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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
PHOENIX DIVISION

CONCERNED CITIZENS AND RETIRED )  
MINERS COALITION; ARIZONA MINING )  
REFORM COALITION; EARTHWORKS; )  
MARICOPA AUDUBON SOCIETY; )  
CENTER FOR BIOLOGICAL DIVERSITY; )  
and GRAND CANYON CHAPTER OF THE )  
SIERRA CLUB, )

Plaintiffs )

vs. )

UNITED STATES FOREST SERVICE, an )  
agency in the U.S. Department of Agriculture; )  
NEIL BOSWORTH, Supervisor of the Tonto )  
National Forest; and JIM UPCHURCH, )  
Objection Deciding Officer and Deputy )  
Regional Forester, )

Defendants. )

Case No.

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

## Introduction and Factual Background

1. On August 22, 2016, Defendant, the United States Forest Service (“USFS”) approved, via a Decision Notice and Finding of No Significant Impact (“DN/FONSI”), the Resolution Copper Mining Baseline Hydrological and Geotechnical Data Gathering Activities Plan of Operations (“Baseline Plan” or “Project”) on the Tonto National Forest on the southern flank of the Superstition Mountains, west of the Town of Superior, Arizona. The DN/FONSI was based on the agency’s Final Environmental Assessment (“Final EA”, or “EA”) issued in January, 2016. The DN/FONSI is found at the USFS website:

[http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906\\_FSPLT3\\_3867232.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_3867232.pdf) (reviewed Sept. 10, 2016). The Final EA is

found at:

[http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906\\_FSPLT3\\_2640925.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2640925.pdf) (reviewed Sept. 10, 2016).

2. As detailed herein, the Project would violate numerous federal public land and environmental laws, regulations, and policies. These laws (with their implementing regulations and policies) include: the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”), and the Forest Service Organic Act of 1897, 16 U.S.C. §§ 478, 551 (“Organic Act”).

3. The project area for the Baseline Plan project covers over 28 square miles. Final EA Figures 1-1 and 1-2 (depicting the project area). The network of roads and

drilling sites in the Baseline Plan project area would be over seven (7) miles wide (east to west) and four (4) miles deep (north to south). Id.

4. The Project is located in the Superstition Mountains near Superior, Arizona. The Superstition Mountains are renowned for their miles and miles of dramatic desert mountains, and seemingly endless and haunting canyons. The area's earliest known inhabitants were the hardy Hohokam and Salados peoples, who established villages and cliff dwellings in this harsh and fabulous country between 800 and 1400 a.d. Vegetation within the Superstition Mountains is primarily that of the Sonoran Desert, with semidesert grassland and chaparral higher up. Dense brushland covers a significant portion, while juniper trees and a few isolated pockets of ponderosa pine may be found at the highest elevations. The area hosts a variety of cacti from the vicious jumping cholla to the iconic giant saguaro to the Apache hedgehog cactus. A wide variety of desert plants are adapted to the low rainfall and humidity and range from mesquite and palo verde trees to brittlebush. Cacti and creosote flourish in the desert along with a wide array of wildflowers, which make their annual debut in early spring and occasionally, after the beginning of the monsoon.

5. The area hosts a surprising variety of animal life. Several lizard species, desert tarantula, rattlesnakes, scorpions, and the Gila monster inhabit the area. Javelina are also common. Mountain lions, bobcats, mule deer, ring-tailed cats, coyotes and even bighorn sheep call the Sonoran Desert home. Other creatures such as Sonoran desert tortoises, roadrunners, quail, jackrabbits and cottontails also thrive. The area hosts a surprising diversity and quantity of birds that migrate through each year. Riparian areas

provide habitat for raptors, cardinals, phainopepla, wrens, orioles, curve-billed thrashers and of course, doves.

6. The Superstition Mountains are a popular recreation destination for Arizonans and for people across the country. Containing approximately 180 miles of trails, the Superstition Mountains are known as one of the premiere hiking destinations in the Southwest. The craggy high desert provides the ideal setting for a backpacking and hiking. Abundant displays of giant Saguaro cacti and bright yellow lichen are highlights of an incredibly rugged desert terrain, which includes eroded rock spires and blocky sheer-walled mesas. The Superstition Mountains are also highly popular for rock climbing and bird watching.

7. The following photograph is at the site of the Project location looking north towards Robles and Hewitt Canyon and the congressionally-designated Superstition Wilderness Area (taken Sept. 9, 2016). The photograph is unedited, depictive of the Project site, and was taken by a member of Plaintiff Concerned Citizens and Retired Miners Coalition.



8. The Project's network of roads will bisect the Arizona National Scenic Trail in at least two places. Final EA Figure 1-2. At least five (5) of the Project's drill sites and trenching operations will be within ½ mile of the Arizona Trail. *Id.* According to the Forest Service:

The Arizona National Scenic Trail (Arizona Trail) stretches over 800 miles from the U.S. border with Mexico to Utah, connecting deserts, mountains, canyons, wilderness, history, communities and people. The Arizona Trail has something for everyone, from remote and challenging wilderness to easily accessible passages near many Gateway Communities, this trail showcases Arizona's diverse vegetation, wildlife, scenery, and history in a way that provides a unique and unparalleled Arizona experience. The Arizona Trail was designated a national scenic trail by Congress in 2009 and is administered by the U.S. Forest Service.

<http://www.fs.usda.gov/main/azt/home> (reviewed Sept. 14, 2016).

9. Among other components, the Baseline Plan involves the drilling of thirty-eight (38) geotechnical drill sites, excavation of thirty-two (32) test trenches, and drilling

of sixteen (16) hydrological testing and monitoring wells, two laydown yards for storage of materials and equipment, along with necessary construction and maintenance of road improvements for heavy equipment access. In addition to reconstructing existing roads to accommodate the heavy equipment, the DN/FONSI authorizes Resolution to construct seven (7) new roads on public land. EA Figure 1-2 (depicting access routes). The Baseline Plan will cause direct disturbance on approximately 75 acres of federal public lands administered by the USFS, as well as indirect impacts to the surrounding public lands within the 28 square mile project area. The Baseline Plan allows continuous drilling activities, 24 hours a day, seven days a week. The Baseline Plan's round-the-clock drilling and associated heavy equipment operation and truck traffic will produce significant noise and require artificial lighting at night.

10. The Project would locate numerous drillings sites along Forest roads that serve as important public access routes to trailheads leading into the Superstition Wilderness Area. The Project's heavy equipment will also travel along and use these Wilderness-access routes. Final EA Figure 1-2.

11. Implementation of the Baseline Plan is expected to take approximately two (2) years. The sixteen (16) hydrological drill sites are expected to require six (6) months, the thirty-eight (38) geotechnical drill sites approximately nine (9) to ten (10) months, and the test trenches approximately three (3) to four (4) months. The entire Baseline Plan is authorized for a ten (10) year period.

12. The Baseline Plan would occur on lands where Resolution Copper Mining LLC ("Resolution") proposes to construct a large tailings waste storage facility for its

Resolution Copper Mine, one of the largest proposed copper mines in the country.

Resolution submitted its Resolution Copper Mining General Plan of Operations for the large-scale copper mine proposal in November of 2013. The USFS accepted the plan as complete in December of 2014. According to the USFS's website for the main mine:

Resolution Copper submitted the General Plan of Operations to the Forest Service in November 2013. After review and subsequent modifications, the Forest Supervisor issued a completeness review letter in December 2014. The Forest Supervisor determined that the Plan is complete in accordance with applicable law, regulation, and policy.

<http://www.resolutionmineeis.us/documents/usfs-tonto-letter-completion-20141205>

(reviewed Sept. 11, 2016). The USFS is currently in the process of developing a separate Environmental Impact Statement (EIS) for the main copper mine proposal.

13. The Baseline Plan area includes, and is adjacent or near to, other current, recent, and proposed mineral operations on the National Forest, including the "Copper King" exploration project, the "Red Top" exploration project, and the "Superior West Exploration Plan," among other projects, as well as the Resolution Copper Mine. Some of the nearby projects that will result in cumulative impacts were not reviewed based on the agency's arbitrarily limited delineation of the cumulative impact area. Others fall within the agency's cumulative impacts review area, but no or inadequate analysis of their cumulative impacts was done.

14. According to the USFS website for the main mine:

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 West Plant Site (WPS), such as a concentrator, administrative facilities, and a laboratory; new facilities at East Plant Site (EPS), such as shafts, hoists, and attendant features; a

tailings storage facility and associated tailings pipeline corridor; several pipelines and other infrastructure within and adjacent to the Magma Arizona Railroad Company 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.

<http://www.resolutionmineeis.us/documents/resolution-copper-gpo> (reviewed Sept. 10, 2016)(this website link also includes the current version of the main mine Plan of Operations).

15. The USFS received the proposed Baseline Plan from Resolution in 2013, and conducted public “scoping” in 2014. After receiving public comments, the agency prepared its Preliminary/Draft Environmental Assessment (“Draft EA”) in March of 2015.

16. Plaintiffs and other members of the public, including the San Carlos Apache Tribe, submitted extensive comments during the scoping period, specifically noting that the main Resolution Copper mine was already proposed to the USFS and thus was a “reasonably foreseeable future action”, the cumulative impacts of which must be analyzed in agency’s Draft EA for the Baseline Plan. *See* June 23, 2014 scoping comments by Plaintiffs; USFS Preliminary EA Scoping Comment and Response Report (compiling and responding to the scoping comments), found at USFS website: [http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906\\_FSPLT3\\_2425372.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2425372.pdf) (reviewed Sept. 11, 2016).

17. The agency refused the requests to include the main mine as a reasonably foreseeable future action. Instead, the Draft EA failed to consider, and did not even list, the large-scale Resolution Copper Mine as a reasonably foreseeable future action for



purposes of the cumulative impacts review, thus avoiding the requirement to include any analysis of the impacts of the proposed mine. *See* Draft EA, March 2015, Figure 3-1 (map of cumulative impacts area and activities with no mention of main copper mine); Table 3-1 (listing other projects in the cumulative impacts area with no mention of the main copper mine). The Draft EA is found at the USFS website:

[http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906\\_FSPLT3\\_2425252.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2425252.pdf) (reviewed Sept. 10, 2016).

18. In response to the Plaintiffs' and the San Carlos Tribe's concerns that the USFS was violating NEPA by not analyzing the cumulative impacts from the proposed main mine in the NEPA process for the Baseline Plan, the agency stated that:

Section 1.5.1 [of the Draft EA] provides information on why development of the deep underground copper ore body, to include development of a tailings storage facility on National Forest System lands, is not a connected action to the proposed Baseline activities, **and therefore is not evaluated in this preliminary EA.**

Draft EA at A-8 (response to comments)(emphasis added). *See also* USFS Preliminary EA Scoping Comment and Response Report, at Table 2-48 (“development of the deep underground copper ore body is not a connected action to the Proposed Action [Baseline Plan], and therefore was not evaluated in this preliminary EA.”).

19. Notably, the agency's Draft EA and Response to Scoping never responded to the Plaintiffs' and Tribe's argument about cumulative impacts from the proposed main mine. Rather, the agency only repeated its position that the Baseline Plan and the main mine were not “connected actions.”

20. Because the agency believed that the main mine and the Baseline Plan were not “connected actions,” the agency did not consider the cumulative impacts from the proposed main mine. Under controlling Ninth Circuit precedent, however, the fact that two projects are not “connected actions” (even if true), does not mean that the agency can avoid considering the cumulative impacts of the two projects. *See* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 968-974 (9th Cir. 2006)(EISs for two mineral projects violated NEPA by failing to adequately analyze “cumulative impacts” from each project, even though the two projects were not “connected actions”). As held in Great Basin Mine Watch, the duty to review the impacts from “connected actions” is separate from the duty under NEPA to review the cumulative impacts from all “past, present, and reasonably foreseeable future actions.” *Id.*

21. Thus, the cumulative impacts from the main mine were never provided to the public, or analyzed by the agency, in the Draft EA. The public comment period on the Draft EA was the last opportunity for public comment on the Baseline Plan during the agency’s NEPA review prior to the issuance of the Final Environmental Assessment (“Final EA”) in January of 2016.

22. In the January 2016 Final EA, issued after the agency closed the public comment period on the Draft EA (in April 2015), the USFS switched positions and finally recognized the full mine proposal as reasonably foreseeable, and including a brief discussion of the main mine. Final EA at 1-9 (“The MPO [Resolution Copper Mining Plan of Operations] is a reasonably foreseeable future action”). *Compare* Final EA Figure 3-1 (expanding the “cumulative effects analysis area” south of U.S. Highway 60

to include the main mine) *with* Draft EA Figure 3-1 (limiting “cumulative effects analysis area” to only north of U.S. Highway 60, with no depiction of the location of the main mine).

23. The Forest Service never provided an opportunity to comment on this switch, nor upon the brand new analysis (albeit improperly truncated as noted below) in the Final EA of the cumulative impacts of the main mine’s operations.

24. As a result, the USFS never provided the public an opportunity to review and comment on the agency’s analysis of the cumulative impacts associated with the full mine, or the extent of the new cumulative impact area, in violation of NEPA.

25. In addition, the Final EA’s truncated discussion of the main mine’s cumulative impacts was cursory at best, and failed to conduct a detailed analysis of the proposed mine, asserting without credible basis that such a review could not be completed because detailed information on the proposed mine was incomplete or unavailable. This is despite the fact that the USFS received the Plan of Operations for the Resolution Copper Mine in 2013, almost three years prior to approving the Baseline Plan. *See* Final EA at 1-1 (acknowledging that the main mine Plan of Operations “was submitted to the Forest Service in November of 2013.”).

26. Further, even if some aspects of the Resolution main mine may be revised, neither Resolution nor the USFS have mentioned any such alternatives to date. At a minimum, during its NEPA review of the proposed main mine, the agency is required to consider the main mine project as proposed (in addition to “reasonable alternatives”). In other words, the agency is fully capable, and required by NEPA, to review the main mine

proposal as it stands now. The fact that some aspects of the project may change does not prevent the agency from reviewing the main mine's cumulative impacts at this time.

27. Although it finally recognized the main mine as a reasonably foreseeable future action under NEPA, the Final EA failed to adequately analyze the cumulative impacts from the mine. Rather the agency simply stated that: "Impacts from the MPO [Resolution Copper Mining Plan of Operations] will be analyzed in more detail in a separate EIS before such operations are approved." Final EA at 3-25 (water quality section of EA).

28. In addition to not conducting the detailed and quantified analysis of the main mine's impacts as required by NEPA, the Final EA also limited its brief discussion of the main mine to just the first two years of operation. *See* Final EA Figure 3-6 (showing location and extent of tailings waste and related infrastructure at year 2 of the main mine). This truncated time frame ignores the fact that the cumulative impacts of the main mine (scheduled to last approximately 40 years), when coupled with the Baseline Plan's activities, will certainly last more than 2 years. Based on this self-imposed limit of two years of main mine operations, the Final EA only considered that the main mine would disturb 918 acres. EA Table 3-2 (at p. 3-29).

29. According to the main Mine Plan of Operations [MPO] on the USFS website, the main mine is proposed to disturb 6,951 acres. MPO Table 1.5-2 (MPO at p. 17). The "Tailings and Tailings Corridor" alone will disturb 4,381 acres. MPO Table 1.5-3 (MPO at p. 18). *See* MPO Volume 1, at USFS website:

<http://www.resolutionmineeis.us/sites/default/files/project-files/resolution-copper-gpo->

[vol-1-20160509.pdf](#) (reviewed Sept. 11, 2016). All of the MPO volumes can be found at: <http://www.resolutionmineeis.us/documents/resolution-copper-gpo> (reviewed Sept. 11, 2016). Thus, the Baseline Plan Final EA only considered roughly 13% of the main mine's disturbance and impacts.

30. In addition to improperly limiting the scope of the mine's impacts to only 2 years and only 13% of the total, the Final EA's brief discussion of the main mine's impacts fails to contain necessary details and relies on unsupported assumptions. For example, for wildlife impacts, the entire section of Final EA dealing with "cumulative effects" is only 3 paragraphs long. Regarding the cumulative effects/impacts from the MPO and other projects, the Final EA merely states that:

Activities associated with the proposed MPO (Table 3-1, Figure 3-6) that have the potential to overlap in time and space with the Baseline Plan would open up 918 acres of land within the cumulative assessment area. However, the incremental effects to wildlife and special status species that are likely to result from the Proposed Action would be negligible to minimal. Although there could be effects to wildlife and special status species from reasonably foreseeable future activities, there is little likelihood that effects from the Proposed Action would measurably add to those effects.

Final EA at 3-59 to -60. No supporting analysis is provided for these conclusory statements.

31. The Final EA's discussion of the cumulative impacts to water resources is similarly brief and conclusory. Regarding the cumulative impacts from the main mine and other projects in the area, the EA states that:

The mineral development projects identified in Table 3-1 could result in a greater degree of water quality effects compared to the Proposed Action [Baseline Plan]. Resolution's proposed MPO, the Pre-feasibility Activities, the OMYA Superior Limestone Quarry (permitted but currently in temporary shutdown), Imerys Perlite

Mine, the proposed Copper King and Red Top projects may affect water quality by disturbing soil and native vegetation. Increases to sedimentation of surface waters may result from erosion caused by this disturbance. Each of these projects would be conducted in accordance with state and federal requirements for water quality protection.

Although the geographical location, final configuration, and schedule for Resolution's MPO activities are uncertain, for this analysis it has been assumed that there is potential overlap in time and space between the Proposed Action and activities included in the MPO. The drivers for cumulative water quality effects associated with the MPO include the mining and milling of copper ore and the establishment of a tailings facility in the cumulative effects analysis area.

**Impacts from the MPO will be analyzed in more detail in a separate EIS before such operations are approved.**

Final EA at 3-25 to -26 (emphasis added). Again, no supporting analysis is provided, as the agency admits that the detailed analysis of "impacts from the MPO" has been deferred to its review of the MPO.

32. Regarding the agency's failure to adequately review the cumulative impacts from the main Resolution mine, the EA asserts that it cannot review the mine's operations at this time: "[i]n the EIS for the MPO, alternatives may be developed that do not conform to the proposed facilities and disturbance figures presented in the [mine plan of operation]. 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.

33. 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). All of

the MPO facilities are currently proposed and “reasonably foreseeable”. *See*

<http://www.resolutionmineeis.us/documents/resolution-copper-gpo>

(USFS website containing the current version of the MPO)(reviewed Sept. 10, 2016).

34. The USFS asserts that it was justified in failing to analyze the impacts from the large-scale mine plan because 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. The EA simply noted the location of the initial portions of the tailings storage facility at year two of construction. EA Figure 3-6 (EA at 3-33).

35. A large part of the area covered by the Baseline Plan is within the areas proposed for the large-scale mine. As a result, the Baseline Plan activities do overlap in space with the large-scale mine proposal. The large-scale mine proposal has been formally submitted and is currently under review by the USFS. Thus, the large-scale mine proposal is a reasonably foreseeable action that will cause surface disturbance that will remain and last into the future.

36. In this case, in addition to the mining plan of operations (“MPO”) for the large-scale 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 large-scale mine’s ore concentrate transfer facility in the area southwest of the immediate Baseline Plan footprint. Plaintiffs had specifically raised this issue, and including the County zoning report, in its Objections filed with the USFS, but the agency ignored the

issue. *See* PINAL COUNTY PLANNING AND ZONING COMMISSION REGULAR MEETING ACTION REPORT OF October 15, 2015 (attached to Plaintiffs' Objections).

37. 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 USFS ruled the MPO "complete" in 2014. The USFS has never requested additional information from Resolution despite claiming that it lacks necessary information to conduct a complete cumulative impacts analysis.

38. The USFS has never provided a demonstration that the costs to obtain additional information necessary to analyze the impacts from the MPO are exorbitant. Indeed, the agency has had the full mine plan since 2013 and is currently analyzing its impacts based on that plan. There is no credible reason why the agency could not have included the cumulative impacts from the mine in its review of the Baseline Plan.

39. Table 3-1 of the EA lists a number of projects that will result in cumulative impacts. The EA provides no details about the actual impacts from this list of projects. The Table and associated text merely lists the projects, their locations, and what resources will be affected. There is no detailed or quantified assessment of the impacts associated with these projects. The USFS Categorically Excluded the Copper King Mineral Exploration Project and Red Top Exploration Project from any detailed analysis in either an EA or EIS under NEPA. *See* Decision Memo for Copper King Project, signed Dec. 24, 2015,

<http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/>



[www/nepa/100962\\_FSPLT3\\_2621209.pdf](http://www/nepa/100962_FSPLT3_2621209.pdf) (reviewed Sept. 11, 2016); Decision Memo for Red Top Project, signed May 6, 2016,

[http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/100959\\_FSPLT3\\_3040027.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/100959_FSPLT3_3040027.pdf) (reviewed Sept. 11, 2016).

40. The Final EA for the Baseline Plan fails to mention another proposed mineral exploration project in the area, the Superior West exploration project. That project was proposed to the Forest Service on October 14, 2015, during the time when the agency was preparing the Final EA for the Baseline Plan. As proposed at that time, the project would conduct mineral exploration drilling on 12 drill sites on 106 potential drill site locations, near the town of Superior. A number of these sites would be in the same watershed, and use at least one of the same access roads, as the Baseline Plan. *See* Plan of Operations, Superior West project: USFS website

[http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/104788\\_FSPLT3\\_3864975.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/104788_FSPLT3_3864975.pdf) (viewed September 8, 2016). *See also* July 14, 2016 Public Notice letter from USFS Globe Ranger District, District Ranger Mark Sando.[http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/104788\\_FSPLT3\\_3864972.pdf](http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/104788_FSPLT3_3864972.pdf) (reviewed Sept. 14, 2016). These proposed drilling locations, accessed via existing roads, new overland travel routes, and up to 50 helicopter trips, would all be located near the town of Superior. *Id.*

41. In response to concerns raised by Plaintiff Arizona Mining Reform Coalition to the USFS on the failure of the Baseline Plan Final EA to include any

mention of the Superior West project, let alone any analysis of its cumulative impacts, Tonto National Forest Minerals Staff official Christine Crawford admitted that:

Regarding Superior West project and the Resolution baseline characterization EA: **Not including Superior West project was an oversight on our part** and right now we're in the process of gathering input internally and getting some direction on how to address this supplemental information.

Email from Christine Crawford, USFS to Roger Featherstone, AMRC, dated August 3, 2016 (emphasis added). Neither the Final EA nor the DN/FONSI made any mention of this project, or the admitted failure of the Final EA to consider the impacts from the Superior West project.

42. This is despite the fact that the Superior West project proposal was submitted to the USFS on October 14, 2015, almost three months before the challenged Final EA was completed. After the Final EA for the Baseline Plan was issued in January of 2016, and after the Forest Service admitted that it failed to include the Superior West project in the Final EA, the company modified that project on August 11, 2016 to remove the proposed drilling and construction north of Highway 60. At the time the Final EA was issued in January of 2016, the Superior West project proposed to conduct drilling and other operations north of Highway 60 as shown in the October 14, 2015 Plan of Operations.

43. The Superior West Project is controlled by Eurasian Minerals, Inc., a Canadian mineral exploration company. On May 4, 2015, Eurasian Minerals, Inc. announced that it had signed "an Exploration and Option to Purchase Agreement (the "Agreement"), through its wholly owned subsidiary Bronco Creek Exploration, for the

Superior West porphyry copper project with Kennecott Exploration Company (“Kennecott”), part of the Rio Tinto Group. The project is located adjacent to the Resolution porphyry copper project, within the Superior Mining District, approximately 100 kilometers east of Phoenix, Arizona.” <http://www.eurasianminerals.com/s/news.asp>; (May 4, 2015 press release)(last viewed September 14, 2016).

44. The press release further states: “the Superior West project comprises more than 680 federal lode mining claims covering more than 5,100 hectares in the vicinity of Superior, Arizona. The boundary of the property lies less than two kilometers from the Resolution copper deposit. ... Kennecott will be the operator with [Eurasian Minerals, Inc.] conducting work through the program’s first year.” *Id.* The Rio Tinto Group (owner of Kennecott Exploration Company), is the majority owner of the Baseline Plan operator, Resolution Copper Mining.

45. The Final EA limits the scope of the purported cumulative impacts analysis area near the Baseline Plan to just the north side of Highway 60 west of Superior (although as noted above, the agency belatedly added some of the main mine area south of the highway east 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). The Final EA did not analyze the cumulative impacts of projects south of Highway 60 in the vicinity of the Baseline Plan project.

46. 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 Plan. EA, Chapter 3. 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). The impacts from the Baseline Project, when combined with the impacts from the MPO and other past, present, and reasonably foreseeable future actions, will have impacts beyond the acreage of the Baseline Plan. For example, the EA admits that the Project alone may result in the “blockage of migration or dispersal corridors” for wildlife. EA at 3-54. No detailed impact analysis was presented in the EA regarding these wildlife corridors.

47. As noted above, the Ninth Circuit’s decision in Great Basin Mine Watch, requires the agency to provide a “quantified assessment” of all of the cumulative impacts from the main mine, even if the main mine and the Baseline Plan are not “connected actions.” In this case, in both the Draft and Final EAs, the agency refused to acknowledge the Baseline Plan as a “connected action” to the full mine proposal, which would also trigger the NEPA requirement to fully review the impacts of the full mine proposal in one NEPA document.

48. The large-scale mine proposal and the Baseline Plan are part of one interdependent mining project, as acknowledged by Resolution. *See* Table 1.4-1 of the 2014 MPO. 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 MPO at 7.

49. The EA states 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 asserting 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 Baseline Plan 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 large-scale mine proposal).

50. Despite acknowledging that the Baseline Plan is a “critical” and “necessary” part of the large-scale mine, and would not occur but for the large-scale mine proposal, the agency did not consider the two projects “connected actions” under NEPA or consider the impacts from the projects in one NEPA document.

51. Yet, the USFS asserted that the company’s statutory rights under the U.S. mining laws – premised on the work it has done to explore and advance the full mine proposal – limited the agency’s authority to deny or substantially limit the Baseline Plan or to authorize various alternatives to the proposed action that would limit impacts. Indeed, the agency admitted the direct connection between the two projects, stating that: “Determin[ing] the feasibility of a potential tailings facility is considered a use that is reasonably incident to mineral exploration and development of a potential mine.” USFS Preliminary EA Scoping Comment and Response Report, at Table 2-6. In this way, the

agency illegally discounted its obligations under NEPA to review impacts from connected actions and various less-impactful alternatives.

52. Section 3003 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law No. 113-291 (12/19/2014))("NDAA") contained provisions relevant to Resolution's proposed operations in the area. The NDAA authorized the USFS to conduct a land exchange for certain areas associated with the proposed mine and specifies that all analyses conducted in association with the proposed projects must fully comply with NEPA. Further, the NDAA demonstrates that the Baseline Plan and the proposed mine are connected actions under NEPA and that the impacts associated with the mine proposal are cumulative impacts with the impacts from the Baseline Plan.

53. The USFS committed additional violations of NEPA by failing to collect and review adequate data concerning existing environmental conditions at the site or conduct the necessary review and analysis of the proposed mitigation measures, and their effectiveness, which the agency overtly relies upon to reduce any impacts of the Baseline Plan to below the level of significance. In particular, the agency failed to assess the impacts associated with the project's air pollution emissions, despite the likelihood that the project's air emissions, coupled with the already high pollution levels in the project area, will exceed federal Clean Air Act ("CAA") standards.

54. The Baseline Plan area has exceeded the allowable National Ambient Air Quality Standards (NAAQS) for the Criteria Pollutant of Ozone. EA Table 3-12 (EA at 3-92); EA at 3-95. No analysis has been done of the Ozone levels created or exacerbated

by the Plan's emissions, or the cumulative Ozone level caused by emissions of the other current and reasonably foreseeable future actions 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.

55. The Resolution Baseline EA Objection Review issued by the USFS with respect to the Baseline Plan states that "the NAAQS for ozone were lowered since the EA was written from 75 ppb [parts per billion] to 70 ppb." Objection Review at 3. In fact, the U.S. Environmental Protection Agency ("EPA") issued its final rule revising the NAAQS for Ozone down to 70 ppb in October, 2015, with an effective date of December 28, 2015. *See* 80 FR 65292 (October 26, 2016). Thus, the lowered Ozone standard was changed and formally effective **before** the Final EA was completed and issued in January 2016. Accordingly, the Final EA never analyzed whether the Project emissions, coupled with the existing background levels and cumulative emissions from other projects in the area, will comply with the new 70 ppb Ozone NAAQS standard (let alone the previous 75 ppb standard).

56. The Final EA's and DN/FONSI's conclusion that there is no potential for Project emissions, alone or in combination with the other current or proposed projects in the area, to contribute to a violate of the Ozone standard is not supported by the record

and is arbitrary and capricious and in violation of NEPA, the Organic Act, and the 36 C.F.R. Part 228 regulations.

57. The Objection Review states that “[a] quick analysis of the data presented in the EA as well as more current air quality data from the Queen monitoring station indicate that it is highly likely that this area will become a non-attainment area for the 8-hr Ozone NAAQS when new designations are determined in 2017.” Objection Review at 3. The USFS calculates that “the 8-hr Ozone NAAQS will have to be 67 ppb or less for the area to achieve the standard in 2017, a value that hasn’t been achieved since at least 2008.” Objection Review at 3. Despite the high likelihood of Ozone standard violations, no additional existing environmental condition or impact analysis of Ozone, or mitigation effectiveness, was conducted.

58. The formation of Ozone is due to the “increase in emissions of NO<sub>x</sub> [Nitrogen Oxides]” from the Project. EA at 3-95. “In the presence of sunlight, NO<sub>x</sub> and volatile organic compounds (VOCs) can react to form ground-level ozone.” EA at 3-95. Although the EA calculates that the Project will emit 102.5 tons per year of NO<sub>x</sub>, and 8.6 tons/year of VOCs, EA Table 3-18 (EA at 3-95), and that NO<sub>x</sub> and VOC emissions contribute to Ozone, no analysis of Ozone levels was done. The agency concluded 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.

59. According to the EPA, ground-level Ozone causes significant adverse impacts to human health and the environment:



Ozone in the air we breathe can harm our health, especially on hot sunny days when ozone can reach unhealthy levels. Even relatively low levels of ozone can cause health effects.

***Who is at risk?***

People most at risk from breathing air containing ozone include people with asthma, children, older adults, and people who are active outdoors, especially outdoor workers.

U.S. EPA, Health Effects of Ozone Pollution, <https://www.epa.gov/ozone-pollution/health-effects-ozone-pollution> (reviewed Sept. 8, 2016).

60. EPA has determined that exposure to Ozone can:

- Make it more difficult to breathe deeply and vigorously.
- Cause shortness of breath, and pain when taking a deep breath.
- Cause coughing and sore or scratchy throat.
- Inflammate and damage the airways.
- Aggravate lung diseases such as asthma, emphysema, and chronic bronchitis.
- Increase the frequency of asthma attacks.
- Make the lungs more susceptible to infection.
- Continue to damage the lungs even when the symptoms have disappeared.
- Cause chronic obstructive pulmonary disease (COPD).

Id. According to EPA: “Recent studies consistently report associations between short-term ozone exposures and total non-accidental mortality, which includes deaths from respiratory causes.” Id.

61. EPA’s 2015 final rule lowering the 8-hour (short-term) national Ozone standard specifically found that the tightened standard was needed “to provide requisite protection of public health and welfare.” 80 FR 65292. “The clearest evidence for health effects associated with exposure to O<sub>3</sub> [ozone] is provided by studies of respiratory effects. Collectively, a very large amount of evidence spanning several decades supports

a relationship between exposure to O<sub>3</sub> and a broad range of respiratory effects.” 80 FR 65302.

62. EPA specifically detailed the adverse health impacts from short-term exposure to ground-level Ozone – the type of Ozone that will be generated by the emissions from the Project as well as the other current and proposed – but not analyzed – mineral and other activities in the area. EPA determined that: “Controlled human exposure, animal toxicological, and epidemiologic studies available in the last review provided clear, consistent evidence of a causal relationship between short-term O<sub>3</sub> exposure and respiratory effects.” 80 FR 65303.

63. The entire cumulative impacts section for air quality in the Final EA consists of less than one page, with no mention of Ozone, let alone a calculation of any of the cumulative air emissions from the other current and proposed projects in the area. Final EA at 3-96. The cumulative impacts of Ozone pollution were not examined, including the impacts from the formation of Ozone from the other projects in the area that will result in increased NO<sub>x</sub> 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. This is in addition to proposed projects that were not even mentioned in the Final EA, such as the Superior West exploration project, which was proposed to the USFS while it was preparing the Final EA.

64. Instead of conducting the required analysis, the EA merely stated that:

Fugitive dust and emissions from the improvements to U.S. 60 and other projects included in Table 3-1 could result in localized temporary effects on air quality in the cumulative effects analysis area. Continued mining of the Perlite Mine could contribute to longer-term effects. Construction and operation of Resolution's proposed MPO could also contribute long-term effects.

Cumulative effects to air quality from the Proposed Action [Baseline Plan] would result in a temporary, localized increase in emissions. However, fugitive dust and emissions would be controlled by dust controls and emission controls. For these reasons, the incremental effects to air quality from the Proposed Action when considered with the effects of past, present, and reasonably foreseeable future actions would be minimal and temporary.

Final EA at 3-96. No supporting analysis is provided. This is especially of concern due to the fact that Ozone levels in the area are at, or above, the federal NAAQS standard – even under the old 75 ppb level, which is now down to 70 ppb.

65. Ozone is the only Criteria Pollutant that has exceeded, or almost exceeded, the NAAQS every year since 2008. *See* Final EA Table 3-12. Yet, Ozone is the only Criteria Pollutant not analyzed in the EA, although the cumulative emissions from the other current and reasonably foreseeable future activities were also never calculated for these pollutants.

66. Regarding the NEPA requirement that the agency conduct a full analysis of existing environmental conditions for all potentially affected resources, the EA states that the agency does not have the required existing environmental condition analysis of the affected area for these resources. For example, the agency acknowledges that, for groundwater, “site-specific water quality information is not readily available.” EA at 3-19. Although the EA summarizes some groundwater flow issues, no information on the condition of the existing environmental quality is provided. The EA also states that “the

Superior Basin was not specifically evaluated.” EA at 3-19. Instead, the EA merely mentions a 17-year old “groundwater quality study” of other basins in Arizona. Id.

67. The EA states 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 that groundwater resources will be impacted from 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, and generation of investigation-derived waste. EA at 3-21.

68. 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. The agency did not gather any groundwater quality data as part of an existing environmental condition analysis for the Baseline Plan. No such information was gathered despite the EA’s statements that the Baseline Plan is independent from the large-scale mining proposal.

69. The EA describes the type of groundwater data that is needed for an existing environmental condition groundwater analysis. The Response Report at Table 2-67/68 lists various types of data that would be needed to ascertain existing environmental conditions such as “chemical quality of groundwater” and “aquifer hydraulic properties”. None of these attributes have been obtained for the Baseline Plan. Instead, the EA states that “site-specific water quality information is not readily available.” EA at 3-19.

70. The EA acknowledges the existence of an extensive network of groundwater wells in the Baseline Plan area. “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). These existing wells were not sampled for existing water quality by the Forest Service for analysis in the EA.

71. The EA lacks a detailed existing environmental conditions analysis for other potentially affected resources such as wildlife, air quality, cultural and historical resources, and recreation. For example, for recreation, the EA admits that: “information is currently unavailable for the amount of [recreation] use.” EA at 3-78. The Baseline Plan will directly impact users of the Arizona Trail and those traveling to the Superstition Wilderness Area. Existing environmental condition and cumulative impacts analyses are necessary to fully ascertain the level of impacts to public land resources, and to determine the significance of these impacts.

72. Similarly, for cultural and historic resources, the EA lacks the required detailed analysis of impacts, cumulative and otherwise. Instead, the EA focuses on those sites eligible for listing on the National Register of Historic Places, and disregards cultural and historic sites the agency determined not eligible for listing. This is especially true for the cumulative impacts analysis, in which the EA discusses impacts only to sites determined to be eligible for listing on the National Register. EA at 3-72.

73. For impacts the EA does identify, the agency relies on mitigation measures to bring the level of impacts below the significance threshold to justify the use of a

DN/FONSI rather than preparation of an Environmental Impact Statement. The mitigation measures were added by the agency to the original proposal during the review process. Here, the USFS states that “[a]dditional 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. The EA does not provide an analysis of how effective these mitigation measures will be.

74. The agency relies on these purported mitigation measures to meet its responsibilities under the Organic Act and Part 228 regulations to “minimize adverse impacts.” The EA states that one of the required mitigation 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. The EA and proposed project approval does not “avoid disturbance of stream channels.” The project proposes numerous drill sites, trench sites, roads, and other project activities/facilities within intermittent or perennial stream channels. *See* EA, Figure 3-3.

75. Also, the EA states: “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. The EA does not provide assurance that all potential copper discharges from the project will be prevented.

76. The EA does not provide assurance that the drill holes excavated from areas where the tailings storage facility is proposed will be sealed in a manner capable of preventing these holes/wells becoming conduits for leakage/seepage of contaminants from

the tailings. The USFS relies solely on Arizona's generalized well/drill closure requirements, with no review of the potential impacts of this leakage/seepage. Rather, the agency states that the issue is "outside the scope of analysis of the preliminary EA," Response Report Table 2-2.

77. Despite the potential for direct, indirect, and cumulative impacts, the USFS approved the Baseline Plan via its Final EA, DN and FONSI under NEPA. To do so, USFS inappropriately determined that there are no substantial questions as to whether the Baseline Plan operations may have a significant effect on the environment, despite failing to consider all of the direct, indirect, connected, and cumulative impacts associated with the project. As a result, the agency illegally issued its Final EA and FONSI, and failed to prepare an Environmental Impact Statement ("EIS") as required by NEPA.

78. The USFS also approved the Baseline Plan without ensuring that the impacts associated with the proposal were minimized, and without ensuring compliance with all other environmental laws – particularly regarding Ozone air pollution standards – as required by the 1897 Organic Act and USFS mining regulations. These failures result in a failure to comply with applicable law and regulations within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*

79. Plaintiffs, Concerned Citizens and Retired Miners Coalition, Arizona Mining Reform Coalition, Maricopa Audubon Society, Center for Biological Diversity, Earthworks, and the Grand Canyon Chapter of the Sierra Club (collectively "the Coalition") seek: (1) declaratory relief that USFS violated NEPA, the 1897 Organic Act, and the implementing regulations of these laws in issuing the Final EA and by approving

the Baseline Plan via a DN/FONSI; (2) an order vacating and setting aside USFS's decision approving the Baseline Plan pursuant to the APA; and (3) such preliminary relief as may be warranted to protect public resources.

### **Jurisdiction**

80. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this lawsuit presents a federal question under the laws of the United States, including NEPA, the Organic Act, the APA, the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201 *et seq.*, and the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. This Court also has jurisdiction under 28 U.S.C. § 1346 (United States as defendant).

81. The Coalition's request for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201(a) and 2202 (DJA) and 5 U.S.C. § 706(2)(A) (APA). An actual controversy, within the meaning of the DJA, exists between Plaintiffs and Defendants. Plaintiffs have exhausted all administrative remedies available to them as required by the APA.

### **Venue**

82. Venue properly rests in the District of Arizona pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the Coalition's claims occur in this district and the federal public land involved in the Baseline Plan is located within this District.

### **Intra-District Venue**

83. This case should be assigned to the Phoenix Division of this Court because the Baseline Plan is located in Pinal County, Arizona. LRCiv. 77.1(a).



## Parties

84. Plaintiff 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; and (2) are retired hard-rock miners who previously worked in now non-operational mines in and around Superior, Arizona, and were displaced due to mine closure or personal disability.

85. Plaintiff Arizona Mining Reform Coalition is comprised of Arizona groups and individuals that work to ensure that responsible mining contributes to healthy communities, a healthy environment, and, when all costs are factored in, is a net benefit to Arizona. The Arizona Mining Reform Coalition expects the mining industry to clean up after itself, comply fully with the spirit of safeguards in place to protect Arizona, and to interact in a transparent and open manner with Arizona citizens.

86. Plaintiff 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. Its members use the Project area that would be affected for bird-watching, hiking and other activities. Maricopa Audubon Society members regularly volunteer at the nearby Boyce Thompson Arboretum and participate in the Superior Christmas Bird Count, an annual event focusing on the observation of bird species in and around the Superior area, including the lands in the Baseline Plan project area.

87. The Center for Biological Diversity is a non-profit public interest organization with an office located in Tucson, Arizona, representing more than 1 million 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.

88. 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. Earthworks works for solutions that protect both the Earth's resources and communities.

89. The 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. Its members have long been committed to protecting and enjoying the Tonto National Forest.

90. Plaintiffs have long-standing interests in the proper and lawful management of the National Forests, especially the Tonto National Forest near and adjacent to the town of Superior, including the lands within the project area. Plaintiffs also have long-

standing interests in the proper implementation of NEPA and federal public land management laws. Members, officers, staff, and supporters of Plaintiffs participate in a wide range of aesthetic, scientific research, and recreational activities on the Tonto National Forest and within and adjacent to the lands proposed to be impacted by the activities approved in the Baseline Plan.

91. Plaintiffs' members, officers, staff, and supporters hike, picnic, take pictures, appreciate scenery, solitude, and quiet, engage in scientific research projects, and attempt to view and value wildlife, in this specific area. Plaintiffs' members, officers, staff, and supporters have concrete plans to continue pursuing these activities in the Tonto National Forest and on the specific lands and transportation routes impacted by the Baseline Plan. Many of Plaintiffs' members live in the town of Superior (just east of the project area) and Queen Valley (just west of the project area). The interests of Plaintiffs and their members, officers, staff, and supporters in this matter are substantial and are adversely affected by Defendants' failure to comply with NEPA, the 1897 Organic Act, the APA, and by the Baseline Plan's activities themselves. The requested relief will redress the injuries of the Coalition, and their members, officers, staff, and supporters.

92. Defendant United States Forest Service (USFS), is a federal agency within the U.S. Department of Agriculture. USFS is responsible for the management of the National Forests, including the Tonto National Forest. As part of its management responsibility, USFS must insure that activities it authorizes on the Tonto National Forest comply with NEPA, the Organic Act, and the APA. In January of 2016, the Tonto

National Forest issued the challenged Final EA. On August 22, 2016, Defendant Tonto National Forest Supervisor Neil Bosworth signed and issued the challenged DN/FONSI for the Project. On May 16, 2016, Defendant Jim Upchurch, Objection Deciding Officer and Deputy Regional Forester, denied Plaintiffs' administrative Objection to the Project. Mr. Bosworth and Mr. Upchurch are sued in their official capacities.

### **Governing Law**

#### **I. The National Environmental Policy Act (NEPA)**

93. NEPA is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).

NEPA establishes “action-forcing” procedures that require agencies to take a “hard look” at environmental consequences.

...

An EIS serves two purposes:

First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 642 (9<sup>th</sup> Cir. 2010).

94. The primary purpose of the NEPA analysis “is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1.

95. “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken ... Accurate scientific analysis, expert agency comments, and public scrutiny are essential to

implementing NEPA.” 40 C.F.R. § 1500.1(b). NEPA also requires federal agencies to take a “hard look” at the environmental effects of their proposed action. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 374 (1989).

96. NEPA requires that all federal agencies “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). The agencies “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 FONSI’s. 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....”). Agencies must “insure the professional integrity, including scientific integrity,” of the analysis in an EIS. 40 C.F.R. § 1502.24.

97. The fundamental purpose of NEPA is to engender more informed decisions by federal agencies and protect the environment as a result. Accordingly, NEPA requires an agency to consider a reasonable range of alternatives to the proposed action. The agency must rigorously explore and objectively evaluate all reasonable alternatives to its initially proposed course of action. 40 C.F.R. § 1502.14.

98. NEPA and its implementing regulations promulgated by the Council on Environmental Quality require federal agencies to prepare an “environmental impact statement” (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11.

99. If an agency is unsure whether a proposed action will have significant environmental effects, it may prepare a shorter document called an “environmental assessment” (EA) to determine if the proposed action may have significant environmental effects and whether an EIS is necessary. 40 C.F.R. § 1501.4(b).

100. In determining whether a proposed project may result in significant impacts, the agency must analyze ten criteria listed in 40 C.F.R. §1508.27(b), including: (1) “The degree to which the proposed action affects public health or safety.” 40 C.F.R. §1508.27(b)(2)); (2) “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.” 40 C.F.R. §1508.27(b)(7); and (3) 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)).

101. The DN/FONSI found that none of the conditions listed in 40 C.F.R. §1508.27(b) were present in this case. DN/FONSI at 12-14. As detailed herein, the record in this case does not support this finding.

102. “If *any* ‘significant’ environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken.” Grand Canyon Trust v. F.A.A., 290 F.3d 339, 340 (D.C. Cir. 2002), citing Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphases in original). The potential presence of even one significance factor is sufficient to require the preparation of an EIS. Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 865 (9<sup>th</sup> Cir. 2005) citing Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 731 (9<sup>th</sup> Cir. 2001).

103. NEPA requires agencies to 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 agency must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. §§ 1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 C.F.R. § 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 C.F.R. § 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 C.F.R. § 1508.7.

104. 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 (9<sup>th</sup> Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

105. In analyzing all impacts, the agency cannot simply defer to a state permitting or other 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 (9<sup>th</sup> Cir.2004).

South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 726 (9<sup>th</sup> Cir. 2009).

106. Where information regarding reasonably foreseeable adverse effects is incomplete or unavailable, NEPA regulations also require that the agency obtain the missing quantitative assessment information. 40 C.F.R. § 1502.22.

107. “[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.

108. 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).

109. 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.

110. Under the applicable federal caselaw, “compliance with the NHPA ‘does not relieve a federal agency of the duty of complying with the impact statement requirement ‘to the fullest extent possible.’”” Lemon v. McHugh, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) *quoting* Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9<sup>th</sup> Cir.

Idaho 1982) *quoting* 42 U.S.C. § 4332. The Council on Environmental Quality’s NEPA regulations specifically require that the “effects” that must be reviewed in a NEPA document include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8.

111. The joint Advisory Council on Historic Preservation (“ACHP”) and Council on Environmental Quality (“CEQ”) NEPA Handbook includes provisions specifically echoing this point:

WHAT IS A “CULTURAL RESOURCE?”

Effects considered under NEPA include cultural and historic. [40 C.F.R. § 1508.8]. The term “cultural resources” covers a wider range of resources than “historic properties,” such as sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections.

CEQ and ACHP, “NEPA and NHPA: A Handbook for Integrating NEPA and Section 106,” March, 2103, at p. 4,

[https://www.whitehouse.gov/sites/default/files/nepa\\_and\\_nhpa\\_handbook.pdf](https://www.whitehouse.gov/sites/default/files/nepa_and_nhpa_handbook.pdf)

(reviewed September 14, 2016).

112. The establishment of the existing environmental 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 (9<sup>th</sup> Cir. 1988).

*See also* Council of Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999).

## II. 1897 Organic Act and 36 C.F.R. Part 228 Regulations

113. 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 (9<sup>th</sup> Cir. 1994).

114. 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).

115. “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).

116. Among these requirements, 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, as amended (42 U.S.C. 1857 *et seq.*)” 36 C.F.R. § 228.8 (a).

117. In addition to ensuring compliance with all applicable environmental standards, 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 C.F.R. § 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 . . . .” *Id.* at 1170.

### **III. The Administrative Procedure Act (APA)**

118. The APA governs the scope of review of Plaintiffs’ NEPA and Organic Act claims against USFS. Because NEPA and the Organic Act contain no internal standard of review, section 706 of the APA, 5 U.S.C. § 706, also provides the standard of review for USFS’s action. Village of False Pass v. Clark, 733 F.2d 605, 609 (9<sup>th</sup> Cir. 1984).

119. The APA provides “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

120. The APA provides “the reviewing court shall ... hold unlawful and set aside agency actions, findings, and conclusions found to be ... arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or which have been taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

**First Claim for Relief  
(Violation of NEPA and APA by USFS)**

121. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

122. NEPA requires federal agencies to provide the public and adequate opportunity to comment upon, and fully participate in, the agency’s review of all aspects of the proposed project under review, including all direct, indirect, and cumulative impacts/effects. By failing to include or mention Resolution’s main copper mine and its impacts in the Draft EA, but then switching positions and including a review of the main mine’s cumulative impacts in the Final EA (and adding to the cumulative impacts analysis area to include south of Highway 60 east of Superior), without any opportunity for the Plaintiffs and the public to review and comment upon the agency’s new analysis, the agency violated the public review and comment requirements of NEPA.

123. Because USFS failed to properly allow for full public review and comment, USFS violated NEPA and its implementing regulations.

124. USFS's decision to issue the Final EA and approve the Baseline Plan via a DN/FONSI without allowing full public review and comment violates NEPA and is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

**Second Claim for Relief  
(Violation of NEPA and APA by USFS)**

125. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

126. NEPA requires federal agencies to include in a NEPA document an analysis of the cumulative impacts of all past, present, and reasonably foreseeable future actions. USFS failed to adequately review and analyze the cumulative impacts to the environment and human and cultural resources from all past, present, and reasonably foreseeable future actions in the Baseline Plan Final EA, as required by NEPA.

127. Because USFS failed to adequately consider the cumulative effects and impacts of all past, present, and reasonably foreseeable future actions in its consideration of the Baseline Plan, including other mineral exploration and mining activities, during the decision-making process, USFS violated NEPA and its implementing regulations, and the agency's own policy.

128. USFS's decision to issue the Final EA and approve the Baseline Plan via a DN/FONSI without conducting the required review and analysis of all direct, indirect and

cumulative impacts violates NEPA and is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

**Third Claim for Relief  
(Violation of NEPA and APA by USFS)**

129. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

130. NEPA requires federal agencies to review actions that are connected in a single NEPA document. USFS failed to adequately review the impacts associated with connected actions to the Baseline Plan. Specifically, the USFS failed to acknowledge and treat the Resolution large-scale copper mine proposal, for which the Baseline Plan is designed to facilitate, as a connected action. USFS failed to prepare a NEPA-compliant document that included analysis of the impacts associated with the connected large-scale copper mine proposal.

131. Because USFS failed to adequately consider and evaluate the impacts associated with the connected action of the large-scale copper mine proposal, USFS violated NEPA and its implementing regulations, and the agency's own policy.

132. USFS's decision to issue the Final EA and approve the Baseline Plan via a DN/FONSI without the NEPA-required connected action analysis is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

**Fourth Claim for Relief:  
(Violation of NEPA and APA by USFS)**

133. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

134. NEPA requires federal agencies to review and analyze the existing environmental conditions at a proposed project site in order to ensure a NEPA-compliant analysis of the impacts associated with a proposed action. USFS failed to adequately review and analyze the existing environmental conditions at the site of the Baseline Plan, as required by NEPA.

135. Because USFS failed to adequately consider and evaluate the existing environmental conditions at the site of the proposed Baseline Plan, USFS violated NEPA and its implementing regulations, and the agency's own policy.

136. USFS's decision to issue the Final EA and approve the Baseline Plan via a DN/FONSI without the NEPA-required existing environmental condition analysis is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

**Fifth Claim for Relief:  
(Violation of NEPA and APA by USFS)**

137. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

138. NEPA requires federal agencies to include in its NEPA documents a reasonably complete discussion of mitigation measures relied upon by the agency to



reduce the impacts of a proposed action. The analysis of mitigation must include an assessment as to the effectiveness of proposed mitigation measures. USFS failed to adequately review and analyze mitigation measures, and their effectiveness, in the Baseline Plan EA, as required by NEPA.

139. Because USFS failed to adequately consider and evaluate proposed mitigation measures in the Baseline Plan EA, USFS violated NEPA and its implementing regulations, and the agency's own policy.

140. USFS's decision to issue the Final EA and approve the Baseline Plan via a DN/FONSI without the NEPA-required mitigation analysis is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

**Sixth Claim for Relief:  
(Violation of NEPA and APA by USFS)**

141. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

142. NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) when the impacts associated with a proposed action may be significant. USFS failed to prepare an EIS for the Baseline Plan, instead relying on a less-detailed Environmental Assessment, coupled with the Decision Notice and Finding of No Significant Impacts. USFS failed to adequately review and analyze the impacts associated with the Baseline Plan, including the direct, indirect, and cumulative impacts, in order to demonstrate that the Baseline Plan may not have significant impacts, and

failed to prepare an Environmental Impact Statement for the Baseline Plan, as required by NEPA.

143. USFS's determination in the DN/FONSI that none of the "significance" considerations listed in 40 C.F.R. §1508.27(b) were present was arbitrary, capricious, not supported by the record, and in violation of NEPA.

144. Because USFS failed to adequately consider and evaluate the impacts of the Baseline Plan and demonstrate that there may not be significant impacts as a result of the proposed Baseline Plan, including with the cumulative impacts of other projects, USFS violated NEPA and its implementing regulations, and the agency's own policy. USFS's issuance of the FONSI based on an inadequate Final EA violates NEPA.

145. USFS's decision to issue the Final EA and approve the Baseline Plan via a DN/FONSI without the NEPA-required Environmental Impact Statement is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

**Seventh Claim for Relief:  
(Violation of Organic Act of 1897, 36 C.F.R. Part 228, and APA by USFS)**

146. Plaintiffs hereby re-allege and incorporate the allegations in all preceding paragraphs of this Complaint herein by reference.

147. The Organic Act of 1897 and the USFS mining regulations at 36 C.F.R. Part 228 require that actions approved by the USFS minimize impacts to the National Forest resources, and comply with all relevant environmental laws, regulations, and standards. In approving the Baseline Plan, USFS failed to minimize impacts to the

National Forests and failed to demonstrate compliance with all applicable environmental laws, standards, and regulations, as required.

148. Because USFS failed to minimize impacts and ensure compliance with all applicable environmental laws, regulations, and standards (including all applicable air quality standards), USFS violated the Organic Act of 1897, the 36 C.F.R. Part 228 regulations, the relevant implementing regulations for these statutes, and the agency's own policies.

149. USFS's decision to approve the Baseline Plan via a DN/FONSI without the required compliance with the Organic Act of 1897 and 36 C.F.R. Part 228 regulations is arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

### **PRAYER FOR RELIEF**

Plaintiffs respectfully ask this Court to:

A. Declare that USFS has acted in a manner that is arbitrary, capricious, an abuse of discretion, and/or contrary to law pursuant to NEPA (and its implementing regulations), the Organic Act of 1897, 36 C.F.R. Part 228, and the APA in issuing the Final EA and approving the Baseline Plan;

B. Vacate, reverse and set aside USFS's decision approving the Baseline Plan, including the DN/FONSI;

C. Enjoin the USFS from implementing or the Baseline Plan approval unless and until the agency demonstrates compliance with all applicable laws;

D. Award the Plaintiffs their reasonable attorney's fees, expenses and costs incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, or other provisions of law; and

E. Grant the Plaintiffs such injunctive and additional relief as the Court deems just and equitable.

Respectfully submitted, this 15<sup>th</sup> day of September, 2016,

*s/ Roger Flynn*

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