Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738
Fax (303) 823-5732
**wmap@igc.org**

Attorneys for Appellants

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
REGIONAL FORESTER, SOUTHWESTERN REGION

ARIZONA MINING REFORM COALITION, the GRAND CANYON CHAPTER of the SIERRA CLUB, EARTHWORKS, the CONCERNED CITIZENS and RETIRED MINERS COALITION, MARICOPA AUDUBON SOCIETY, and the CENTER FOR BIOLOGICAL DIVERSITY,

Appellants

v.

UNITED STATES FOREST SERVICE

---

**APPEAL OF DECISION NOTICE/FINDING OF NO SIGNIFICANT IMPACT and ENVIRONMENTAL ASSESSMENT:**

***RESOLUTION COPPER MINING PRE-FEASIBILITY ACTIVITIES PLAN OF OPERATIONS***

---

The Arizona Mining Reform Coalition, the Grand Canyon Chapter of the Sierra Club, EARTHWORKS, the Concerned Citizens and Retired Miners Coalition, Maricopa Audubon Society, and the Center for Biological Diversity (hereinafter "Appellants") hereby appeal the Decision Notice and Finding of No Significant Impact ("DN") and Environmental Assessment

("EA") for Resolution Copper Mining Pre-Feasibility Activities Plan of Operations (the Project) signed by Tonto National Forest ("TNF") Supervisor Gene Blankenbaker on May 14, 2010.

This Appeal is submitted within 45 days of the publication of the legal notice in the *Arizona Capitol Times* and is therefore timely. This Appeal is filed pursuant to, and in accordance with, 36 CFR Part 215. Appellants have fully participated in the commenting process on the Draft EA and are thus parties eligible to appeal the DN/EA. Appellants' members use and enjoy the lands and waters in the Oak Flat/Gaan Canyon/Apache Leap watershed for recreational, aesthetic, religious, scientific, and conservational purposes. Appellants and their members will be adversely affected by the drilling operations covered by the DN and EA, as well as by the agency's failure to prepare an adequate NEPA document. All issues raised by Appellants in previous comments to the Forest Service regarding the drilling project are hereby incorporated into this appeal for the purposes of exhaustion of remedies and putting the agency on notice of Appellants' concerns. This appeal also incorporates the appeal of the San Carlos Apache Tribe by reference as if fully set forth herein.

As set forth in detail below, the DN and EA do not comply with numerous requirements of the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the 1872 Mining Law, and the Forest Service Organic Act of 1897, and several other federal and state environmental, public land, and historical preservation laws, as well as the implementing regulations of these laws. As such, the DN and EA must be rescinded and remanded with instructions to comply with all applicable requirements including, but not limited to, the preparation of a full Environmental Impact Statement as required by NEPA. At a minimum, due to the numerous inadequacies of the EA, a revised EA, with full opportunities for public review and comment on the draft, must be prepared. Until the USFS complies with the law, the agency cannot authorize any Project activities to begin.

**APPELLANTS**

The **Arizona Mining Reform Coalition** works in Arizona to improve state and federal laws, rules, and regulations governing hard rock mining to protect communities and the environment. We work 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, The Dragoon Conservation Alliance, the Groundwater Awareness League, Concerned Citizens and Retired Miners Association, the Center for Biological Diversity, and the Sky Island Alliance.

The **Sierra Club** is America's oldest, largest and most influential grassroots environmental organization. Inspired by nature, the Sierra Club's 800,000 members—including 14,000 in Arizona—work together to protect our communities and the planet. The Sierra Club's Grand Canyon Chapter is very engaged in public lands management and protection in Arizona and our members have specifically been involved in working to protect this area from mining and other activities. Our members recreate in the area including hiking, wildlife viewing, climbing, and other activities. We have a significant interest in any proposed mining in the area, including in this pre-feasibility proposal and the related exploration activities. We are concerned about the significant negative and unmitigable impacts the Project will have on the air, land, wildlife, and water of the area, as well as the loss of recreational opportunities associated with it.

**EARTHWORKS** is a non-profit, non-partisan environmental organization dedicated to protecting communities and the environment from the adverse impacts of mineral development. EARTHWORKS works to protect communities and the environment from the impacts of destructive mining, digging, and drilling. Our national office, based in Washington D.C., provides support to citizens across the country and around the world. Our field office in Montana

assists communities throughout the western United States concerned about the impact of mineral development in and near their communities.

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 allocated to a foreign mining company for private use. The Coalition is not opposed to mining. In fact, it strongly supports responsible mining practices in and around its community of Superior, Arizona. However, we oppose the federal land exchange bill S. 409 because it proposes to hand over Oak Flat Campground to Resolution Copper Company without the necessary potential health, water and environmental impacts analysis under the National Environmental Policy Act (NEPA). This is public land, and the public must be heard openly and fairly under the NEPA process.

**Maricopa Audubon Society** is an organization of volunteers dedicated to the enjoyment of birds and other wildlife with a primary focus on the protection and restoration of the habitat of the Southwest through fellowship, education, and community involvement. Currently the chapter has 2300 members and is the chapter closest to the Oak Flat campground. Maricopa Audubon Society is National Audubon Society's Phoenix metropolitan area chapter.

**Center for Biological Diversity** ("CBD") is a nonprofit corporation with its primary office in Tucson, Arizona, and with other offices throughout the United States. CBD is actively involved in species and habitat protection issues throughout North America and the World, with over 40,000 members. CBD's members (including its staff) include Arizona residents with

biological health, educational, scientific research, moral, spiritual, aesthetic, and recreational interests in the protection of the Oak Flat and Apache Leap area ecosystem.

**PROJECT BACKGROUND**

The DN approves the Plan of Operations ("PoO") submitted by Resolution Copper Co. ("Resolution"), a subsidiary of multinational mining corporations Rio Tinto and BHP. The DN authorizes Resolution to construct various new mining exploration drill sites and groundwater wells, the continuation of exploratory and monitoring wells sites, the construction and reconstruction of various roads to access the drill and well sites, along with the related support and surface facilities. The Project would disturb approximately 83 acres of mostly Forest Service land (including a limited amount of private and State Trust lands). *See* EA at 3-4 (more detailed description of Project).

As recognized by the agency, the Project would be located in an area with special religious and cultural significance by Native American Tribes (including Apache Leap and Gaan Canyon) and contains a world-recognized climbing and recreational area (Oak Flat). Portions of the Project, especially the use and reconstruction of access roads, would occur in an area withdrawn by Presidents Eisenhower and Nixon from mineral entry. From its inception, the Project has drawn increased public opposition from Native American Tribes, recreational users, conservationists, retired miners, and the public at large.

The DN would allow the Withdrawal Area to be impacted by noise, light and other pollution from drilling locations directly adjacent to the Withdrawal Area. In addition, truck traffic would occur within the Withdrawal Area to reach adjacent drilling sites, which would require the "improvement" of roads within Area that would not be needed if this aspect of the PoO was not authorized.

## APPEAL ISSUES

### I. IN GRANTING ACCESS ACROSS THE WITHDRAWN LANDS UNDER AN ASSERTED "RIGHT TO MINE," THE AGENCY VIOLATED FLPMA'S AND THE ORGANIC ACT'S RIGHT-OF-WAY AND SPECIAL USE PERMIT REQUIREMENTS

The DN approved the Project PoO under the agency's 36 Part 228 mining regulations and the 1872 Mining Law. DN at 11. These regulations govern "use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54 [the 1872 Mining Law]), which confers a statutory right to enter upon the public lands to search for minerals." 36 CFR § 228.1. "Operations" are defined as "all functions, work, and activities in connection with prospecting, exploration, development, mining … and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims." 36 CFR § 228.3. In this case, by approving the PoO under the 228 regulations, the agency considered the access and use of the Withdrawal Area to be part of the proposed mineral "operations."

The Oak Flat Withdrawal Area was created by Public Land Order (PLO) 1229 in 1955 and amended by PLO 5132 in 1971 to withdraw the area from all forms of mineral entry and operations. In such a withdrawn area, no mineral operations may occur, unless they are conducted pursuant to valid existing rights which existed on the date of withdrawal. "The evidence must show that a discovery existed within the boundaries of the claims at the time of withdrawal. *United States v. Boucher*, 147 IBLA 236, 242-43 (IBLA 1999)." Ernest K. Lehmann v. Salazar, 2009 WL 659673 at *1 (D.D.C. 2009). *See also* United States v. Gunsight Mining Co., 5 IBLA 62 (1972).

As the Secretary of the Interior has ruled: "When lands are withdrawn from entry under the Mining Law, the Mining Law's authorization for citizens to explore for and develop minerals

on those public lands terminates." M-37012 (Secretary Norton, Nov. 14, 2005). The fact that the actual exploration is proposed in this case just outside the Withdrawal Area does not change this overarching rule – that any rights under the Mining Law "terminate" within the Withdrawal Area. In this case, as quoted herein, the DN was based on the view that Resolution had a "right of access" under the Mining Law across the Withdrawal Area and thus approved the Project pursuant to these "rights" under the Mining Law and Part 228 regulations.

That is fundamentally at odds with the law and thus cannot be the basis for authorizing the access, use, and refurbishment of the road across the Withdrawal Area. Because Resolution's alleged "right" to enter the Withdrawal Area under the Mining Law post-dates the Presidential withdrawals (even if they are valid which has not been shown), operations conducted pursuant to the Mining Law cannot occur within the Withdrawal Area.

Despite these limitations, the Forest Service approved Resolution's entry across the Withdrawal Area to conduct mineral operations (i.e., reconstruction and use of the road for exploration). According to the DN: "The Forest Service is required to provide reasonable access under the U.S. Mining Laws." DN at 11. The DN specifically rejected any authority to deny any of Resolution's proposed PoO, including the access route across the withdrawn Oak Flat lands, because: "The 1872 Mining Act confers a statutory right to enter upon public lands open to location in pursuit of locatable minerals and to conduct mining activities, locate necessary facilities, associated incidental activities, and all uses reasonable incident thereto." DN at 11. *See also* DN at 2 (same). The agency even stated that any denial of Resolution's right to conduct its operations, including the access approved across Oak Flat, "could involve a probable 'taking' of private property rights under the Fifth Amendment to the Constitution." Id.

This position, which is found throughout the agency's rational for Project approval, ignores the fact that no such "right" exists to enter the Withdrawal Area. When public comments

protested the agency's proposed authorization for Resolution to use the Withdrawal Area for mineral access, the Forest Service stated that: "vehicle traffic within the Oak Flat Withdrawal Area does not constitute a mineral entry or appropriation in violation of the withdrawal." EA at B-13.

However, the DN approved the use and reconstruction of the access road as part of a mining plan of operations, which according to the agency must be approved under Resolution's "right of access" under the Mining Law. Yet at the same time the agency argues that the access road is not related to mineral entry. EA at B-13. The agency and Resolution cannot have it both ways. If the access/use is part of a mining operation subject to "rights" under the Mining Law, then it is prohibited in the Withdrawal Area. If the access/use is not part of a mining operation (and thus could be arguably allowed within the Withdrawal Area since the Withdrawal Area is open to non-mining related uses), then the access/use cannot be authorized under the Mining Law and Part 228 regulations.

Thus, because the access/use in the Withdrawal Area cannot be governed by the Mining Law and Part 228 regulations (since that would be prohibited by the Withdrawal) the only regulatory authority for the agency to approve the access/use in the Withdrawal Area is via a special use permit or right-of-way application, which is governed by FLPMA and the Organic Act, and not subject to any "rights" under the Mining Law.

Special uses are regulated under the agency's permitting requirements for non-mineral uses found at 36 C.F.R. Part 251. The Part 251 "special use" regulations were promulgated pursuant to the Federal Land Policy and Management Act of 1976 ("FLPMA"), 42 U.S.C. §§1701 *et seq.*, among other statutes (such as the Forest Service Organic Act of 1987, 16 U.S.C.

§ 551).[1] Activities regulated under the Part 251 "special use" regulations, are not regulated under the 1872 Mining Law and the agency's mining regulations at 36 C.F.R. Part 228. The Forest Service regulations specifically exclude mineral operations approved pursuant to Part 228 from the category of "special uses." Under the heading of "Special Uses" in Subpart B of Part 251, the regulations state: "All uses of National Forest System lands, improvements, and resources, **except those authorized by the regulations governing … minerals (part 228)** are designated 'special uses'." 36 C.F.R. § 251.50(a)(emphasis added).

Moreover, under 36 C.F.R. Part 251 — and unlike mineral operations proposed under the Mining Law and Part 228 regulations — the Forest Service has discretion to deny proposed activities under various criteria, and must reject any project that is not "in the public interest." 36 C.F.R. § 251.54(e). This "public interest" determination under FLPMA and Part 251 was never made by the agency in this case. If it was, based on the outstanding values at Oak Flat – as recognized by the Presidential Executive Orders creating the Withdrawal Area – the only credible conclusion would be that continued and expanded use of the Withdrawal Area for industrial mine exploration access is not in the public interest.

The Forest Service cannot have it both ways – regulating the access/use across the Withdrawal Area as a "right" under the Mining Law while at the same time disavowing that the access/use is related to a mineral entry or mineral operation. The agency cannot avoid the Part 251 restrictions in this manner.

[1] Under FLPMA, authorizations to conduct special uses, such as a right-of-way across public lands authorized by the DN, must be accompanied by the payment of "Fair Market Value." 43 U.S.C. § 1701(a)(9). Such a payment was not produced by Resolution, or required by the Forest Service in this case – in violation of FLPMA.

## II. THE EA FAILED TO FULLY ANALYZE ALL CUMULATIVE IMPACTS

Although the DN and EA lists a number of "past, present, and reasonably foreseeable future activities" in the area, the EA's analysis of these activities fails to conduct the required detailed and quantitative review of the cumulative impacts from these activities. Indeed, the EA lists over 30 such projects (many dealing with Resolution's other operations in the area). EA at 3-69-75, Table 3-18. The EA even acknowledges that these projects will have various cumulative impacts to air quality, wildlife, cultural resources, endangered/threatened species, recreation, and other resources. Table 3-18. However, outside of a cursory mention that these projects will result in these cumulative impacts, there is no detailed analysis of the actual impacts of these other projects.

Instead, the EA relies on the fact that it concluded that the impacts from the PoO itself would not result in significant impacts and thus there was no need to review the cumulative impacts from the other projects in-depth. As explained below, such a truncated view of the agency's duties under NEPA has been repeatedly rejected by the Ninth Circuit Court of Appeals – including a case rejecting a BLM-issued EA on cumulative impacts decided just last month.

Further, despite repeated public requests that the agency fully consider the cumulative impacts from these other projects, the DN and EA argued that since almost all of the projects were not "connected actions," or "cumulative actions," the agency had satisfied its NEPA "hard look" duties. EA at B-11 to B-16 (repeatedly stressing that, since these other projects were not "connected actions," their environmental impacts were not reviewed in the EA).[2] Regarding "cumulative actions," the agency again bypassed full review, arguing that:

[2] The agency did, based on public comments, consider two projects (out of the over 30 projects in the area), exploration and groundwater wells on State Trust lands and private lands, to be "connected actions" and thus part of the EA. EA at B-14. However, the public never had an opportunity to review the agency's analysis of these projects, in violation of the public's rights under NEPA.

> The CEQ requires that cumulative actions, when viewed with other proposed actions, should be discussed in the same environmental analysis if they would have cumulatively significant impacts. Proposed actions in the context of cumulative actions are considered proposed Federal actions or proposed activities over which an agency has discretionary authority and are subject to NEPA review. Similar actions are those reasonably foreseeable or proposed agency actions which have similarities, such as timing or geography, which provide a basis for evaluating their environmental consequences together in the same environmental analysis. No agency actions were identified that fit the definition of similar actions or cumulative actions in developing the scope of analysis for this EA (EA Section 3.11).

EA at B-15-16.

Each of these rationales fundamentally misinterprets NEPA and ignores a recent string of NEPA decisions by the Ninth Circuit (the jurisdiction covering this case) which hold that the agency must conduct a detailed and in-depth review of the cumulative environmental impacts from these other projects, **even if** they are not "connected" or "cumulative" actions.

Congress enacted NEPA to ensure that federal agencies, before approving a project, (1) consider and evaluate all environmental impacts of their decisions and (2) disclose and provide an opportunity for the public to comment on such environmental impacts. 40 C.F.R. §§ 1501.2, 1502.5; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Through the NEPA process, agencies are required to take a "hard look" at the environmental impacts of their actions:

> NEPA's intent is to "focus[ ] the agency's attention on the environmental consequences of a proposed project," to "guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role" in forming and implementing the agency's decision, and to provide other governmental bodies that may be affected with "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner."

Robertson, 490 U.S. at 349-50. "The thrust of [NEPA] is ... that environmental concerns be integrated into the very process of agency decision-making." Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency's attention on the environmental consequences of its proposed action, NEPA

"ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson, 490 U.S. at 349.

"A threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS [Environmental Impact Statement]." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (*citing* 42 U.S.C. § 4332(2)(C)). "As a preliminary step, an agency may prepare an EA [Environmental Assessment] to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS." Id. (*citing* 40 CFR § 1508.9). "The purpose of an EA is to provide the agency with sufficient evidence and analysis for determining whether to prepare an EIS or to issue a [FONSI, Finding of No Significant Impact]." Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000) (*citing* 40 CFR § 1508.9). "Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process." Id.; *see also* 40 CFR § 1500.1(b); Idaho Sporting Congress, 137 F.3d at 1151. If the EA concludes that the project **may** have a significant impact on the environment, then an EIS must be prepared. National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001).

To comply with NEPA, the Forest Service must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR § 1502.16; 40 CFR § 1508.8; 40 CFR § 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). 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 (or impacts) are defined as the impacts resulting from the incremental impact of the proposed action when added to other past, present, and reasonably

foreseeable future actions. 40 CFR § 1508.7. Cumulative impacts result from individually minor but collectively significant actions taking place over a period of time. Id.

The question as to whether a project may "significantly" effect the environment is defined as: "Whether an action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary of by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7).

Cumulative impacts are defined as:

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

40 C.F.R. §1508.7 (emphasis added). "If several actions have a cumulative environmental effect, this consequence must be considered in an EIS." Blue Mountains Biodiversity Project, 161 F.3d at 1214. *See also* Te-Moak Tribe of Western Shoshone v. Department of the Interior, ___ F.3d ___, 2010 WL 2431001, at * 7 (9th Cir., June 18, 2010) ("NEPA requires that where several actions have a cumulative ... environmental effect, this consequence must be considered in an EIS.").

> 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, 2010 WL 2431001, at *8 (citations omitted)(rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

> The [federal 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 project's cumulative impacts.

Klamath Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 1001 (9th Cir. 2004).

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 "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); 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). In Great Basin Mine Watch, the Ninth Circuit specifically rejected the federal agency's reliance on a listing (and map) of the other nearby projects and a brief mention of their impacts as the means to comply with NEPA's cumulative impacts requirements. This is the same type of listing, map, and cursory mention of impacts that the EA relies upon here.

The agency cannot, as the EA did here, limit its analysis to just the impacts from the approved project, and fail to conduct the detailed review of the impacts from other projects (i.e., those listed in Table 3-18).

> The EA's discussion of the [approved project's] direct effects in lieu of a discussion of cumulative impacts is inadequate. *See* Klamath Siskiyou Wildlands Center at 994 (holding that an EA's cumulative impact analysis was inadequate when, among other deficiencies, "[a] considerable portion of each section discusses only the direct effects of the project at issue on its own minor watershed").

Te-Moak Tribe of Western Shoshone, ___ F.3d ___, 2010 WL 2431001, at *8. Thus, even if the agency's review of the impacts (and mitigation measures) from the authorized Project is sufficient (which is not the case here), the EA or EIS must review the impacts from the **other** projects as well.

> The EA, however, fails to explain how [the project applicant] will mitigate or avoid impacts to the different resources resulting from the *other* existing, proposed, or reasonably foreseeable projects…. Further, as in Klamath-Siskiyou, the EA fails to explain the nature of *unmitigated* impacts of the Amendment's expanded exploration activities with other existing, proposed, and reasonably foreseeable activities.

Te-Moak Tribe, at * 9 (emphasis in original).

Thus, without an understanding of the "cumulative impacts," the agency cannot credibly determine whether the impacts from the approved Project, coupled with the cumulative impacts from the over 30 other projects – are insignificant. Yet that is precisely what the Forest Service did in this case. Here, the EA merely lists these other projects, but provides no detailed analysis of their impacts to environmental, cultural, and other resources.[3] Indeed, the EA admits that

[3] In addition to the already formally-proposed and current projects, although the EA lists the planned "Development of a Deep Underground Mine" at the site to be a "reasonably foreseeable future activity," EA at 3-72 (Table 3-18), it then bypasses any review of its impacts, labeling that project as "speculative." However, the agency cannot consider such a project to be "reasonably foreseeable" under NEPA and then dismiss its review as "speculative." The Draft EA (at section 1.3) stated that: "The purpose of the Pre-feasibility Plan of Operations is to gather and evaluate geologic, geotechnical, and hydrologic data to support pre-feasibility studies being conducted by RCM [Resolution] for their *planned development* of a deep copper ore deposit." (Emphasis added.). *See* EA at 1-4. The EA further states that: "The activities considered, all of which are

many of these projects will have adverse impacts. EA at 3-69-75 (listing the fact that these projects will have cumulative impacts). However, the EA fails to contain the "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed projects in the area, as required by the Ninth Circuit. Great Basin Mine Watch v. Hankins, 456 F.3d at 971-974; Te-Moak Tribe of Western Shoshone v. Department of the Interior, ___ F.3d ___, 2010 WL 2431001, at * 7-8.

The Ninth Circuit has specifically held that the agency's duty to conduct this in-depth, quantitative analysis of the cumulative impacts from these other projects is a separate and independent duty from the duty under NEPA to analyze "connected actions" or "cumulative actions" in one NEPA document. For example, in Great Basin Mine Watch v. Hankins, 456 F.3d at 969-70, found that various projects were not "connected actions" and did not have to be analyzed in one EIS. However, the court then struck down the EISs because the EISs had failed to consider the cumulative impacts from the other "past, present, and reasonably foreseeable future actions" in the area. 456 F.3d at 971-974.

Here, as the agency recognizes, there are a significant number of other "past, present, and reasonably foreseeable future actions" in the area – indeed, the EA lists them. However, simply listing these projects, with a cursory mention of their impacts, clearly violates the NEPA requirements established by the Ninth Circuit. Thus, the agency failed to take the required "hard look" under NEPA and failed to substantiate its decision to forego preparation of an EIS.

---

associated with RCM's *ultimate goal of developing* a new underground copper mine…" (Emphasis added.). EA at 1-6. Yet, the Forest Service concludes that any analysis of this planned development itself is not warranted as part of the EA. This is clearly not consistent with the agency's finding that such a project was "reasonably foreseeable."

## III. THE AGENCY FURTHER FAILED TO JUSTIFY ITS FINDING OF NO SIGNIFICANT IMPACT

As detailed above, the failure to conduct the proper cumulative impacts analysis fatally flaws the agency's decision not to prepare an EIS. In addition, the agency's FONSI decision violated other aspects of NEPA, which require the preparation of an EIS in this case.

Federal court precedent, as well as Forest Service and NEPA regulations state that if a project "*may* have a significant effect upon the ... environment, an EIS must be prepared." National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001)(emphasis in original). The decision not to prepare an EIS must be accompanied by "a convincing statement of reasons to explain why a project's impacts are insignificant." Id.

> A plaintiff seeking to show that an agency should have prepared an EIS instead of a FONSI "need not demonstrate that significant effects *will* occur," but rather must show only that "there are *substantial questions* whether the project may have a significant effect of [sic] [on] the environment." *Anderson [v. Evans*], 350 F.3d 815, 831 (9th Cir. 2003).

Western Land Exchange Project v. U.S. Bureau of Land Management, 315 F.Supp.2d 1068, 1087 (D. Nev. 2004) (emphasis in original). "If several actions taken together have a cumulatively significant effect, this must be analyzed in an EIS. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998)." Western Land Exchange Project, 315 F.Supp.2d at 1094. In determining whether the cumulative and other impacts may result in a significant effect to warrant preparation of an EIS, the regulations focus on various "significance factors," which if present, warrant preparation of an EIS:

> The regulations also define "significantly" as involving "considerations of both context and intensity." 40 CFR § 1508.27. In terms of context, "[s]ignificance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend on the effects in the locale rather than in the world as a whole." 40 CFR § 1508.27(a). Both the short-term and long-term effects of an action are relevant to context. *Id*. With respect to intensity, the regulations set forth a number of factors to be considered in evaluating "the severity of the impact," several of which are directly relevant here [among others]: …

> (3) Unique characteristics of the geographic area **such as proximity to historical or cultural resources, park lands** ….
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. **Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment**. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or **eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources**.

Id. at 1086-87, *quoting* 40 CFR § 1508.27(b) (emphasis added). *See also* 40 CFR § 1508.27(b)(4), noting that "highly controversial" effects signal the need for an EIS. Other "significance" factors listed in § 1508.27 include: (b)(9) whether a project may adversely affect an endangered species (the case here with the Arizona Hedgehog Cactus)(b)(9), and (b)(6) whether the action may "establish a precedent for future actions" (the case here due to the use of the Withdrawal Area).

Here, in addition to the above-detailed failure of the agency to analyze the significant cumulative impacts from other projects in the area, Oak Flat and Apache Leap, at a minimum, qualify under the above NEPA significance criteria warranting an EIS. Overall, based on the unique environmental and recreational resources that will be impacted by the Project, alone and cumulatively, as well as the significant cultural and religious resources at risk from the Project, the issuance of a FONSI violates NEPA. These impacts are in addition to the EA's failure to fully review the cumulative, direct, and indirect impacts from this and other connected, related, and reasonably foreseeable future actions.

Further, comments prepared during the scoping phase of this EA and other documents known to exist by the Forest Service show the critical spiritual and cultural importance of this area to Native American Tribes. At a minimum, the Tonto National Forest has a trust and a

treaty responsibility to exhaustively protect human rights and religious freedom of Indian Tribes that warrants the preparation of more extensive analysis than was afforded by the EA.

## IV. THE DN IMPROPERLY APPROVES DRILLING TO FACILITATE FUTURE ACTIVITIES UNDER THE WITHDRAWAL AREA

The agency correctly found that no operations could be conducted underneath the Withdrawal Area based on the lack of Resolution having any legal rights to do so. DN at 9 (prohibiting directional drilling under the Withdrawal Area). However, despite the agency's acknowledgement that no operations could be conducted in this Area, the DN authorized drilling to investigate the alignment of the two tunnel routes that Resolution is investigating that would place either or both of the tunnels under the Withdrawal Area. These future tunnels and boreholes cannot be allowed under current law and any exploration project is not reasonably related to a legitimate mining operation. There is no legal purpose for investigating the location for a tunnel under an area where it would be illegal to place a tunnel.

In response, the EA states that "the analysis of RCM [Resolution]'s legal right to construct a conveyor tunnel under the National Forest System Lands [i.e., the Withdrawal Area] is beyond the scope of this EA." EA at B-14. Yet, as noted above, one of the mitigation measures listed in the DN (prohibiting directional drilling under the Withdrawal Area) was based precisely on the agency's "analysis of Resolution's legal right" to enter the Withdrawal Area. DN at 9; EA Section 3.7; EA at B-12.

The very purpose of conducting a rigorous NEPA process is to provide all the information necessary for the decision-maker to make an informed decision. In this case, since there would be an environmental and cultural impact from exploratory drilling at the Tunnel Characterization Geotechnical Borehole Drilling sites, it is entirely proper and necessary to

assess the legality of the creation of a mining tunnel under an area withdrawn from mining before the drilling is allowed.

Further, as noted herein, the agency takes the position that review of the impacts from Resolution's underground mine is not needed because that would be "speculative." However, the same is true for the boreholes. As the agency admits, in order for the tunnels or any other mineral activity to occur within/under the Withdrawal Area, the Presidential Withdrawal must be lifted/eliminated. Although Resolution has attempted to enact legislation that would undo the Withdrawal, it has been unsuccessful. Thus, any tunnel/borehole project under the Area would violate federal law and is speculative. The Forest Service cannot approve mineral operations related to such a speculative prospect, as it would not bear a reasonable relationship to any future mineral operations that would be allowed under current law.

## V. FAILURE TO ANALYZE WATER QUALITY UNDER NEPA AND FAILURE TO COMPLY WITH THE WATER QUALITY PROVISIONS OF THE CLEAN WATER ACT AND ORGANIC ACT

The DN and EA acknowledge that the Project will result in the discharge of drilling and/or dewatering waters – noting the requirement for state water discharge permits. DN at 4-5. Although the DN requires some additional documentation of the quality of water used for the drilling project, there should have been an analysis of this information in the EA itself before a decision was made. The Forest Service mentions in the EA that future compliance with the Clean Water Act (CWA) will be required of Resolution during the life of the drilling project yet fails to analyze whether the discharge water will meet all applicable water quality standards. Simply deferring to a future state permitting process, which will not undergo any NEPA review, does not satisfy the agency's analysis and public disclosure duties under NEPA. *See* South Fork band Council of Western Shoshone v. Department of Interior, 588 F.3d 718, 726 (9th Cir.

2009)("[a] non-NEPA document – let alone one prepared and adopted by a state government – cannot satisfy a federal agency's obligations under NEPA.")

For example, there is no analysis of the impacts on groundwater from the dewatering wells associated with this Project (or analyzed as a cumulative impact from the dewatering). Further, there is no analysis of the quality and quantity of the pumped water, by itself or in relation to (and impact upon) the baseline conditions of any receiving lands or ground/surface waters.

The Forest Service has a duty under the CWA and Organic Act to ensure that any project it authorizes complies with all applicable surface and ground water standards. In addition, under Section 401 of the CWA, the Forest Service cannot authorize any such project without the required certification from the State of Arizona that the project complies with all standards.

Section 313 of the CWA requires all federal agencies to comply with water quality standards. 33 U.S.C. § 1323(a). Federal agencies must ensure that activities on public lands comply with water quality standards. *See* Idaho Sporting Cong. v.Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998); Nat'l Wildlife Fed'n v. U.S. Army Corps of Engrs., 384 F.3d 1163, 1167 (9th Cir. 2004); Hells Canyon Presv. Council v. Haines, 2006 WL 2252554, *4-5 (D. Or. 2006)(USFS mine approvals must comply with CWA standards).

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 CFR § 228.8. The operator must fully describe "measures to be taken to meet the

requirements for environmental protection in § 228.8." 36 CFR 228.4(c)(3). The "[o]perator shall comply with all applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151, et seq.)[the CWA]." 36 CFR § 228.8(b). "In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations." 36 CFR § 228.8(e). The regulations thus impose an affirmative duty on the USFS to reject any mining plan that does not demonstrate compliance with the CWA or does not "protect fisheries and wildlife habitat." *See* Rock Creek Alliance v. U.S. Forest Service, ___ F.Supp.2d ___, 2010 WL 1872864, at *7-8, *13 (D. Montana 2010) (rejecting Forest Service approval of mining project for failure to protect fisheries and water quality under the Organic Act and Part 228 regulations); Hells Canyon Presv. Council v. Haines, 2006 WL 2252554, *6 (D. Or. 2006)(same).

Regarding the required Section 401 Certification, federal agencies are prohibited from issuing a federal license or permit for any activity that may result in a discharge into waters of the United States until the permit applicant has obtained certification pursuant to Section 401 of the CWA. 33 U.S.C. § 1341(a)(1). Under Section 401, an applicant for a federal license or permit to conduct any activity which may result in any such discharge must first obtain a certification from the state in which the discharge originates stating that the discharge will comply with Sections 301, 302, 306, and 307 of the CWA. 33 U.S.C. § 1341(a)(1). Sections 301, 302, 306, and 307 of the CWA set forth the permitting, pollutant treatment, and water quality compliance requirements applicable to point sources under the CWA. 33 U.S.C. §§ 1311, 1312, 1316, 1317; *see also* PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 713 (1994) (noting that Section 301 incorporates Section 303's water

quality standards by reference). Federal agencies are prohibited from issuing federal licenses or permits until applicants have obtained certification from the state stating that discharges resulting from federally permitted activities will adhere to the permitting and water quality requirements of the CWA. 33 U.S.C. § 1341(a)(1). The federal courts have required the Forest Service to comply with Section 401 prior to the approval of a mining plan of operations.

> The agency's responsibility under the CWA is clear and, as here, the Forest Service has not complied with the § 401 requirement of certification prior to permitting miners to begin mining operations. See 33 U.S.C. § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained[.]"). Regardless of how the permit or licensing process is defined, the record shows, and the Forest Service admitted at oral argument, that it has not and will not require § 401 certification prior to final approval of PoOs. Thus, mining activities that may result in discharges of pollutants into navigable waters will commence without § 401 certification, a violation of the CWA.

Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *4 (D. Or. 2006).

Here, there is no evidence that the Forest Service has required Resolution to obtain the required 401 Certification, nor does the agency have it. Thus, any Project approval violates the CWA and cannot stand.

## VI. FAILURE TO MINIMIZE ADVERSE IMPACTS UNDER THE ORGANIC ACT

The agency overemphasizes the "rights" under federal mining laws and improperly constricts its own authorities to regulate mining. The Organic Act of 1897 authorizes the Forest Service to promulgate regulations for the national forests "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. The Organic Act "specifies that persons 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 Forest Service's mining regulations are found at 36 C.F.R. Part 228, which states 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.

These regulations govern mining regulations proposed for Forest Service lands under the 1872 Mining Law, 30 U.S.C. §§ 21, et seq. Although the 1872 Mining Law bestows some "rights" to claim holders, under the 36 CFR Part 228 regulations, the Forest Service has ample authority to reject an "unreasonable" drilling plan.

The rejection of a mining plan of operations where the operator does not, or cannot, comply with his affirmative duty to demonstrate the operations' ability to comply with federal environmental laws is fully supported by federal statutory and case law. In holding that the Forest Service has authority to not approve mining operations where the proposal has not been shown to comply with federal environmental laws, one federal court stated:

> The Forest Service has adopted regulations to ensure that mining operations on national forests are "conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1 (1994). *See generally*, 36 C.F.R. pt. 228 (1994).
> …
> In reviewing these regulations, the Ninth Circuit held that "[t]he initiation or continuation of such an operation is subject to the approval of the Forest Service." U.S. v. Weiss, 642 F.2d 296, 297 (9th Cir. 1981). *See* 36 C.F.R. §§ 228.4-.5 (1994). In deciding whether a state or the Forest Service has authority to regulate mining to ensure compliance with environmental laws, the Ninth Circuit declared as follows: "We conclude that Forest Service regulations mandate that the power to prohibit the initiation or continuation of mining in national forests for failure to abide by applicable environmental requirements lies with the Forest Service." Granite Rock Co. v. California Coastal Comm'n., 768 F.2d 1077, 1083 (9th Cir. 1985).

Pacific Rivers Council v. Thomas, 873 F.Supp. 365, 374 (D. Idaho 1995).

"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)(emphasis added) *citing* Baker v. U.S. Dept. of Agriculture, 928 F.Supp. 1513, 1518 (D. Idaho 1996).

In allowing or authorizing the Project, the agency has violated the Organic Act and its implementing regulations, especially 36 C.F.R. Part 228. The agency has failed to "minimize adverse environmental impacts," 36 C.F.R. §§ 228.1, 228.8, and failed to demonstrate that the mining operators have "take[en] all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations." 36 CFR § 228.8(e).

In this case, the Forest Service violated its duties under the Organic Act and 228 regulations by approving the plan without sufficient evidence that is was reasonable and complied with all federal environmental laws. At a minimum, the agency should not have approved any use of the Withdrawal Area. As detailed above, Resolution has no rights to this access and any use (even if such use in the Withdrawal Area could be authorized under the 228 regulations, which as shown above it cannot). Failure to protect the Withdrawal Area fails to "minimize adverse impacts."

The agency also rejected the Appellants' requests for further minimization of impacts though such mitigations as helicopter access, preclusion of night activities, among other impacts. *See* April 30, 2009 Appellants' comment letter. The agency's response was limited, at best. Regarding helicopter access to the drill sites, the agency only focused on drilling on State and private lands, and ignored its duty to minimize impacts on Forest Service public land. EA at B-18-19. Regarding night operations, the agency merely required some reduction in the upward glare of the lights, and did not seriously consider minimizing impacts via the preclusion of night operations.

Overall, the agency failed to recognize its significant authority over mining, apparently believing that it did not have authority to require these conditions. As noted above, such a truncated view of the agency's authority does not square with federal law. A simple and generalized **reduction** of impacts does not equate to the strict requirements for minimization of

impacts and protection of resources. As one federal court stated, 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.

## VII. VIOLATION OF THE ENDANGERED SPECIES ACT (ESA)

The DN and EA admit that the Project will adversely affect the endangered Arizona Hedgehog Cactus (AHC, *Echinocereus triglochiadiatus* var. *arizonicus*). The Forest Service relies upon the Fish and Wildlife Service's (FWS) mitigation measures as a means to comply with the ESA. Both agencies' reviews of the impacts, mitigation measures, and environmental baseline for the AHC, however, failed to consider the cumulative impacts on the AHC from the other 30+ current and reasonably foreseeable future projects in the area (see above discussion).

Simply engaging in consultation with the FWS does not satisfy the Forest Service's "rigorous duty" under the ESA to protect listed species. Instead, it is incumbent upon the action agency, the USFS, to independently ensure that its actions do not jeopardize a listed species or destroy or adversely modify critical habitat. *See* Pyramid Lake Paiute Tribe v. Dept. of the Navy, 898 F.2d 1410, 1415 (9th Cir. 1990).

In addition, the initial EA upon which the public based their comments failed to include additional information developed during consultation with the FWS regarding the impacts of the Project to the AHC. Including this information in the revised EA after a decision has been made is not proper under NEPA or the ESA. For example, the transplanting of AHC, one of the

primary mitigation measures required to purportedly avoid jeopardy, has not been properly studied and verified as successful in ensuring species viability and recovery.

## VIII. FAILURE TO PROPERLY CONSULT WITH NATIVE AMERICAN TRIBES AND PROTECT CULTURAL RESOURCES

The Forest Service did not properly consult with Native American Tribes before issuing the DN and EA and approving the Project. In response to the Appellants' concerns over the lack of consultation, the agency simply referred to Chapter 4 of the EA. *See* EA at B-19. However, that Chapter merely lists the organizations that received the scoping and public comment letters.

Simply sending letters to Tribal Governments under NEPA does not constitute proper consultation under National Historic Preservation Act. Such a truncated consultation process violates the NHPA and its implementing regulations. NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of this Project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See* Te-Moak Tribe of Western Shoshone, ___ F.3d ___, 2010 WL 2431001, at * 11; Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470. "Under section 106, the [federal agency] was required to consider the [Project's] effects on the two sites, identify any adverse effects, and avoid or mitigate any adverse effects. *See* 36 C.F.R. §§ 800.5, 800.6." Te-Moak Tribe of Western Shoshone, ___ F.3d ___, 2010 WL 2431001, at * 12.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American Tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2); Te-Moak Tribe of Western Shoshone, ___ F.3d ___, 2010 WL 2431001, at * 11-12; Pueblo of Sandia, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties). The NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). *See* Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771. *See also* Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999); Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006); Te-Moak Tribe of Western Shoshone, ___ F.3d ___, 2010 WL 2431001, at * 11-12.

President Obama recently recognized the unique duties of federal agencies in government-to-government consultation with Tribes.

> The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.
>
> History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

> My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175.

Presidential Memorandum and Order, November 5, 2009. *See also*, Department of Agriculture Action Plan for Tribal Consultation and Collaboration, Plan Submitted Pursuant to Presidential Memorandum dated November 5, 2009." http://www.ncai.org/fileadmin/governance/USDA_Action_Plan_on_Tribal_Consultation_2.3.2010_FINAL.pdf. Despite this, the Forest Service failed to recognize the critical distinction between its duties to the general public under NEPA and this government-to-government duty to Tribes under the NHPA and the Executive Orders.

Here, the agency failed to properly ascertain the historical, cultural, and religious properties and values of the lands that will be affected by the Project and related activities, as well as failing to properly ascertain the impacts of the Project on these resources (including cumulative impacts of other projects). This is particularly true due to the immense religious and cultural importance placed on the Apache Leap and surrounding areas by Arizona Tribes.

While the Forest Service acknowledges its duty to apply Executive Order 13007 to this action and protect all sacred sites identified by a Tribe, it rejects any duties under this Order despite comments from the San Carlos Apache Tribe stating that "Oak Flat, Apache Leap, Devil's Canyon[4] and the related canyons, geological formations, and springs in the area of proposed activity are holy, sacred, and consecrated lands."

As held by the Ninth Circuit, federal agencies must comply with Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771. Under the E.O., agencies are to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious

[4] Devil's Canyon is also known as Gaan Canyon.

practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." As the Ninth Circuit held, the E.O. "imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them. *See* 61 Fed. Reg. 26771 (May 24, 1996). The district court expressly recognized that BLM was required to comply with the Executive Order." South Fork Band Council of Western Shoshone v. Department of Interior, 588 F.3d 718, 724 (9th Cir. 2009). *See also* Wyoming Sawmills, Inc. v. U.S. Forest Service, 383 F.3d 1241, 1245 (10th Cir. 2004)(requiring federal agencies to comply with the Sacred Sites E.O.).

Instead of summarily rejecting the information regarding the sacred nature of the lands affected by the Project, the Forest Service should have taken its duty to fully consult seriously and work with effected Tribes to understand more fully the nature of the objections and consequences of this proposal on their religious practices. What the Forest Service fails to understand (although this has been communicated to them on numerous occasions) is that the entire "shape" of the Oak Flat/Gaan Canyon/Apache Leap watershed is critical for the religious freedom of Native Americans. The "shape" of the area includes the land mass, the water, all the plant and animal beings which live in the watershed, the air, and indeed everything from the center of the earth to the furthest reaches of the heavens of the watershed. One cannot pull out one part of this "shape" and study its impacts without doing so in the context of all the other parts. One can no more separate the impacts to the water of the watershed from the sacredness of the watershed than one can study only the blood of a human body without looking at the heart. Given that the Forest Service knows (or should reasonably have known) that the "shape" of the Oak Flat/Gaan Canyon/Apache Leap watershed is of such critical importance to the religious freedom of Native Americans, yet failed completely to take this into account in authorizing the Project (finding that there would be no adverse impacts to any Native American religious

resources or practices) is a failing of the letter and intent of the Executive Order and related federal laws designed to protect Native American sacred sites and their uses, as well as NEPA.

The Forest Service's treatment of Arizona Tribes as mere members of the public, equating government-to-government consultation with the basic public comment process under NEPA, violates the NHPA and the Presidential Executive Orders. "Consultation" on historic properties of significance to Indian tribes includes making the Tribe a "consulting party" and providing the Tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR §800.2(c)(2)(ii). Such consultation must involve more than just giving notice to a Tribe via the public comment process. *See* Te-Moak Tribe of Western Shoshone, ___ F.3d ___, 2010 WL 2431001, at * 11-14 (describing BLM's numerous meetings and field visits with potential affected Tribes as part of a legitimate consultation process).

Overall, the Forest Service's failure to conduct the required in-depth government-to-government consultation, and to recognize the immediate impacts from this Project, especially when coupled with the cumulative impacts from other nearby activities affecting Native American Tribes, violates the letter and spirit of the NHPA, its implementing regulations, and the various Presidential Executive Orders and agency policies.

**RELIEF REQUESTED.**

For the above reasons, Appellants respectively request that the Regional Forester's Office vacate and remand the DN and EA until all the requirements noted above have been met.

Pursuant to the Administrative Procedures Act (APA), for every issue and point raised herein, the decision of the Regional Forester on this appeal must contain a full and detailed response.

Respectfully submitted this 2nd day of July, 2010.

ARIZONA MINING REFORM COALITION, the GRAND CANYON CHAPTER of the SIERRA CLUB, EARTHWORKS, the CONCERNED CITIZENS and RETIRED MINERS COALITION, MARICOPA AUDUBON SOCIETY, and the CENTER FOR BIOLOGICAL DIVERSITY,

By:

/s/ *Roger Flynn*

Roger Flynn
Jeffrey C. Parsons
WESTERN MINING ACTION PROJECT
P.O. Box 349,
440 Main Street, #2
Lyons, CO 80540
(303) 823-5738
Fax (303) 823-5732
wmap@igc.org

**Attorneys for Appellants**