USFS does not have to consider impacts that will not occur at the same time as the Baseline Project. USFS "Preliminary EA Public Comment and Response Report" (Response Report) at Table 2-6 to -8. http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2640927.pdf The EA simply noted the location of the initial portions of the TSF at year two of TSF construction. EA Figure 3-6 (EA at 3-33).

The agency's unilateral decision to cut-off any review of the TSF and MPO activities at two years (and as noted herein, even that review is cursory at best), based on a "no temporal overlap" theory is factually and legally wrong under NEPA. Further, the fact that the final location of the MPO facilities and impacts may be "uncertain" at this time does not mean that the USFS can ignore them.

First, as shown by the proposed plan of operations for the Main Mine submitted by Resolution Copper, and currently under review by the USFS, a large part of the area covered by the proposed action is actually within the areas proposed for the Main Mine. (Note: the full MPO under consideration by the USFS must be included in the administrative record for this case). Thus, the EA's claim that Main Mine "does not overlap in space" is contradicted by Resolution's own Plan submitted to the USFS.

The EA's self-imposed "temporal" limitation on the cumulative impacts analysis area also improperly restricts its review under NEPA. The fact that the proposed Main Mine may not be approved until after the proposed action is completed does not eliminate the agency's duty to review the cumulative impacts from the Main Mine. That is the reason NEPA requires the agency to fully review the cumulative impacts from all "reasonably foreseeable future actions."

There can be no doubt that the proposed action will cause surface disturbance that will remain and last into the future. Although some aspects of the proposed action will be "reclaimed," the EA does not propose complete elimination of all ground disturbance effects. Further, impacts to wildlife, air and water quality and quantity, recreation, and other public resources that will be adversely affected by the proposed action will also be adversely affected by the Main Mine, even if the Main Mine would occur in the future. The USFS cannot simply postpone its review of the cumulative nature of these impacts to after the impacts from the proposed action have already started/occurred. Any agency position which claims that there will be no incremental or cumulative environmental impact from the proposed action when added to the future mine not only violates NEPA and is arbitrary and capricious; it defies logic and common sense.

The agency's attempt to bypass review of what clearly is a RFFA violates NEPA. The fact that the agency has yet to complete its review of this proposed Main Mine does not mean that its impacts can be ignored. If that was true, then a federal agency would never have to review the cumulative impacts of "proposed" projects since it is possible that every project under USFS review could change somewhat. Such a short-sighted view of NEPA has been consistently rejected by the federal courts.

> NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done. *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) ("Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,'" quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C.Cir.1973)).

Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1072 (9th Cir. 2002).

The Ninth Circuit has clearly held that proposed mining projects must be fully reviewed in NEPA documents for nearby projects. *See* Te-Moak Tribe of Western Shoshone v. U.S. Dept. 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). Even projects that have not reached the formal proposal stage (which is not the case here, since Resolution has already submitted its Main Mine proposal to the USFS) are considered "reasonably foreseeable" and must be reviewed in this EA or EIS.

> **[P]rojects need not be finalized before they are reasonably foreseeable.** "NEPA requires that an EIS engage in reasonable forecasting. Because speculation is ... implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." Selkirk, 336 F.3d at 962 (internal quotation marks and citation omitted). As the Environmental Protection Agency (EPA) also has noted, **"reasonably foreseeable future actions need to be considered even if they are not specific proposals."** EPA, Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents,

> Office of Federal Activities, 12–13 (May 1999), available at http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf.

Northern Plains Resource Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1078-79 (9th Cir. 2011)(emphasis added). Additionally, the federal courts have routinely required the agencies to review the impacts from future, not-yet-proposed mineral activity when preparing EAs or EISs for mineral leasing projects.

> BLM finally argues that at this stage, the exact scope and extent of drilling that will involve fracking is unknown, so NEPA analysis, if any, should be conducted when there is a site-specific proposal. But "the basic thrust" of NEPA is to require that agencies consider the range of possible environmental effects before resources are committed and the effects are fully known. "Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'"

Center for Biological Diversity v. Bureau of Land Management, 937 F.Supp.2d 1140, 1157 (N.D. Cal. 2013) citing City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir.1975) and Northern Plains, 668 F.3d at 1079. See also, Connor v. Burford, 848 F.2d 1441 (9th Cir. 1988)(future impacts of drilling must be analyzed when preparing NEPA document for oil and gas lease); Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1209-09 (D. Colo. 2011)(impacts from future, as-yet-un-proposed mining must be considered when preparing NEPA document for leasing decision).

In New Mexico ex rel. Richardson v. Bureau of Land Management, 565 F.3d 683, 718-19 (10th Cir. 2009), the Tenth Circuit determined that future mineral activity was "reasonably foreseeable" due to the fact that "considerable exploration has already occurred on parcels adjacent to the [challenged] parcel," a developable mineral deposit "is known to exist beneath these parcels," and the company "has concrete plans to build" a mineral project on these lands. All of these conditions are present here – as acknowledged by Resolution in the PoO. http://resolutioncopper.com/the-project/mine-plan-of-operations/.

In this case, in addition to the MPO/PoO for the Main Mine submitted by Resolution to the USFS, the company, through its law firm and related company, "Integrity Land and Cattle, LLC landowner/applicant, Rose Law Group, agent" recently applied for, and was approved for, a zoning change to locate the Main Mine's ore concentrate transfer facility in the area southwest of the immediate Baseline Project footprint. *See* PINAL COUNTY PLANNING AND ZONING COMMISSION REGULAR MEETING ACTION REPORT OF October 15, 2015 (attached).

Importantly, the federal district court in Arizona recently rejected the Forest Service's argument that it does not have to review the cumulative impacts from projects that do not "temporally overlap."

> USFS argues that noise and light impacts are short-term impacts that cease upon project conclusion, and that there are therefore no cumulative noise and light impacts for projects

> that do not temporally overlap. (Doc. 35 at 11.) However, in finding that the Sunnyside Project was not likely to adversely affect listed species, USFS and USFWS relied heavily on the project's limited temporal and geographic scope. The record indicates that the Hermosa Project will have similar environmental effects as the Sunnyside Project, meaning the environmental disturbances from the projects will exist over a larger geographical area and a larger temporal timeframe than that analyzed in the revised Decision Memorandum. Even if the projects will not temporally overlap, USFS has not shown that its failure to analyze the cumulative impact of the Sunnyside and Hermosa projects *clearly* had no bearing on its conclusion that the Sunnyside Project would not have cumulatively significant environmental effects.

Defenders of Wildlife v. U.S. Forest Service, Order on Summary Judgment, CV-14-02446-TUC-RM (Sept. 15, 2015)(emphasis in original)(attached).

As such, Resolution's Main Mine must be fully reviewed in the revised EA/EIS. This is in addition to any other "past, present, or reasonably foreseeable future activity" in the area (e.g., mineral operations, grazing, ORV use, road use and construction, etc.).

As stated by Resolution to the USFS, in the company's cover letter to the agency when it submitted the PoO for the Main Mine:

> Resolution Copper Mining LLC is pleased to submit the proposed General Plan of Operation (GPO) for the Resolution Copper Mine Project. This GPO was prepared pursuant to 36 CFR 228 and describes our plan for construction, operation, and closure of the Resolution Copper Mine Project, located near Superior, Arizona. The project includes an underground mine, ore processing facility, tailings disposal facilities, access roads, and supporting infrastructure. Portions of the project will be located on lands managed by the Tonto National Forest.

Nov. 15, 2013 letter from Vicky Peacey, Senior Manager, Environmental and External Affairs for Resolution Copper Mining LLC, to Tonto Forest Supervisor Neil Bosworth (previously submitted to USFS as part of Coalition's comments in the record). Indeed, Resolution has highlighted to the public and potential investors the fact that the Main Mine is a viable mining proposal. "As promised, on November 15, 2013 Resolution Copper filed a Mine Plan of Operations with the U.S. Forest Service, which outlines our detailed plans to design, construct and operate a world-class mine." http://resolutioncopper.com/the-project/mine-plan-of-operations/ (viewed June 22, 2014) (previously submitted to USFS). Resolution also highlighted the detailed nature of the Main Mine PoO that it submitted to the USFS:

> The MPO provides detail and key information about matters that have to be addressed for the safe, responsible operation of a modern mine. These include:
>
> > All operations planned to be on private, state and federal lands – the mine itself, a concentrator, a tailings site, mine infrastructure and a filter plant.
> > Water sources and quantity, pipeline locations, and how water will be used.
> > Baseline data collected in and around the proposed mine, including detail about water, air, biology and cultural resources.

> Environmental protection measures that will safeguard air, land and water.
> Permits required to construct and operate the mine.
> Detail about the 3,700 jobs projected to be created by the mine, which also is expected to generate $20 billion in federal, state and local tax revenue and deliver an estimated $61.4 billion in economic value.

"A Milestone: Filing our Mine Plan of Operations", Resolution News Release dated Nov. 22, 2013. http://resolutioncopper.com/in-the-news/a-milestone-filing-our-mine-plan-of-operations/ (viewed June 22, 2014)(previously submitted into the record).

Indeed, Resolution has already begun initial work on the Main Mine (on its private lands). *See* "Sinking America's Deepest Shaft, Development and Blast Applications for Resolution Copper's #10 Shaft," Engineering and Mining Journal, April 2014, at 28-32 (previously submitted). Thus, there can be no doubt that the Main Mine is "reasonably foreseeable" and must be fully analyzed in the EA/EIS for this project.

The Main Mine PoO was initially submitted on Nov. 15, 2013 and can be found at: http://resolutioncopper.com/the-project/mine-plan-of-operations/. As the Main Mine PoO has been submitted to the USFS, it, and any revisions, are part of the administrative record for this Project, and incorporated into these comments (along with all documents submitted by Resolution regarding the Main Mine and this Project).

Resolution submitted a revised PoO for the Main Mine on September 23, 2014 (attached). The cover letter addressed to the USFS specifically acknowledged that the agency had reviewed the PoO and submitted comments to Resolution:

> Please find enclosed 10 electronic copies of Resolution Copper Mining LLC's (RCML) updated General Plan of Operations in response to Forest Service comments which were received by RCML on June 27th, 2014. This updated version of the General Plan of Operations incorporates information contained within the responses to comments from the Forest Service, which was submitted by RCML on September 4, 2014. Additionally, 10 hard copies will be delivered to Tonto National Forest Phoenix office in the coming week.

September 23, 2014 letter from Resolution to USFS, with PoO following (previously attached to Objectors' comments). The 2014 PoO stated:

> The proposed underground mine, ore processing operation, and associated facilities and infrastructure described herein are collectively identified as the Resolution Copper Project (Resolution Project or Project). Resolution Copper Mining, LLC (Resolution Copper), is the operating company and the Project's proponent. The name of this document is the Resolution Copper Project General Plan of Operations (GPO or Plan).
>
> This document was prepared pursuant to US Forest Service (FS) regulation (36 Code of Federal Regulations [CFR] 228A) and is being submitted to the FS for review and approval. This Plan was prepared consistent with this regulation and with the FS plans of operation guidelines provided in Appendix C of the document Training Guide for

> Reclamation and Bond Estimation and Administration for Mineral Plans of Operation Authorized and Administered under 36 CFR 228A (FS 2004).

2014 PoO at 1. Chapter One of the 2014 PoO summarizes the extensive activities related to Main Mine that have been proposed and/or approved:

> Resolution Copper proposes to construct and operate an underground copper mine and associated facilities on a combination of private, federal, and state lands. In general, the Project includes the following features:
> - New facilities at WPS, such as a Concentrator, administrative facilities, and a laboratory;
> - New facilities at EPS, such as shafts, hoists, and attendant features;
> - A TSF and associated tailings pipeline corridor;
> - Several pipelines and other infrastructure within and adjacent to the MARRCO right-of-way;
> - A Filter Plant and Loadout Facility; and
> - A conveyor corridor connecting EPS with WPS located entirely underground beneath unpatented mining claims and private lands.
>
> A schematic showing the sequence of the process flow is shown in ***Figure 1.5-1***. A detailed discussion of the Project process and features is provided in ***Section 3***.

2014 PoO at 15. Each of these activities are either direct, indirect, or cumulative impacts that must be fully reviewed.

The EA admits that the MPO "proposal was deemed administratively complete in December 2014." Response Report Table 2-7. Yet the agency excuses its failure to review the cumulative impacts because "detailed information concerning the potential effects of mining operations contemplated by the proposed MPO is incomplete or unavailable." Response Report Table 2-8.

Yet, the only reason "detailed information" on the MPO's impacts is "incomplete or unavailable" is because the agency has refused to review or obtain it – despite having the "complete" MPO since 2014. The agency argues that it does not have to review this information under the cumulative impacts requirements under NEPA, including 40 CFR §1502.22 (noted above), because the MPO may be revised in the future based on future analysis and the results from the Baseline Project. Response Report Table 2-8. Yet, as noted herein, simply because a RFFA may be modified in the future does not mean that the USFS can ignore the impacts from the MPO it is currently considering.

Further, under 40 CFR §1502.22, the agency must obtain such information when "the overall costs of obtaining it are not exorbitant." 40 CFR §1502.22 (a) ("If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement."). Here, there is no rational basis, nor has one been provided, that the costs to analyze the impacts from the MPO are "exorbitant." Indeed, the EA and Resolution both acknowledge that this information will be

gathered in a future EIS. The fact that Rio Tinto, a parent company of Resolution, is one of the world's largest mining companies, with the financial resources to pay for the gathering of this information (as they will do for the future EIS), further belies any cost argument.

Further, even if the agency could somehow argue that the costs are "exorbitant," the USFS still must conduct an "evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 CFR §1502.22 (b)(1)(4). Certainly, both the USFS and Resolution/Rio Tinto have the expertise to "evaluate such impacts" based upon their scientific and technical experience.

B. The EA Fails to Fully Analyze the Cumulative Impacts From Other Past, Present, and Reasonably Foreseeable Future Actions

In addition to failing to even consider the cumulative impacts from the Main Mine, the EA also violates NEPA's cumulative impacts analysis requirements for other activities in the area. The EA contains very brief cumulative effects/impacts sections. Although Table 3-1 lists a number of projects that will result in cumulative impacts, no details about the actual impacts are provided. The Table and associated text merely lists the projects, their locations, and what resources will be affected.

Such a listing was expressly found to violate NEPA in Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "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). Yet for each of these resources/impacts, none of the required analysis regarding other existing and proposed activities in the region is provided. As the Ninth Circuit has further held:

> Our cases firmly establish that a cumulative effects analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects." Klamath–Siskiyou, 387 F.3d at 994 (emphasis added) (quoting Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir.2004)). To this end, **we have recently noted two critical features of a cumulative effects analysis. First, it must not only describe related projects but also enumerate the environmental effects of those projects.** See Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide "adequate data of the time, place, and scale" and did not explain in detail "how different project plans and harvest methods affected the environment"). **Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project.** See Klamath–Siskiyou, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when "it only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007)(emphasis added). Note that the requirement for a full cumulative impacts analysis is required in an EA, as

well as in an EIS. See Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of cumulative impacts from nearby proposed mining operations).

The EA's Response to Comments Report merely repeats, *ad nauseam*, that Table 3-1 and Section complies with NEPA. Yet none of the required "detailed and quantified assessment" is provided. To make matters worse, it should also be noted that the USFS has Categorically Excluded the Copper King Mineral Exploration Project, and proposes to do the same for the nearby Red Top Exploration Project. *See* USFS public scoping notice letter, March 2, 2015, http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/100962_FSPLT3_2425052.pdf. Thus, not only does this EA avoid any review of these projects, the agency proposes to avoid preparation of an EA or EIS for those projects as well – completely bypassing any detailed NEPA review.

Further, regarding the projects listed in Table 3-1, the EA improperly limits the scope of the purported cumulative impacts analysis area near the Baseline Project to essentially just the north side of Highway 60 (although it does include some of the MPO area south of the highway east of the town of Superior). Yet the visual, noise, wildlife movement, air quality, and other impacts from the proposed action can be felt south of the Highway (and east and west of the analysis area). Other projects south of the Highway can have cumulative impacts which must be fully analyzed.

Lastly, and this applies to both the Main Mine and the other projects listed in Table 3-1, the EA limits its determination of the significance of the direct, indirect, and cumulative impacts to just the impacts within the "project area" of the Baseline Project. *See generally* continued references to impacts to resources in "project area" in Chapter 3 of the EA. Yet this defies common sense as the impacts from the Baseline Project, when combined with the impacts from the MPO and other past, present, and RFFAs, will certainly have impacts beyond the acreage of the Baseline Project. As just one example, the EA admits that the Project alone may result in the "blockage of migration or dispersal corridors" for wildlife. EA at 3-54. Yet no analysis was done regarding these wildlife corridors – especially due to the fact that the projects listed in Table 3-1 are/will be located in all directions around the Baseline Project. *See* Figure 3-1 (EA at 3-5).

III. THE MAIN MINE IS A CONNECTED ACTION THAT MUST BE REVIEWED IN ONE EA/EIS

In addition to, and separate from, the agency's duty to review the cumulative and other impacts from the Main Mine, NEPA requires that the Main Mine and the Project be considered in one EA/EIS (certainly an EIS in this case) as a "connected action" under NEPA. This is because the Main Mine and the Project are part of one interdependent mining project, as acknowledged by Resolution. *See* Table 1.4-1 of the 2014 PoO. There, Resolution admits that the "Baseline Hydrological & Geotechnical Data Gathering Activities" listed in Table 1.4-1 "is being conducted in support of the Resolution Project to facilitate activities such as exploration, the collection of environmental baseline data, facility designs, and associated access." 2014 PoO at 7.

"[A]n agency is required to consider more than one action in a single EIS if they are 'connected actions,' 'cumulative actions,' or 'similar actions.'" Kleppe v. Sierra Club, 427 U.S. 390, 408 (1976). "[P]roposals for . . . actions that will have cumulative or synergistic environmental impact upon a region . . . pending concurrently before an agency . . . must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." Kleppe, 427 U.S. at 410. When preparing an EA or an EIS, an agency must consider all "connected actions," "cumulative actions," and "similar actions." 40 C.F.R. § 1508.25(a).

Actions are "connected" if they trigger other actions, cannot proceed without previous or simultaneous actions, or are "interdependent parts of a larger action and depend on the larger action for their justification." Id. § 1508.25(a)(1). If one project cannot proceed without the other project (i.e., "but for" the other project), or if the first project is not "independent" of the second project, the two projects are considered connected actions and must be reviewed in the same EIS. Thomas v. Peterson, 753 F. 2d 754, 758-60 (9th Cir. 1985). "The purpose of this requirement is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact. … The crux of the test is whether each of the two projects would have taken place with or without the other and thus had independent utility." Great Basin Mine Watch, 456 F.3d at 969 (9th Cir. 2006).

Even if the Mine could conceivably occur without the previous or simultaneous occurrence of the Project (or vice versa), which is not the case here, if it could not occur without such actions it is a connected action and must be considered within the same NEPA document as the underlying action. "[E]ven though an action could conceivably occur without the previous or simultaneous occurrence of another action, if it would not occur without such action it is a 'connected action' and must be considered within the same NEPA document as the underlying action." Dine Citizens Against Ruining Our Env't v. Klein, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010).

The EA asserts that "the Resolution Copper mine is not dependent on authorization of the Baseline Plan." Response Report at Table 2-25. Yet, the agency admits that "the Baseline Plan is critical to support the EIS for the proposed MPO." Table 2-24. Also, in arguing that Resolution has a "right" to conduct the Baseline Plan under the 1872 Mining Law and 1955 Surface Resources Act, the agency states that the Project is "reasonably incident to prospecting, exploration, development, mining or processing of copper ore from the Resolution ore body." Response Report Table 2-11. The EA also acknowledges that: "The proposed [Baseline] Plan … is necessary to support design and environmental analysis of a proposed TSF [Tailings Storage Facility], which would be incident to mining and processing of mineral resources at the Resolution Copper Mine." EA at 1-3. *See also* Draft DN at 8-9 (Baseline Project is "critical" to review and operation of the Main Mine).

Thus, as acknowledged by Resolution and the EA, the Project is a "critical" and "necessary" part of the Main Mine, and would not occur but for the Main Mine. Similarly, as also admitted by Resolution and the USFS, the Main Mine would not occur without this Project. As such, they are considered "connected actions" under NEPA and must be considered in one EIS.

IV. THE AGENCY CANNOT ASSUME THAT RESOLUTION HAS "RIGHTS" TO PROCEED WITH THE PROJECT YET AT THE SAME TIME ARGUE THAT THE PROJECT IS NOT PART OF THE MAIN MINE PROPOSAL

The EA states that Resolution has a "legal right" to conduct the Baseline Plan Project. Response Report Table 2-81. The agency further states, that due to this alleged "right," the agency must approve the Project and cannot choose the no action alternative: "[D]ue to the statutory rights afforded by the U.S. Mining Laws; the Forest Service cannot select the *No Action* alternative as a preferred alternative." Scoping letter at 4. "The statutory right of Resolution to mine mineral resources on federally administered lands is recognized in the *General Mining Law of* 1872." Id. *See also* USFS Resolution Copper Mining, LLC Baseline Hydrological & Geotechnical Data Gathering Activities, Plan of Operations, Frequently Asked Questions, March 2015, at 3 (asserting that the agency cannot deny the proposed action PoO).

Yet, as admitted by the USFS in the EA and in the scoping letter, the Project is not proposed to explore or mine mineral resources. It is simply a proposal to gather geologic, water, and related information. The only legal way that Resolution can arguably claim any "rights" or "entitlement" to use these public lands is if the Project was part of an exploration or mining project on public lands. But here, the USFS, in an attempt to justify the agency's refusal to review the impacts from the Main Mine and related proposals, says that the Project is not part of any mining or exploration project.

The agency and Resolution cannot have it both ways. They cannot argue that the company has rights/entitlements under the Mining Law based on the exploration or development of mineral resources, yet divorce the Project from any plan to conduct such exploration/development of minerals. In other words, the Project is either part of an exploration/mining proposal (and it is not exploration since the company has already submitted its plan to mine/develop the minerals), and the Mining Law applies, or it is not.

The EA and scoping letter says that the Project is not part of the Main Mine plan. Thus, the alleged rights/entitlements under the Mining Law do not apply. On the other hand, for the Mining Law to apply the USFS must consider the Project and the Main Mine linked, and thus the "connected action" and/or "cumulative impacts" requirements under NEPA necessarily apply.

V. IF THE USFS DOES NOT CONSIDER THE PROJECT AND MAIN MINE AS PART OF THE SAME PROJECT, THEN THE PROPER PERMITTING AUTHORITY IS NOT THE MINING LAW OR 36 PART 228 REGULATIONS, BUT THE USFS' SPECIAL USE PERMITTING REGULATIONS

If the agency does not consider the Project and the Main Mine part of the same operation – so as to attempt to avoid them being considered connected actions under NEPA – then the Project cannot be considered a mining project under the Mining Law or 36 CFR Part 228 regulations. As such, the Project can only be reviewed and considered under the USFS Special Use permitting regime.

Thus, the USFS must require the company to submit right-of-way or other special use permit authorizations and require that all mandates of Title V of the Federal Land Policy Management

Act ("FLPMA") and its implementing regulations are adhered to (e.g., no permit can be issued unless it can be shown that the issuance of the permits is in the best interests of the public, payment of fair market value, etc.). *See* 36 CFR Part 251 (USFS special use permit regulations).

This is required because the approval of roads is not a right covered by the 1872 Mining Law (especially when the roads are not proposed to access mineral deposits) – even if the company could show that its mining claims were valid, which it has not done. Further, even if the USFS could ignore its duties under its multiple use and other mandates and assume that the company had a right under the Mining Law (which as noted herein is wrong), such rights do not attach to the right-of-ways and other FLPMA approvals needed for the roads.

Roads, even those across public land related to a mining operation, are not covered by statutory rights under the Mining Law. Alanco Environmental Resources Corp., 145 IBLA 289, 297 (1998)("construction of a road, was subject not only to authorization under 43 C.F.R. Subpart 3809 [BLM mining regulations], but also to issuance of a right-of-way under 43 C.F.R. Part 2800 [BLM FLPMA Title V regulations]."). "[A] right-of-way must be obtained prior to transportation of water across Federal lands for mining." Far West Exploration, Inc., 100 IBLA 306, 308 n. 4 (1988) *citing* Desert Survivors, 96 IBLA 193 (1987). *See also*; Wayne D. Klump, 130 IBLA 98, 100 (1995) ("Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations [FLPMA Title V and ROW regulations]."). Although these cases dealt with BLM lands, they apply equally to Forest Service lands. As noted in Alanco, ROWs for access roads are subject to FLPMA's Title V requirements. The leading treatise on federal natural resources law confirms this rule: "Rights-of-way must be explicitly applied for and granted; **approvals of mining plans or other operational plans do not implicitly confer a right-of-way**." Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, §15.21 (emphasis added).

The fact that the USFS mining regulations consider roads associated with the Project part of the mineral "operations," 36 CFR §228.3, does not override these holdings or somehow create statutory rights where none exist. The court in Mineral Policy Center v. Norton, 292 F.Supp.2d, 30 (D.D.C. 2003) specifically **rejected** the federal government's argument that all mining-related operations were exempt from FLPMA's ROW requirements. 292 F.Supp.2d at 49-51 ("[I]f there is no valid claim and the claimant is doing more than engaging in initial exploration activities on lands open to location, the claimants' activity is not explicitly protected by the Mining Law."). Id. at 50.

Overall, the USFS must apply the proper discretionary and public interest review applicable to Title V and its USFS implementing regulations. This permitting regime governs the agency's position regarding NEPA alternatives and mitigation analysis, as well as the fundamental errors in assuming that Resolution has a statutory right to receive approval of these roads.

Operations not conducted on "valid and perfected claims" must comply with all of FLPMA's requirements, including Title V's SUP/ROW requirements. Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 49-51 ("[I]f there is no valid claim and the claimant is doing more than

engaging in initial exploration activities on lands open to location, the claimants' activity is not explicitly protected by the Mining Law."). Id. at 50.

Under FLPMA Title V, Section 504, the USFS may grant a SUP/ROW if it "(4) will do no unnecessary damage to the environment." 43 U.S.C. § 1764(a). Rights of way "shall be granted, issued or renewed … consistent with … any other applicable laws." Id. § 1764(c). A right-of-way that "may have significant impact on the environment" requires submission of a plan of construction, operation, and rehabilitation of the right-of-way. Id. § 1764(d).

A Title V SUP/ROW "shall contain terms and conditions which will … (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." Id. § 1765(a). In addition, the SUP/ROW can only be issued if activities resulting from the SUP/ROW:

> (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

FLPMA, § 1765(b).

At least two important substantive requirements flow from the FLPMA's SUP/ROW provisions. First, the USFS has a mandatory duty under Section 505(a) to impose conditions that "**will** minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise **protect the environment**." Id. §1765(a) (emphasis added). The terms of this section do not limit "damage" specifically to the land within the ROW corridor. Rather, the repeated use of the expansive term "the environment" indicates that the overall effects of the SUP/ROW on cultural, environmental, scenic and aesthetic values must be evaluated and these resources protected. In addition, the obligation to impose terms and conditions that "protect Federal property and economic interests" in Section 505(b) supports an expansive reading that the USFS must impose conditions that protect not only the land crossed by the right-of-way, but **all** federal land affected by the approval of the SUP/ROW.[2]

[2] Overall, the Forest Service has broad authority to restrict and deny access routes to mining claims to protect non-mineral values and uses of the public lands. In a recent major decision, the Ninth Circuit held that: "[T]he Secretary of Agriculture has long had the authority to restrict motorized access to specified areas of national forests, including to mining claims. *See* Clouser [v. Espy], 42 F.3d 1522, 1530 (9th Cir. 1994)." Public Lands for the People v. U.S. Dept. of Agriculture, 697, F.3d 1192, 1198 (9th Cir. 2012).

Second, the discretionary requirements in Section 505(b) require a USFS determination as to what conditions are "necessary" to protect federal property and economic interests, as well as "otherwise **protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto**." (emphasis added). This means that the agency can only approve the SUP/ROW if it "protects the public interest in lands" not only upon which the roads would traverse, but also lands and resources adjacent to and associated with the SUP/ROW. Thus, in this case, the USFS can only approve the SUP/ROWs if all aspects of the Project, and the Main Mine itself, "protect the public interest." The agency has made no showing that this is the case here.

The federal courts have recently and repeatedly held that the USFS not only has the authority to consider the adverse impacts on lands and waters outside the immediate ROW corridor, it has an obligation to protect these resources under FLPMA. In County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003), the court affirmed the Forest Service's imposition of mandatory minimum stream flows as a condition of granting a ROW for a water pipeline across USFS land. This was true even when the condition/requirement restricted or denied vested property rights (in that case, water rights). Id. at 1085-86.

The USFS cannot issue a SUP/ROW that fails to "protect the environment" as required by FLPMA, including the environmental resource values outside the immediate ROW corridor. "FLPMA itself does not authorize the Supervisor's consideration of the interests of private facility owners as weighed against environmental interests such as protection of fish and wildlife habitat. FLPMA *requires* all land-use authorizations to contain terms and conditions which will protect resources and the environment." Colorado Trout Unlimited v. U.S. Dept. of Agriculture, 320 F.Supp.2d 1090, 1108 (D. Colo. 2004)(emphasis in original) appeal dismissed as moot, 441 F.3d 1214 (10th Cir. 2006).

A recent case, dealing with a USFS-issued Special Use Permit for a water conveyance, specifically found that the agency must consider its duties under FLPMA to protect public resources. "Federal law, including the Federal Land Policy Management Act of 1976 ("FLMPA") 'specifically authorizes the Forest Service to restrict such rights-of-way [granted by an SUP] to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law.' County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081,1086 (9th Cir.2003)." Sequoia Forestkeeper v. U.S. Forest Service, 2010 WL 5059621, *19 (E.D. Cal. 2010), amended on reconsideration, 2011 WL 902120 (E.D. Cal. 2011). The court also held that the USFS failed to consider its SUP authorities during the scoping process in violation of NEPA: "The USFS's erroneous conclusion that it had no authority to condition the SUP to require minimum bypass flows or other rights-of-way restrictions led to its unreasonable failure to consider the requests to do so in its scoping period." Sequoia Forestkeeper v. U.S. Forest Service, 2010 WL 5059621, *21. The fact that that case dealt with an SUP for a water conveyance, rather than a road, is not relevant, as the same SUP/ROW requirements to protect public resources apply equally in both situations.

The Department of Interior, interpreting FLPMA V and its similar right-of-way regulations, has held that: "A right-of-way application may be denied, however, if the authorized officer determines that the grant of the proposed right-of-way would be inconsistent with the purpose for

which the public lands are managed or if the grant of the proposed right-of-way would not be in the public interest or would be inconsistent with applicable laws." Clifford Bryden, 139 IBLA 387, 389-90 (1997) 1997 WL 558400 at *3 (affirming denial of right-of-way for water pipeline, where diversion from spring would be inconsistent with BLM wetland protection standards).

Similar to the County of Okanogan, Colorado Trout Unlimited, and Sequoia Forestkeeper federal court decisions noted above, the Interior Department has held that the fact that a ROW applicant has a property right that may be adversely affected by the denial of the ROW does not override the agency's duties to protect the "public interest." In Kenneth Knight, 129 IBLA 182, 185 (1994), the BLM's denial of the ROW was affirmed due not only to the direct impact of the water pipeline, but on the adverse effects of the removal of the water in the first place:

> [T]he granting of the right-of-way and concomitant reduction of that resource, would, in all likelihood, adversely affect public land values, including grazing, wildlife, and riparian vegetation and wildlife habitat. The record is clear that, while construction of the improvements associated with the proposed right-of-way would have minimal immediate physical impact on the public lands, the effect of removal of water from those lands would be environmental degradation. Prevention of that degradation, by itself, justified BLM's rejection of the application.

1994 WL 481924 at *3. That was also the case in Clifford Bryden, as the adverse impacts from the removal of the water was considered just as important as the adverse impacts from the pipeline that would deliver the water. 139 IBLA at 388-89. *See also* C.B. Slabaugh, 116 IBLA 63 (1990) 1990 WL 308006 (affirming denial of right-of-way for water pipeline, where BLM sought to prevent applicant from establishing a water right in a wilderness study area).

In King's Meadow Ranches, 126 IBLA 339 (1993), 1993 WL 417949, the IBLA affirmed the denial of right-of-way for water pipeline, where the pipeline would degrade riparian vegetation and reduce bald eagle habitat. The Department specifically noted that under FLPMA Title V: "[A]s BLM has held, **it is not private interests but the public interest that must be served by the issuance of a right-of-way**." 126 IBLA at 342, 1993 WL 417949 at *3 (emphasis added).

The Forest Service Manual also requires that the project be covered by the ROW/SUP regime. Forest Service Manual 2730 provides direction regarding road rights of way. It states the following regarding FLMPA rights of way: "Grant all road rights-of-way under Title V of the Federal Land Policy and Management Act with the exception of: 5. **Roads constructed on valid mining claims** or mineral lease areas when the construction is authorized by an approved operating plan (36 CFR part 228 and FSM 2810)."

Thus, regarding the roads in this case, the Manual requires that a FLPMA Title V authorization is required for roads "*except*" for "**roads constructed on valid mining claims.**" Thus, even if the agency's legal position that authorization of roads and related facilities is considered a "right" under the Mining Law and approved via the Part 228 regulations was correct – which as shown herein it is not – this is true only for such facilities/uses "on valid mining claims."

The record contains no evidence whatsoever that the lands to be crossed by the roads and technical facilities are covered by "valid mining claims." Under the Mining Law, in order to be valid, mining claims must contain the "discovery of a valuable mineral deposit." 30 U.S.C. § 22. Under the "marketability" test, it must be shown that the mineral can be "extracted, removed and marketed at a profit." United States v. Coleman, 390 U.S. 599, 600 (1968). According to the "prudent-person" test, "the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labors and means, with a reasonable prospect of success, in developing a valuable mine." Id. at 602. The Supreme Court has held that profitability is "an important consideration in applying the prudent-man test and the marketability test," and noted that ". . . the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former." Id. at 602-603.

"In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the USFS. These require a claimant to: … 2. Discover a valuable mineral deposit. … (and) 7. Be prepared to show evidence of mineral discovery." FSM 2813.2. "A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands." FSM §2811.5.

In addition to the lack of any evidence that the claims to be crossed by the roads are valid under the Mining Law, it is almost certain the Project's activities are on lands far from the mineralized zone and do not contain the requisite valuable mineral deposit. Indeed, it is likely that these lands contain common varieties of rock that are not even considered locatable minerals under federal mining law.

Forest Service rules (Region 3's FSM 2500, Chapter 2540 Water Use and Development) (previously submitted) also state that special use authorization is necessary for this project as it is a consumptive water use on the National Forest. Since the 1872 General Mining Law does not apply here, a special use permit would be required and would also require an examination of the water developments in the project and consideration of their potential to impact groundwater, streams, springs, seeps and associated riparian and aquatic ecosystems.

> 2541.03 "…consumptive water uses on the National Forest include, but are not limited to, domestic water to support administrative sites, **water for road building**, and water for firefighting." (Emphasis added.)
>
> 2541.35 "Entities other than the Forest Service cannot construct wells and **pipelines** (water developments) on National Forest System (NSF) land without Forest Service authorization." (emphasis added.)

Accordingly, the agency's decision to review and approve these facilities solely through the Part 228 PoO process violates federal law. Any review and regulation of the proposed activities must occur under the legally-correct permitting regime.

VI. RESOLUTION IS NOT "ENTITLED" TO HAVE THE PROJECT APPROVED UNDER THE MINING LAW

As noted above, the EA and Draft DN are based on the belief that Resolution has a statutory "right" under the Mining Law and 1955 Act to have it approved. The agency further states, that due to this alleged "right" the agency must approve the Project and cannot choose the no action alternative: "[D]ue to the statutory rights afforded by the U.S. Mining Laws; the Forest Service cannot select the *No Action* alternative as a preferred alternative." Scoping letter at 4. "The statutory right of Resolution to mine mineral resources on federally administered lands is recognized in the *General Mining Law of* 1872." Id. *See also* USFS Resolution Copper Mining, LLC Baseline Hydrological & Geotechnical Data Gathering Activities, Plan of Operations, Frequently Asked Questions, March 2015, at 3 (asserting that the agency cannot deny the proposed action PoO) (attached).

Yet this position violates the FLPMA and the 1872 Mining Law, by not requiring Resolution to pay Fair Market Value (FMV) for the use of public lands not covered by valid mining claims, based on the lack of any evidence that the vast majority of the mining claims (or indeed any claims at all) at the Project site contain locatable minerals and the requisite discovery of a valuable mineral deposit. Similarly, the agency's position also violates provisions of FLPMA and the Multiple Use Sustained Yield Act, NFMA, 1897 Organic Act, and other laws mandating that the agencies manage, or at least consider managing, these lands for non-mineral uses – something which the USFS refuses to do or consider in this case.

The EA is based on the overriding assumption that Resolution has statutory rights to use all of the public lands at the site under the 1872 Mining Law. However, where Project lands have not been verified to contain, or do not contain, such rights, the USFS's more discretionary multiple-use authorities apply. *See* Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 46-51 (D.D.C. 2003) (although that case dealt with Interior Department lands, the same analysis applies to USFS lands.).

As one very recent federal court case, dealing with "takings" case aimed against Forest Service regulation of a proposed mining operation in Oregon, stated:

> [A]lthough 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. United States, 13 Cl.Ct. 7, 28 (1987))).

Freeman v. U.S. Dept. of Interior, 2014 WL 1491248, *3 (D.D.C. 2014). A more recent decision highlighted the fact that, without evidence that the claims are valid, the operator has no rights against the United States:

> As the Supreme Court explained almost a century ago, "no right arises from an invalid claim of any kind ... otherwise they work an unlawful private appropriation in derogation of the rights of the public." *Cameron v. United States*, 252 U.S. 450, 460, 40 S.Ct. 410, 64 L.Ed. 659 (1920). 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").

Freeman v. U.S. Dept. of Interior, 2015 WL 1213657, *2 (D.D.C. 2015).

The Mineral Policy Center court specifically recognized the federal government's duty to apply its broader, multiple use authority when mineral-related operations are proposed on lands not subject to valid and perfected claims:

> While a claimant can explore for valuable mineral deposits before perfecting a valid mining claim, **without such a claim, she has no property rights against the United States (although she may establish rights against other potential claimants), and her use of the land may be circumscribed beyond the UUD standard because it is not explicitly protected by the Mining Law**.

292 F.Supp.2d at 47 (emphasis added). Although the "UUD standard" was at issue in that case (BLM's duty to "prevent unnecessary or undue degradation" under FLPMA), the holding that development "rights" under the mining laws only apply to lands covered by valid claims applies equally to the USFS and BLM. The court was equally clear as to what was required to "perfect" a mining claim:

> The Mining Law gives individuals the right to explore for mineral resources on lands that are "free and open" in advance of having made a "discovery" or perfected a valid mining claim. United States v. Locke, 471 U.S. 84, 86, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985). The Mining Law provides, however, that a mining claim cannot be perfected "until the discovery of the vein or lode." 30 U.S.C. § 23.

Id. at 46 n. 19. As a result:

> **[b]efore 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.**

Id. at 48 (emphasis added). Yet, in its review of the Project, the USFS erroneously believes that it does not have this "wide discretion" to "approve or disapprove" any part of the PoO.

The Mining Law does not prohibit any and all uses of a mining claim for milling or processing activities. Indeed, a 1955 enactment of Congress specifically authorizes the use of mining claims for "prospecting, mining or processing operations and uses reasonably incident thereto." Surface Resources Act of 1955, 30 U.S.C. § 601,603, 611-615.

However, the 1955 Act did not create any surface use rights independent of the underlying mining claim. This is because the overall intent of the 1955 Act was to limit, not expand, mining claimants' rights. *See generally* Clayton J. Parr & Dale A. Kimball, "Acquisition of Non-Mineral Land for Mine Related Purposes," 23 Rocky Mtn. Min. L. Inst. 595,635-36 (1977). The 1955 Act must therefore be read as not altering the principle that the right of a mining claimant to use the surface of a mining claim is derived from the right to mine the discovered mineral deposit. In other words, although the 1955 Act authorizes "reasonably incident" uses, discovery is still required on each claim in order to establish rights against the United States.

Consequently, if a mining claim is proposed to be used solely for activities that are "reasonably incident" to extracting minerals from other lands, it must be supported by the requisite discovery. This is especially true because federal courts have long and consistently held that a mining claimant's right to use an unpatented mining claim is limited to purposes connected with the removal of minerals from that claim, and not for other purposes. *See, e.g.,* Teller v. United States, 113 F. 273 (8th Cir. 1901); United States v. Rizzinelli, 182 F. 675 (D. Idaho 191 0). As one mining industry author stated:

> [T]he use of the surface of an unpatented mining claim for mining and processing minerals removed from other lands may not be authorized. It appears that the use of the surface of unpatented mining claims would be more likely to be challenged if permanent damage is caused to the surface and no mining is conducted under the mining claim.

Richard G. Allen, "Utilization of Adjacent Properties, Cross-Mining, and Commingling," 26 Rocky Mtn. Min. L. Inst. 419,428 (1980); *see also* Parr & Kimball, at 634-36 (concluding that the "surface rights of the locator [of a mining claim are tied] to extraction of the mineral deposit contained within the boundaries of the claim," and therefore if a claim is being used for "dumping of waste, stripping, or some other similar use causing permanent surface disturbance" in connection with mining off that claim, it is questionable at best).

The leading mining industry treatise stated:

> Several early cases recognized the right of an operator to occupy and use unoccupied public domain in connection with mining operations. However, it is doubtful that such rights continue to exist in light of the comprehensive land use procedures adopted in the Federal Land Policy and Management Act of 1976. When ground is held by a mining claim that is not valid, an operator's rights are limited to those conferred under the doctrine of *pedis possesio*.

4 Am. L. Mining 2d, supra note 17, 110.02[3][d] (Aug. 1997) (citations omitted). Thus, the USFS cannot in this case determine that Resolution is "entitled" under the Mining Law to use its claims for roads and scientific studies, etc., when there is no evidence in the record that those claims are supported by any rights under the Mining Law against the United States.

A proper application of USFS's multiple use, public interest, and sustained yield mandates to those areas not covered by valid claims would result in a very different Project review, alternatives, and level of protection for public land resources and values, as well as reducing or eliminating the adverse impacts to the use of these lands by members of the public.

Regarding the requirement for the federal government to obtain FMV for the use of lands not covered by valid claims, under FLPMA, "the United States [must] receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute." 43 U.S.C. §1701(a)(9). The Mineral Policy Center court held that unless the lands were covered by valid claims (*i.e.* the situation "otherwise provided for by statute" in § 01(a)(9)), the agencies must comply with their FMV duty:

> Operations neither conducted pursuant to valid mining claims nor otherwise explicitly protected by FLPMA or the Mining Law (*i.e.*, exploration activities, ingress and egress, and limited utilization of mill sites) must be evaluated in light of Congress's expressed policy goal for the United States to "receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9).

Mineral Policy Center, at 51.

Here, the USFS has failed to even consider the application of its multiple use authority, and related FMV requirements as mandated by Mineral Policy Center – a violation of FLPMA, the Mining Law, and their multiple-use mandates, as well as being an arbitrary and capricious decision under the Administrative Procedure Act (APA).

As noted above, it is likely that these lands contain common varieties of rock that are not even considered locatable minerals under federal mining law, which is a prerequisite for claim validity. *See* 30 U.S.C. § 22 (only "valuable mineral deposits" are covered by the Mining Law); 30 U.S.C. § 611 ("common varieties" of minerals are not locatable under the Mining Law). As the Interior Department has held:

> Generally, absent the discovery of a "valuable mineral deposit" on each of the unpatented lode mining claims, [the claimant] would not be entitled to the "exclusive right of possession and enjoyment of all the surface [of the claim]" and subsurface rights under 30 U.S.C. §§ 22 and 26, good against the United States, or ultimately to a patent of the claimed lands, pursuant to 30 U.S.C. §§ 22 and 29 (2000). Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Wilbur v. Krushnic, 280 U.S. 306, 316-17 (1930); Cameron v. United States, 252 U.S. 450, 460 (1920); Cole v. Ralph, 252 U.S. 286, 294-96 (1920). In such circumstances, BLM would have discretion to modify or even reject an MPO filed to engage in mining operations and related activity. Great Basin Mine Watch, 146 IBLA 248, 256 (1998) ("Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit".)

Center for Biological Diversity, 162 IBLA 268, 278 (2004). "[T]he location of a mining claim does not render a claim presumptively valid and the Department may require a claimant to provide evidence of validity before approving an MPO or allowing other surface disturbance in connection with the claim." Id. at 281. As stated in the USFS Minerals Manual: "**In order to successfully defend rights to occupy and use a claim** for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the USFS. These **require a claimant to: … 2. Discover a valuable**

mineral deposit. … (and) 7. Be prepared to show evidence of mineral discovery." FSM 2813.2 (emphasis added).

Under the Mining Law, in order to be valid, mining claims must contain the "discovery of a valuable mineral deposit." 30 U.S.C. § 22. *See* herein discussion of the test for valid claims. According to the USFS Minerals Manual: "A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands." FSM §2811.5.

> The term "valid claim" often is used in a loose and incorrect sense to indicate only that the ritualistic requirements of posting of notice, monumentation, discovery work, recording, annual assessment work, payment of taxes, and so forth, have been met. This overlooks the basic requirement that the claimant must discover a valuable mineral deposit. Generally, a valid claim is a claim that may be patented.

FSM § 28115.

> [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. United States, 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).

Freeman v. U.S. Dept. of Interior, 2014 WL 1491248, *4 (D.D.C. 2014). The holding of this case is instructive, as the court affirmed the rule "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."

At a minimum, the USFS should inquire as to whether the Project lands contain "common varieties" or "valuable mineral deposits." T he USFS recognizes that a valid claim under the Mining Law cannot be made for common variety minerals. "The 1955 Multiple-Use Mining Act (69 Stat. 367; 30 U.S.C. 601, 603, 611-615) amended the United States mining laws in several respects. The act provides that common varieties of mineral materials shall not be deemed valuable mineral deposits for purposes of establishing a mining claim." FSM §2812.

Although a complete mineral report and claim validity verification is not required for every single proposal, the agency must have evidence that the claims meet the legal prerequisites to establish rights under the Mining Law. At a minimum, evidence needs to be in the record supporting valid rights under the mining law **if** the agency reviews and approves land uses under an assumed right under the Mining Law – rights that accrue only if based on valid claims as shown by the legal decisions noted herein. As stated in the USFS Minerals Manual: "In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the USFS. These require a claimant to: … 2. Discover a valuable

mineral deposit. … (and) 7. **Be prepared to show evidence of mineral discovery**." FSM 2813.2 (emphasis added).

In other words, if the agency's review and approval of the Project is based on "rights" under the Mining Law, the record must contain evidence that the legal prerequisites for establishing those rights exist in fact and law. Any policy or decision to the contrary is illegal.

In response, the EA and Draft DN merely repeat the assertion that because the Baseline Project is "incidental" to the Main Mine, it has statutory rights under the Mining Law and 1955 Act. *See* Response Report Table in multiple sections. Yet, as noted above, there are no "rights" to project approval, whether the operations are "incidental" or not, without satisfying the fundamental requirements of the Mining Law.

VII. THE EA FAILS TO FULLY ANALYZE ALL BASELINE CONDITIONS POTENTIALLY AFFECTED BY THE PROJECT

The Project proposes an extensive network of roads, drilling sites, and support facilities across a large area. These activities will adversely impact a number of critical public resources such as air, water (surface and ground, quantity and quality), wildlife, recreation, visual/scenic, cultural/religious, historical, etc. As noted above, each of these potential impacts must be fully reviewed, not just in the immediate location of the impact, but on a regional scale. In addition, the agency must prepare for public review a detailed analysis of the current baseline conditions for all potentially affected resources, both at the immediate site locations, but also nearby and regionally (e.g., baseline current conditions of Queen Creek and any and all impacts to the nearby Boyce Thompson Arboretum). The impacts from this project to the towns of Superior and Queen Creek must also be fully reviewed.

The USFS is required to "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process:

> "NEPA clearly requires that consideration of environmental impacts of proposed projects take place before [a final decision] is made." LaFlamme v. FERC, 842 F.2d 1063, 1071 (9th Cir.1988) (emphasis in original). Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. Id. Without establishing the baseline conditions which exist in the vicinity … before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA.

Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). "In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F.Supp.2d 1113, 1126 (D. Nev. 2008). "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council of Environmental

Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999).

Such baseline information and analysis must be part of the EA/EIS and be subject to public review and comment under NEPA. The lack of an adequate baseline analysis fatally flaws an EA or EIS. "[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible." Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011). "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." Id. at 1085.

Here, the EA admits that the agency does not have the required baseline analysis of the affected area for numerous potentially affected resources. For example, the agency acknowledges that, for groundwater, **"site-specific water quality information is not readily available."** EA at 3-19 (emphasis added). Although the EA summarizes some groundwater flow issues, no baseline information on quality is provided. The EA also admits that "the Superior Basin was not specifically evaluated." EA at 3-19. Instead of this required analysis, the EA merely mentions a 17-year old "groundwater quality study" of other basins in Arizona. Id.

The lack of baseline groundwater analysis is especially troubling (and in violation of NEPA) due to the admitted adverse impacts to groundwater that may result from the project. The EA admits that groundwater and surface water in the Superior Basin may be adversely affected by the project. EA Section 3.3. For example, the EA states:

> The types of project activities that could affect groundwater resources include the following:
>
> - Intrusive activity (i.e. drilling) that intersects the groundwater system or is located close to existing groundwater wells or springs.
> - Surface-disturbing activity near existing groundwater wells and springs.
> - Groundwater use associated with drilling and well testing procedures.
> - Generation of investigation-derived waste.

EA at 3-21.

The EA states that "available data regarding baseline groundwater conditions in the project area would be supplemented by the activities in the Baseline Plan." Response Report Table 2-67. Yet, as noted herein, the EA admits that the agency did not gather **any** groundwater quality data. The fact the Project is designed to gather baseline data for the Main Mine proposal does not satisfy the agency's duty to obtain baseline groundwater quality data for **this Project.**

Indeed, because the agency argues that the Baseline project is "independent" of the Main Mine Project (in order to avoid reviewing the two projects together under NEPA), it cannot rely on some future study as the means to satisfy its baseline data requirements for **this Project.**

The EA itself details the type of groundwater data that is needed for the Main Mine, essentially

admitting the types of data that would constitute an adequate baseline groundwater analysis. Response Report at Table2-67/68 (listing various types of data that would be needed to ascertain baseline conditions such as "chemical quality of groundwater" and "aquifer hydraulic properties"). None of these important attributes have been obtained for this Project. "[S]ite-specific water quality information is not readily available." EA at 3-19. Yet, as noted above, the fact that baseline data is "not available," does not mean that the agency does not have a duty under NEPA to obtain such data – indeed, that is the very purpose of NEPA.

The USFS's failure to require baseline groundwater studies, analysis and mitigation measures in reviewing a mineral-related drilling plan under NEPA and the 228 regulations was ruled illegal by the Idaho Federal District Court. In Idaho Conservation League, 2012 WL 3758161 (D. Idaho 2012), the Idaho federal court concluded that the Forest Service acted arbitrarily and capriciously by authorizing exploratory hardrock mineral drilling without fully analyzing the baseline groundwater and hydrology. Id. at *17. Such analysis should include "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." Idaho Conservation League, 2012 WL 3758161, at *16. See also Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011).

Additionally, the Court noted that the Forest Service cannot rely on mitigation measures as a substitute for NEPA compliance, which the EA does in this case.

> Further, pointing to the use of closed drilling methods to answer the concerns regarding groundwater is arbitrary and capricious as it inappropriately relies upon mitigation measures to satisfy NEPA's obligations. *See Northern Plains Resource v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding mitigation measures are not alone sufficient to meet NEPA's obligations to determine the projected extent of the environmental harm to resources before a project is approved.). While the assurances regarding closed drilling may ultimately be the appropriate way to address the concerns regarding contamination to the groundwater, it does not address concerns regarding the lack of baseline data, analysis, and monitoring of groundwater. These are significant environmental concerns which demand at least baseline analysis and/or at least some monitoring mechanism to give some assurance to the assumptions regarding the closed drilling methods before a finding of no significant impact can be made. *See Northern Plains*, 668 F.3d at 1083 ("Once a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible.")(citation and marks omitted).

Id. at *17.

This holds true for potential impacts to all resources from the proposed project, not just groundwater (e.g., wildlife, recreation, air quality, etc.).

A more recent federal court decision reiterated the NEPA requirement for a detailed groundwater baseline analysis. "Ninth Circuit cases acknowledge the importance of obtaining baseline

condition information before assessing the environmental impacts of a proposed project." Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *28 (D. Or. 2014)(USFS/BLM EA for mineral exploration project failed to obtain and analyze baseline water quality data in violation of NEPA).

Importantly, the EA admits that there already is an extensive network of groundwater wells in the Project area alone. "There are approximately 35 registered water wells within the project area footprint. … The majority of wells have depths ranging from 50 to 150 feet below ground surface." EA at 3-19. A number of wells exceed 150 feet in depth. EA Figure 3-4 (EA at 3-19).

The fact that there were existing wells in the project area, yet were not sampled for baseline water quality by the Forest Service, was an important factor in the federal court's decision in Gifford Pinchot invalidating a USFS EA for failing to conduct a baseline analysis of ground water quality conditions. Further, the court specifically rejected the argument that mitigation and monitoring of the project to allegedly protect groundwater excuses the NEPA requirement for a full baseline analysis. 2014 WL 3019165, *25-33. Interestingly, upon remand, the Forest Service's/BLM joint Modified EA in that case now argues that it complies with the court's baseline order because it has now conducted water quality sampling and analysis of the existing wells in the area – something the Baseline Project EA admits has not occurred. https://eplanning.blm.gov/epl-front-office/projects/nepa/52147/66795/72638/Goat_Mountain_MEA_20151217_FINAL.pdf

Here, at a minimum, prior to considering or approving any project, the Forest Service must first obtain this required baseline information and subject the information and analysis to public review and comment in a revised Draft EA or EIS.

"NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward." Northern Plains, 668 F.3d at 1083 (internal citations omitted) (concluding that an agency's "plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, indicate failure to take the requisite "hard look" at environmental impacts). This requirement applies not only to ground and surface waters, but any potentially affected resource such as air quality, recreation, soils, cultural/historical, wildlife, etc.

The same inadequate baseline analysis is true for other potentially affected resources such as wildlife, air quality, and recreation. For example, for recreation, the EA admits that: "information is currently unavailable for the amount of [recreation] use." EA at 3-78. This is despite the fact that the Project will directly impact users of the Arizona Trail.

VIII. WITHOUT THE REQUIRED ADEQUATE ANALYSIS, ANY POTENTIAL FINDING OF NO SIGNIFICANT IMPACT (FONSI) WOULD BE INADEQUATE – NECESSITATING PREPARATION OF AN EIS.

The Project poses potentially significant risks to wildlife (including indicator, sensitive, threatened and endangered species) and wildlife habitat, groundwater and surface water

resources, cultural/historical, air quality, recreation, and other resources. It should be noted that, without the required baseline and cumulative impacts analysis, it is impossible to fully ascertain the level of threats to public land resources. Because of the potentially significant impacts, an EIS is required.

An EIS "must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549, 562 (9th Cir. 2006). "[A] plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir.1998) (emphasis in original). "This is a low standard." Klamath Siskiyou, 468 F.3d at 562. See also Te-Moak Tribe of Western Shoshone v. Department of the Interior, 608 F.3d 592, 602 (9th Cir. 2010) ("NEPA requires that where several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS.").

Additionally, as noted above, due to the agency's decision not to review all cumulative impacts or connected actions, the agency's decision to not prepare an EIS (i.e., proposed FONSI) violates NEPA, as the lack of an adequate connected action/cumulative actions/impacts analysis necessarily renders any FONSI inadequate and arbitrary and capricious. "[W]here 'several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS.' City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir.1990)." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1378 (9th Cir. 1998).

"[I]f the cumulative impact of a given project and other planned projects is significant, an applicant cannot simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project." Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1076 (9th Cir. 2002). "An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The agency must supply a convincing statement of reasons why potential effects are insignificant." Public Service Co. of Colorado v. Andrus, 825 F.Supp. 1483, 1496 (D. Idaho 1993) citing The Steamboaters v. FERC, 759 F.2d 1383, 1393 (9th Cir. 1985). "[T]o prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are '*substantial questions* whether a project **may** have a significant effect' on the environment is sufficient." Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004) (italics in original, bold emphasis added, citations omitted). *See also* Western Land Exchange Project v. BLM, 315 F.Supp.2d 1068, 1087 (D. Nev. 2004)(same).

> The [agency] cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. See Alaska Ctr. for Env't v. United States Forest Serv., 189 F.3d 851, 859 (9th Cir.1999). If an agency, such as the Corps, opts not to prepare an EIS, it must put forth a "convincing statement of reasons" that explain why the project will impact the environment no more than insignificantly. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir.1998). This account proves crucial to evaluating whether the Corps took the requisite "hard look" at the potential impact of the dock extension. Id.

> "[A]n EIS *must* be prepared if 'substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor.' " Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir.1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992)). "To trigger this requirement a 'plaintiff need not show that significant effects *will in fact occur*,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient." Id. at 1150 (quoting Greenpeace, 14 F.3d at 1332).
>
> The Council on Environmental Quality has adopted regulations governing the implementation of NEPA. In determining whether a federal action requires an EIS because it significantly affects the quality of the human environment, an agency must consider what "significantly" means. The regulations give it two components: context and intensity. 40 C.F.R. § 1508.27. Context refers to the setting in which the proposed action takes place, in this case Cherry Point. See id. § 1508.27(a). Intensity means "the severity of the impact." Id. § 1508.27(b).
>
> In considering the severity of the potential environmental impact, a reviewing agency may consider up to ten factors that help inform the "significance" of a project, such as the unique characteristics of the geographic area, including proximity to an ecologically sensitive area; whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts; the level of uncertainty of the risk and to what degree it involves unique or unknown risks; and whether the action threatens violation of an environmental law. Id. § 1508.27(b)(3), (5), (7), (10). We have held that one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances. See Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir.2001).

Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864-65 (9th Cir. 2005)(EA and FONSI inadequate when agency fails to prepare adequate cumulative impacts analysis) (emphasis in original).

In addition, as noted above, the agency failed to analyze the direct, indirect, and cumulative impacts to air quality, especially Ozone, and has not shown that the Ozone NAAQS will be met. Among the attributes of "significance" which triggers the need for an EIS is "Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27 (b)(10).

Clearly, the projected NOx and VOC emissions from the Project, along with (unanalyzed) emissions from other activities in the cumulative effects study area, "threaten" to cause Ozone levels/emissions to exceed the NAAQS when the area already has exceeded, or been extremely close to exceedence, every reported year since 2008. EA Table 3-12 (EA at 3-92).

Thus, in this case, the agency's admitted failure to fully review all direct, indirect, and cumulative impacts, and connected and cumulative actions, necessarily renders the EA deficient. As such, the USFS cannot issue a FONSI. Without the required review of baseline information,

and the potential direct, indirect, and cumulative impacts of the Project, any decision not to prepare an EIS would be without sufficient evidentiary support.

IX. THE EA FAILS TO INCLUDE AN ADEQUATE MITIGATION PLAN, INCLUDING A DETAILED REVIEW OF THE IMPACTS FROM, AND EFFECTIVENESS OF, ANY MITIGATION MEASURES

Under NEPA, the agency must have an adequate mitigation plan to minimize or eliminate all potential project impacts. NEPA requires the agency to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 CFR § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 CFR § 1502.16(h). NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§1508.20(a)-(e). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).

NEPA requires that the agency discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Methow Valley, 490 U.S. at 352, 109 S.Ct. 1835.

> An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. Compare Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) with Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52, 109 S.Ct. 1835(citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.

South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009)(emphasis added)(rejecting EIS for mining project for failure to conduct adequate review of mitigation and mitigation effectiveness in EIS). "The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency's] reliance on mitigation is supported by substantial evidence in the record." Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1251 n. 8 (D. Wyo. 2005). See also Dine Citizens v. Klein, 747 F.Supp.2d 1234, 1258-59 (D. Colo. 2010) (finding "lack of detail as the nature of the mitigation measures" precluded "meaningful judicial review").

The EA provides only a cursory mention that all of the mitigation measures will be effective. Yet no supporting analysis is provided to back up this claim. It is impossible for the USFS to

contend that it fully reviewed the effectiveness of mitigation measures – as required by NEPA – when the EA lacks any reference to such analysis. Simply referring to the list of mitigation measures, as the EA does, does not comply with NEPA.

As held recently by the federal courts, an EA violates NEPA if it "fails to address the effectiveness of the mitigation measures." Gifford Pinchot Task Force v. Perez, 2014 WL 3019165, *39 (D. Or. 2014). The court specifically rejected the argument from the Forest Service and mining company that an effectiveness analysis was not required in an EA. This is especially true when, like in Gifford Pinchot, the mitigation measures were added by the agency to the original proposal during the review process. Here, the USFS admits that "Additional mitigation measures developed to reduce adverse environmental impacts are included in Chapter 3, and summarized in Section 2.5." Response to Comments at Table 2-137.

Yet as in Gifford Pinchot, no analysis, let alone mention, of how effective these mitigation measures will be is contained in the EA. As such the EA violates NEPA. In addition, because the agency relies on these purported mitigation measures to allegedly meet its responsibilities under the Organic Act and Part 228 regulations to "minimize adverse impacts" (*see* herein), the failure to adequately support these measures also violates these requirements.

X. THE EA FAILED TO FULLY REVIEW ALL REASONABLE ALTERNATIVES

NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b). It must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). The alternatives analysis is considered the heart of a NEPA analysis. 40 C.F.R. § 1502.14. The alternatives analysis should present the environmental impacts in comparative form, thus sharply defining important issues and providing the public and the decisionmaker with a clear basis for choice. Id. The lead agency must "rigorously explore and objectively evaluate all reasonable alternatives" including alternatives that are "not within the [lead agency's] jurisdiction." Id.

Even if an EA leads to a FONSI, it is essential for the agency to consider all reasonable alternatives to the proposed action. One of the Ninth Circuit's leading EA/alternatives decisions states:

> NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions "involve[ ] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982). The goal of the statute is to ensure "that federal agencies infuse in project planning a thorough consideration of environmental values." The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers "[have] before [them] and take [ ] into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." NEPA's requirement that alternatives be studied, developed, and

> described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place. Informed and meaningful consideration of alternatives--including the no action alternative-- is thus an integral part of the statutory scheme.
>
> Moreover, consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. See id. § 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-1229 (9th Cir. 1988) (citations omitted, emphasis in original). "While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities." Ayers v. Espy, 873 F.Supp. 455, 473 (D. Colo. 1994).

In this case, the revised Draft EA or EIS must consider, at a minimum, the following reasonable alternatives:

- Approval of only activities on current existing roads.
- Access to activities not on existing roads should be conducted via helicopter.
- Reduction in the amount, scope, and impact of each activity or group of activity.
- Timing restrictions to protect wildlife, recreation, and other public resources;
- Avoidance of any impact to recreational users of the Arizona Trail (visual, scenic, noise, etc.).
- Avoidance of cultural and historic areas.
- Review of Project under the correct legal regime as noted above, with mitigations to protect the public interest from adverse impacts.
- Controls to prevent adverse impacts from future mine dumping (e.g., prevention of possibility that project drill holes would be a conduit for leakage/pollution from eventual tailings disposition.
- As noted above, reviewing the Project along with the Main Mine in one EIS.
- Examining the use of a cut and fill method of mining. This method would drastically reduce the amount of tailings that would be generated thereby changing entirely the size and composition for a possible tailings facility as a result of this action.
- An examination of other tailings locations such as tailings on State Trust lands near Florence Junction that would eliminate the need for this study.

The agency's response largely argues that alternatives that would reduce Resolution's desired scope of work and "purpose and need" required the rejection of alternatives. *See e.g.*, Response Report Table 2-27 to -31. However, the agency cannot circumscribe its duty to fully review "all reasonable alternatives" in this manner. The CEQ regulations warn that a NEPA document is not to be used to justify a decision already made. 40 C.F.R. § 1502.2(g). Thus, "an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S. Ct. 616 (1991). *See* Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 n.7 (9th Cir. 1999).

"An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998). "Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." Sylvester v. U.S. Army Corps of Engineers, 882 F.2d 407, 409 (9th Cir.1989). "No decision is more important than that delimiting what these 'reasonable alternatives' are ... One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence) ... If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role." Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 660 (7th Cir. 1997).

XI. THE FOREST SERVICE FAILED TO MINIMIZE ALL ADVERSE IMPACTS FROM THE PROJECT AND ENSURE COMPLIANCE WITH ALL ENVIRONMENTAL AND PUBLIC LAND LAWS

On the National Forests, the Organic Act requires the USFS "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. "[P]ersons entering the national forests for the purpose of exploiting mineral resources must comply with the rules and regulations covering such national forests." Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994).

The USFS mining regulations require that "all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources." 36 C.F.R. § 228.8. In addition, the operator must fully describe "measures to be taken to meet the requirements for environmental protection in § 228.8." 36 C.F.R. 228.4(c)(3). "Although the Forest Service cannot categorically deny a reasonable plan of operations, it can reject an unreasonable plan and prohibit mining activity until it has evaluated the plan and imposed mitigation measures." Siskiyou Regional Education Project v. Rose, 87 F. Supp. 2d 1074, 1086 (D. Or. 1999), citing Baker v. U.S. Dept. of Agriculture, 928 F.Supp. 1513, 1518 (D. Idaho 1996). "This court does not believe the law supports the Forest Service's concession of authority to miners under the General Mining Act in derogation of environmental laws and regulations." Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, at *6 (D. Or.

2006)(finding violation of Organic Act in Forest Service's failure to minimize adverse impacts to streams).

In addition to ensuring compliance with all applicable environmental standards (which has not been shown here due to the inadequate NEPA compliance), the USFS has a mandatory duty to require "all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations" under 36 CFR § 228.8(e)). See Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1170 (D. Montana 2010) (Forest Service violated Organic Act and 228 regulations by failing to protect water quality and fisheries in approving mining PoO). "Under the Organic Act the Forest Service must minimize adverse environmental impacts where feasible and must require [the operator] to take all practicable measures to maintain and protect fisheries and wildlife habitat." Id. at 1170. This duty applies to all wildlife, not just indicator, sensitive, threatened, and endangered species.

Here, for example, the agency admits that one of the required environmental protection measures would be to **"avoid disturbance of stream channels to minimize effects on riparian vegetation** (U.S. Forest Service, 1985 [Tonto Forest Plan]**."** EA at 3-11 (emphasis added). Yet the EA and proposed project approval does not "avoid disturbance of stream channels." In fact, the project proposes numerous drill sites, trench sites, roads, and other project activities/facilities within intermittent or perennial stream channels. *See* Figure 3-3. The EA further acknowledges the importance of these stream channels, noting that

> The project area is also drained by several intermittent tributaries to Queen Creek, including Hewitt Canyon, Roblas Canyon, Bear Tank Canyon, Benson Spring Canyon, Potts Canyon, Rice Water Canyon, Happy Camp Canyon and Silver King Wash (Figure 3-2). These tributaries flow southwest from their mountainous headwaters before joining Queen Creek near the central axis of the Superior Basin. Bear Tank Canyon, Benson Spring Canyon, Potts Canyon, and Happy Camp Canyon contain springs that occur at topographic breaks within the canyons.

EA at 3-20. Accordingly, in order to comply with the agency's own admission of their legal responsibilities, the project must be reconfigured to "avoid" any disturbance of the intermittent and perennial stream channels shown on Figure 3-2. The agency's response, that this Forest Plan standard does not apply, Response Report Table 2-73, is inadequate, as the above-quoted requirement is still in the EA and is required under the Organic Act/Part 228 as well as the NFMA.

Additionally, a simple and generalized reduction of impacts does not equate to the strict requirements for minimization of impacts and protection of resources. The Forest Service's duty to minimize impacts is not met simply by somewhat reducing those impacts. Trout Unlimited v. U.S. Dep't. of Agriculture, 320 F.Supp.2d 1090, 1110 (D. Colo. 2004). In interpreting the Federal Land Policy and Management Act (FLPMA)'s duty on the agency to "minimize damage to … fish and wildlife habitat and otherwise protect the environment," 43 U.S.C. § 1765(a), the court specifically stated the agency's finding that mitigation measures would "reasonably protect" fisheries and habitat failed to meet its duty to "minimize" impacts. Id.

The agency must demonstrate that all feasible means have been required to minimize all adverse impacts to all potentially affected resources. For example, the Ninth Circuit Court of Appeals recently held that the Forest Service had the authority to strictly limit mining claimants' vehicular access to mining claims. Public Lands for the People v. U.S. Dept. of Agriculture, 697 F.3d 1192 (9th Cir. 2012). As held by the court:

> The Secretary of Agriculture has the right to restrict motorized access to specified areas of the national forests, including mining claims. [Clouser v. Espy, 42 F.3d at 1530 (citing 16 U.S.C. § 551)] (means of access "may be regulated by the Forest Service"). More specifically, we have upheld Forest Service decisions restricting the holders of mining claims to the use of pack animals or other non-motorized means to access their claims. Id. at 1536-38. Relatedly, we have rejected the contention that conduct "reasonably incident[al]" to mining could not be regulated. United States v. Doremus, 888 F.2d 630, 632-33 (9th Cir. 1989). Our precedent thus confirms that the Forest Service has ample authority to restrict motor vehicle use within the ENF [El Dorado National Forest].

Id. at 1197.

Thus, in this case, in order to minimize all adverse impacts, the agency must, among other restrictions to protect wildlife and the environment, limit project activities to existing roads, etc. (assuming that the Project was reviewed and approved under the proper legal regime, which the EA does not do). Also, as noted herein, the agency must fully consider such limitations as reasonable alternative(s) under NEPA.

As just one example, the agency proposes no mitigation or minimization to eliminate the likelihood that the Ozone NAAQS will be exceeded by the emissions from the Project, as well as combined with the emissions from the other current and RFFAs. The fact that the EA did not analyze these emissions only highlights the failure to minimize their impacts.

In addition, water quality must be protected. For example, pursuant to the Clean Water Act, the USFS must require Resolution to obtain Arizona Pollutant Discharge Elimination System (AZPDES) permit coverage for the sediment and other pollutants discharged from the road culverts and other water management structures. As the Ninth Circuit has stated:

> Further, the term man-made "conveyance," the essential trigger for finding a "point source" under the CWA, is broadly defined. [W]hen stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

Northwest Environmental Defense Center v. Brown, 640 F.3d 1063, 1070-71 (9th Cir. 2011) (culverts directing stormwater flows are point sources subject to NPDES permitting) overturned

on other grounds Decker v. Nw. Envtl. Def. Ctr., 133 S.Ct. 1326 (2013). The Ninth Circuit recently reiterated, in light of the Supreme Court's and its previous decision in those cases, that:

> The Court left intact our holding that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable, confined and discrete conveyance' of pollutants, and there is therefore a discharge from a point source" within the meaning of the Clean Water Act's basic definition of a point source in 33 U.S.C. § 1362(14).

Northwest Environmental Defense Center v. Decker, 728 F.3d 1085-86 (9th Cir. 2013). Without the required CWA permits (and Section 401 Certification), the USFS cannot approve the Plan of Operations. *See* Dubois v. U.S. Dept. of Agriculture, 102 F3d 127, 1300 (1st Cir. 1996) ("the Forest Service was obligated to assure itself that an NPDES permit was obtained before permitting the [requested activity]."); Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, at *3-4 (D. Or. 2006)(USFS failed to require the mandatory 401 Certification prior to approval of mining operations – a violation also occurring here).

Also, the EA admits that: "In the project area, Queen Creek and several of its tributaries are listed as impaired due to elevated dissolved copper concentrations. The copper impairment applies to the entire reach of Queen Creek from its headwaters downstream to Whitlow Canyon." EA at 3-20. Yet there is no assurance that all potential copper discharges from the project will be prevented. Under the Clean Water Act, no discharges are allowed of a pollutant into a watercourse that is impaired for that pollutant. Friends of Pinto Creek v. U.S. E.P.A., 504 F.3d 1007 (9th Cir. 2007), *cert. denied*, 129 S.Ct. 896 (2009).

One potential serious issue regards the intended use of these lands by Resolution for tailings dumps, especially the immediate areas of the drill holes created by the Project. Although the company would have to meet basic state drill/well hole closure requirements, these requirements do not account for the fact that millions of tons of tailings could be placed directly on the holes/wells. This could result in the serious condition of these holes/wells becoming conduits for leakage/seepage of contaminants from the tailings. The USFS failed to ensure against this possibility – more than simply referring to Arizona's generalized well/drill closure requirements.

The agency's response, that this issue "is outside the scope of analysis of the preliminary EA," Response Report Table 2-2, cannot be used to avoid the agency's duties under NEPA, the Organic Act, CWA, 228 regulations, and the NFMA. The agency cannot authorize a potential adverse impact on public lands without any analysis of its impacts, mitigation measures, or substantive controls. Simply saying that the future deposition of tailings on these sites is "outside the scope of analysis" when the agency is currently reviewing Resolution's proposal to put tailings in these very areas not only violates these laws, but defies common sense.

Compliance with the NFMA is also required. The NFMA requires that all site-specific actions authorized by the USFS be consistent with Forest Plan standards and guidelines. 16 U.S.C. § 1604(i). "Pursuant to the NFMA, the Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan of the entire forest." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1377 (9th Cir.1998). "[W]e must affirm

the district court's decision to enjoin the [Project] if that [Project] is inconsistent with the Land Management Plan." Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 (9th Cir. 1998). "All site specific actions must be consistent with adopted forest plans." Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 966 (9th Coir. 2002). "Specific projects . . . must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan." Neighbors of Cuddy Mountain v. Alexandar, 303 F.3d 1059, 1062 (9th Cir. 2002).

USFS authorization of mining and mineral exploration must comply with all Forest Plan and NFMA requirements. *See* Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *7-*10 (D. Oregon 2006) (approval of mining operations violated Forest Plan minerals management standards); Rock Creek Alliance v. U.S. Forest Service, 703 F.Supp.2d 1152, 1187, n. 23 (D. Mont. 2010)(same).

Thus, at a minimum, all standards in the Forest Plan and NFMA requirements must be met. There is no "mining exemption" from any of these standards, including Forest Plan requirements that all water and air quality standards be met at all times.

CONCLUSION

In conclusion, as detailed above and in previous comments submitted by the Objectors, the EA and Draft DN/FONSI fail to fully comply with numerous federal and state laws, regulations, policies, and other requirements. As such, the Regional Office must vacate and remand both documents and order the correction of all errors noted herein. The USFS cannot approve any of the action alternatives described in the EA, or any action alternative at all that the applicant may propose, unless and until all laws, etc., noted herein are satisfied. Please direct all communications regarding this Objection to the undersigned attorneys.

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Concerned Climbers of Arizona
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Maricopa Audubon Society
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