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12 *Attorneys for Plaintiff San Carlos Apache Tribe*

13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**
15 **PHOENIX DIVISION**

16 SAN CARLOS APACHE TRIBE, a
17 federally recognized tribe,

Case No.

18 Plaintiff,

COMPLAINT

19 vs.

20 UNITED STATES FOREST
21 SERVICE, an agency in the U.S.
22 Department of Agriculture; NEIL
23 BOSWORTH, Supervisor of the
24 Tonto National Forest;

25 Defendant.

26 Plaintiff San Carlos Apache Tribe (“Plaintiff” or “Tribe”), by and
27 through undersigned counsel, for its complaint alleges as follows:
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INTRODUCTION

1. On August 22, 2016, the United States Forest Service (“Forest

1 Service”) issued a Decision Notice and Finding of No Significant Impact
2 (“DN/FONSI”) and approved the Resolution Copper Mining (“RCM”)
3 Baseline Hydrological and Geotechnical Data Gathering Activities Plan of
4 Operations (“Baseline Plan” or “Project”) occurring on the Tonto National
5 Forest, west of the Town of Superior, Arizona. The DN/FONSI was based
6 on the agency’s Final Environmental Assessment (“Final EA”, or “EA”)
7 issued in January, 2016. See TNF DN/FONSI at:

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10 http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_3867232.pdf (reviewed Sept. 14,

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13 2016). The Final EA is found at:

14 http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2640925.pdf (reviewed Sept. 14,

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17 2. The Project occurs on federal Forest Service lands and within
18 the Tribe’s aboriginal territories. Under the Baseline Plan, RCM proposes to
19 construct a tailings storage facility (“TSF”) for an anticipated underground
20 copper mine. The Baseline Plan involves the drilling of thirty-eight (38)
21 geotechnical drill sites, excavation of thirty-two (32) test trenches, and
22 drilling of sixteen (16) hydrological testing and monitoring wells, two
23 laydown yards for storage of materials and equipment, along with necessary
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1 construction, expansion and maintenance of roads on Forest Service lands.
2 The Project will cause direct disturbance on approximately 75 acres of Tonto
3 National Forest (“TNF”) lands. The TSF is anticipated to encompass over
4 4,000 acres of TNF lands or 28 square miles.
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6 3. This is an action to compel Defendants to comply with the
7 National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321,
8 *et seq.*, the National Historic Preservation Act (“NHPA”), 54 U.S.C. §§
9 300101, *et seq.*, Section 3003(c)(9) of the FY 2015 National Defense
10 Authorization Act (“NDAA”), the Forest Service Organic Act of 1897, 16
11 U.S.C. §§ 478, 551 (“Organic Act”), and the Administrative Procedure Act
12 (“APA”), 5 U.S.C. § 706. Plaintiff challenges Defendants Neil Bosworth’s,
13 Forest Supervisor for the Tonto National Forest and the United States Forest
14 Service’s (collectively referred to as “the Forest Service”) failure to comply
15 with environmental, mining, public land, and historic preservation laws in
16 relation to the Baseline Plan. Plaintiff challenges Defendants’ failure to
17 comply with the NHPA, and to meet their procedural and substantive duties
18 under by NEPA by failing to adequately perform environmental review
19 procedures in the Final Environmental Assessment (“FEA”) and the
20 associated Record of Decision (“ROD”) for the Baseline Plan.
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26 4. Plaintiff seeks declaratory relief that Defendants have violated,
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1 and remain in violation of, the aforementioned environmental, mining,
 2 public land, and historic preservation laws in relation to RCM's Project.
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 4 Plaintiff also seeks injunctive relief directing that all Baseline Plan
 5 operations cease and enjoining the Forest Service from authorizing or
 6 allowing any further Baseline Plan related activities continuing pending
 7 compliance with all applicable laws. The requested relief is necessary to
 8 preserve the *status quo*, to prevent illegal agency action, and to forestall
 9 irreparable injury to cultural resources and the environment.
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 12 5. By this Complaint, Plaintiff requests a declaration that
 13 Defendants have violated NEPA, the NHPA, Section 3003(c)(9) of the
 14 NDAA and the APA; an Order requiring Defendants to comply with Section
 15 106 of the NHPA and negotiate, execute, and implement a "Memoranda of
 16 Agreement" ("MOA") or Programmatic Agreement with Plaintiff stipulating
 17 how the adverse effects of Federal actions of RCM's Project will be
 18 resolved; an Order requiring Defendants to prepare an Environmental Impact
 19 Statement ("EIS") for RCM's Baseline Plan; and a further Order enjoining
 20 any activities in furtherance of the Baseline Plan until Defendants comply
 21 with federal law.
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25 JURISDICTION

26 6. Jurisdiction is proper in this Court under 28 U.S.C. § 1331, 5
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1 U.S.C. § 701, et seq., and 28 U.S.C. § 1346. This action involves the United
 2 States as a defendant and arises under the laws of the United States,
 3 including NEPA, NHPA, and the APA. An actual, justiciable controversy
 4 exists between Plaintiff and Defendant.
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6 7. The requested relief is proper under 28 U.S.C. §§ 2201-02 and
 7 5 U.S.C. §§ 705 and 706. The challenged agency actions and/or inactions
 8 are subject to this Court's review under the APA. 5 U.S.C. §§ 702, 704, and
 9 706. Plaintiff has exhausted all administrative remedies available to it as
 10 required by the APA.
 11

12 8. Venue properly rests in the District of Arizona pursuant to 28
 13 U.S.C. §
 14 1391(e) because the events or omissions giving rise to Plaintiff's claims
 15 occurred in this district. The TNF lands involved in the Baseline Plan are
 16 located in Pinal County, Arizona.
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20 **PARTIES**

21 9. Plaintiff, San Carlos Apache Tribe, is a federally recognized
 22 Indian Tribe pursuant to the Apache Treaty of 1852, July 1, 1852, 10 Stat.
 23 979, and Section 16 of the Indian Reorganization Act of June 18, 1934 (48
 24 Stat. 984). The governing body of the Tribe is the San Carlos Apache Tribal
 25 Council. The Tribe is suing in its own capacity and as *parens patriae* on
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1 behalf of its members.

2 10. The San Carlos Apache Reservation is situated in three counties
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4 in eastern Arizona – Gila, Pinal and Graham. The Reservation is a much
5 smaller portion of the larger aboriginal and ancestral homelands of the Tribe
6 and Apaches. The Tribe’s traditional and ancestral territory extends well
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8 beyond the current Reservation’s exterior boundaries, encompassing lands
9 that are the subject of this action. The federal public lands on which the
10 Baseline Plan activities will occur is within the aboriginal and ancestral
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12 homelands of the members of the Tribe. A number of significant and
13 important cultural, historic and sacred sites to the members of and to the
14 Tribe are located within the federal public lands on which the Baseline Plan
15 activities will occur. The Apaches, including ancestors of members of the
16 Tribe resided in communities, conducted ceremonies at sacred sites,
17
18 conducted trade, migrated through, and buried their dead in and around the
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20 public lands on which the Baseline Plan activities will occur.

21 11. Under the Tribe’s Constitution, the San Carlos Council, the
22 governing body of the Tribe, has the power and the responsibility to promote
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24 the general welfare of all Apache People, to establish equality and justice for
25 the Tribe, to restore and preserve Tribal and Apache traditions, customs,
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27 language and ancestral rights, and to secure to the Tribe and its descendants
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1 the power to exercise the inherent rights of self-governance. The Tribe's
2 members live near, use, enjoy, and recreate on public lands, including the
3 Tonto National Forest. Members of the Tribe visit and enjoy the Project
4 area for spiritual, religious, cultural, historical, educational, recreational, and
5 subsistence activities. Members of the Tribe have long utilized the area
6 where the Baseline Plan is situated for a variety of religious, traditional and
7 cultural purposes, including the performance of traditional ceremonies,
8 gathering of native plants and other materials, and for other purposes.
9
10 Implementation of the Baseline Plan without full compliance with the
11 NHPA, NEPA, and other federal laws has affected, is affecting, and will
12 adversely affect the Tribe's interest in preserving its cultural heritage and in
13 protecting sites of historical, cultural and religious significance to the Tribe
14 and its members.

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18 12. The Tribe would sustain injury to its interests and those of its
19 members if the Baseline Plan is undertaken in the absence of a legally and
20 scientifically sufficient analysis of the project's environmental impacts and
21 compliance with the National Historic Preservation Act. The Tribe's
22 interests and those of its members would sustain further injury because the
23 Project will diminish spiritual, religious, cultural, historic, subsistence,
24 aesthetic, and recreational value, and harm forest health in and around the
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1 Project area. These injuries are not likely to be redressed unless the Court
2 enjoins further work on the Baseline Plan until Defendants fully comply
3 with the requirements of federal law. The Tribe has submitted comments on
4 and administratively objected to the Baseline Plan.
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6 13. Defendant Neil Bosworth is sued in his official capacity as the
7 Forest Supervisor for the Tonto National Forest, and took and/or authorized
8 the actions alleged herein. Mr. Bosworth is the responsible official who
9 oversees, regulates and approves mining activities located in the Tonto
10 National Forest.
11

12 14. Defendant U.S. Forest Service is a federal agency within the
13 U.S. Department of Agriculture. Defendant Forest Service is, by law,
14 responsible for the management policies and actions undertaken with respect
15 to the public lands at issue here. By statutory authority, and the agency's
16 own regulations and policies, Defendant Forest Service is also responsible
17 for implementing the NHPA, NEPA, and other land management laws and
18 regulations pertaining to actions and decisions on lands administered by
19 Defendant. The Forest Service has an obligation to consult and coordinate
20 with the San Carlos Apache Tribe and other governmental units when
21 making findings and determinations under Section 106 of the NHPA
22 regarding the effects of Forest Service-approved projects on cultural
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1 resources. The Forest Service also has a fiduciary duty under the federal
 2 trust responsibility to consult and coordinate with the Tribe and protect the
 3 Tribe's properties, including traditional cultural properties and sacred sites,
 4 when approving and assessing the effects of projects.
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6 **STATUTORY AND REGULATORY BACKGROUND**

7 **A. The Administrative Procedure Act**

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 9 15. The Administrative Procedure Act ("APA") governs the scope
 10 of review of Plaintiff's claims against USFS, and provides a right of judicial
 11 review of an agency or official which "acted or failed to act acted or failed to
 12 act in an official capacity or under color of legal authority." 5 U.S.C. § 702.
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14 16. The APA also provides that "[a] person suffering legal wrong
 15 because of agency action, or adversely affected or aggrieved by agency
 16 action within the meaning of a relevant statute, is entitled to judicial review
 17 thereof." 5 U.S.C. § 702.
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19 17. The APA further provides that a court shall compel an agency action
 20 that is "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1),
 21 and shall hold unlawful and set aside agency actions found to be "arbitrary,
 22 capricious, an abuse of discretion, or otherwise not in accordance with law,"
 23 5 U.S.C. § 706(2)(A), or which have been taken "without observance of
 24 procedure required by law." 5 U.S.C. § 706(2)(D).
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1 18. Section 706 of the APA also provides the standard of review for
 2 USFS's action. *Village of False Pass v. Clark*, 733 F. 2d 605, 609 (9th Cir.
 3 1984).

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 5 **B. Forest Service Organic Administration Act of 1897 and 36 C.F.R.**
 6 **Part 228 regulations**

7 19. The Forest Service Organic Act authorizes the agency to
 8 promulgate rules and regulations for the national forests “to regulate their
 9 occupancy and use and to preserve the forests thereon from destruction.” 16
 10 U.S.C. § 551. The Forest Service promulgated mining regulations pursuant
 11 to the Organic Act to “minimize adverse environmental impacts” to, among
 12 other things, air quality, water quality, scenic values, fisheries and wildlife.
 13 36 C.F.R. §§ 228.1, 228.8. The regulations also require companies to
 14 reclaim Forest Service lands adversely impacted by mining activities and
 15 post reclamation bonds to ensure funds are available to complete
 16 reclamation activities. *Id.* §§ 228.8(g), 228.13.

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 20 20. Before mining may commence on Forest Service lands, an
 21 operator must submit and the Forest Service must approve a “plan of
 22 operations” “if the proposed operations will likely cause a significant
 23 disturbance of surface resources.” 36 C.F.R. §§ 228.4(a)(3), 228.5. A plan
 24 of operations must include: the name of operators and their lessees, assigns
 25 and designees; map of operations' area, included access roads and resources
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1 to be disturbed; and detailed information about the type of operations, access
 2 roads, duration of operations, a measures to be taken to comply with
 3 environmental protection laws. *Id.* § 228.4(c). The Forest Service is
 4 required to comply with NEPA upon reviewing and approving a plan of
 5 operations. *Id.* § 228.4(f). Supplements and modifications of approved plans
 6 may be required when there are “unforeseen significant disturbance of
 7 surface resources.” *Id.* §§ 228.4(e), 228.5(c).

10 **C. The National Historic Preservation Act and Executive Order**
 11 **13007**

12 21. Congress enacted the National Historic Preservation Act
 13 (“NHPA”), 54 U.S.C. §§ 300101 *et seq.*, in 1966 with the express intent that
 14 “the historical and cultural foundations of the Nation should be preserved as
 15 a living part of our community life and development in order to give a sense
 16 of orientation to the American people.”

19 22. Section 106 of the NHPA requires federal agencies involved in
 20 an “undertaking,” which includes projects requiring a federal permit, to
 21 “take into account the effect of the undertaking on any district, site, building,
 22 structure, or object that is included in or eligible for inclusion in the National
 23 Register [of Historic Places]” and to do so “prior to” approving the action.
 24 54 U.S.C. § 306108. Section 106 also requires that the agency afford the
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1 Advisory Council on Historic Preservation (“ACHP”) “a reasonable
2 opportunity to comment” on the project. *Id.*

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4 23. Federal agencies “must complete the section 106 process prior
5 to the approval of the expenditure of any Federal funds on the undertaking or
6 prior to the issuance of any license.” 36 C.F.R. § 800.1.

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8 24. The NHPA defines undertaking as “a project, activity, or
9 program funded in whole or in part under the direct or indirect jurisdiction of
10 a Federal agency, including -- (1) those carried out by or on behalf of the
11 Federal agency; (2) those carried out with Federal financial assistance; (3)
12 those requiring a Federal permit, license, or approval; and (4) those subject
13 to State or local regulation administered pursuant to a delegation or approval
14 by a Federal agency.” 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y).

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17 25. Early in the NHPA process, an agency must determine the area
18 of potential effects (“APE”) of a federal undertaking. 36 C.F.R. §
19 800.4(1)(1). The APE is defined by regulation to include the area “within
20 which an undertaking may directly or indirectly cause alterations in the
21 character or use of historic properties. . . . The [APE] is influenced by the
22 scale and nature of an undertaking and may be different for different kinds
23 of effects caused by the undertaking.” *Id.* § 800.16(d).

1 26. The NHPA Section 106 process requires federal agencies
2 involved in undertakings to make a reasonable and good faith effort to
3 identify and disclose historic properties within affected areas, evaluate the
4 potential adverse effects of the federal undertaking to the historic properties,
5 and seek ways to avoid, minimize, or mitigate any adverse effects to the
6 historic properties. 36 C.F.R. §§ 800.4-800.6. Throughout all stages of the
7 Section 106 process, the applicable federal agency must consult with Indian
8 tribes that attach religious and cultural significance to historic properties
9 within the affected area that may be affected by an undertaking, even if such
10 an area is outside of a Tribe's Reservation boundaries. *Id.* §§
11 800.2(c)(2)(ii)(iii), 800.3(f)(2), 800.4(a)(4), 800.5(c)(2)(iii), 800.6(a),
12 800.6(b)(2).

13 27. Federal agencies are required to consult with Indian tribes such
14 as Plaintiff on a government-to-government basis pursuant to Executive
15 Orders, Presidential memoranda, and other authorities. Section
16 800.2(c)(2)(ii)(B) of the ACHP's regulations remind federal agencies that
17 "the Federal Government has a unique legal relationship with Indian tribes
18 set forth in the Constitution of the United States, treaties, statutes, and court
19 decisions. Consultation with Indian tribes should be conducted in a sensitive
20 manner respectful of tribal sovereignty. Nothing in this part alters, amends,
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1 repeats, interprets or modifies tribal sovereignty, any treaty rights, or other
 2 rights of an Indian tribe, or preempts, modifies or limits the exercise of such
 3 rights.” *Id.*

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 5 28. Section 800.2(c)(2)(ii)(C) of the ACHP’s regulations further
 6 states “consultation with an Indian tribe must recognize the government-to-
 7 government relationship between the Federal Government and Indian tribes.
 8 The agency official shall consult with representatives designated or
 9 identified by the tribal government.”

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 12 29. Section 302706(b) of the NHPA specifically requires that “in
 13 carrying out its responsibilities under [Section 106], a Federal agency shall
 14 consult with any Indian tribe . . . that attaches religious and cultural
 15 significance to [historic properties that may be affected by the undertaking].”

16
 17 30. The NHPA and its implementing regulations further and
 18 specifically provide that “[c]onsultation [with Indian tribes] should
 19 commence early in the planning process, in order to identify and discuss
 20 relevant preservation issues . . .” (36 C.F.R. § 800.2(c)(2)(ii)(A)) and that
 21 federal agencies provide the tribe with “a reasonable opportunity to identify
 22 its concerns about historic properties, advise on the identification and
 23 evaluation of historic properties, including those of traditional religious and
 24 cultural importance, articulate its views on the undertaking’s effects on such
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1 properties, and participate in the resolution of adverse effects.” *Id.* §
2 800.5(c)(2)(ii)(A). The agency must evaluate the historic significance of
3 such sites, and determine whether they are potentially eligible for listing
4 under the National Register. *Id.* § 800.4(c).

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6 31. If the agency determines that no historic properties will be
7 affected by the undertaking, it must provide notice of such finding to the
8 state and tribal historic preservation offices, and the ACHP, which
9 administers the NHPA. *Id.* § 800.4(d). The regulations give those parties the
10 opportunity to object to such a finding, which elevates the consultation
11 process further. *Id.*

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14 32. If the agency finds that historic properties are affected, it must
15 provide notification to all consulting parties, and invite their views to assess
16 adverse effects. *Id.* Any adverse effects to historic properties must be
17 resolved, involving all consulting parties and the public. *Id.* § 800.6. If
18 adverse effects cannot be resolved, the process is elevated again to the
19 ACHP and the head of the agency undertaking the action. *Id.* §800.7. Until
20 this process is complete, the action in question cannot go forward.

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24 33. Section 106 regulations also provide an alternative compliance
25 mechanism under which agencies can negotiate a “programmatic
26 agreement” with the ACHP to resolve “complex project situations or
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1 multiple undertakings.” 36 C.F.R. § 800.14(b). Such agreements are
2 suitable for “when effects on historic properties are similar and repetitive or
3 are multi-State or regional in scope;” “when effects on historic properties
4 cannot be fully determined prior to approval of an undertaking;” or when
5 “nonfederal parties are delegated major decision making responsibilities,”
6 among other situations. *Id.* § 800.14(b)(1). Programmatic agreements
7 require consultation with Tribes, among others, as well as public
8 participation.
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12 34. TNF has not adopted a programmatic agreement with the
13 ACHP regarding any aspect of RCM’s mining operation or the Baseline Plan
14 permits or any other activity.
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16 35. In 1996, President Clinton adopted Executive Order 13007,
17 which provides procedural and substantive protection for Native American
18 sacred sites. Executive Order 13007 directs federal land management
19 agencies, including the Forest Service, to: (1) accommodate access to and
20 ceremonial use of Indian sacred sites by Indian religious practitioners, and
21 (2) avoid adversely affecting the physical integrity of such sacred sites.
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23 Executive Order 13007, § 1(a) (61 Fed. Reg. 26,771 (May 24, 1996)).

24 Executive Order 13007 defines a “sacred site” as “any specific discrete,
25 narrowly delineated location on Federal land that is identified by an Indian
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1 | tribe, or Indian individual determined to be an appropriately authoritative
 2 | representative of an Indian religion, as sacred by virtue of its established
 3 | religious significance to, or ceremonial use by, an Indian religious; provided
 4 | that the tribe or appropriately authoritative representative of an Indian
 5 | religion has informed the agency of the existence of such a site.” *Id.* §
 6 | 1(b)(iii). The Executive Order also requires that Federal land management
 7 | agencies adopt procedures to ensure notice is provided of actions that may
 8 | restrict access or use of sacred sites, or adversely affect sacred sites. *Id.* § 2.

12 | **D. The National Environmental Policy Act**

14 | 36. NEPA, 42 U.S.C. §§ 4321–4370f, is our “basic national charter
 15 | for protection of the environment.” 40 C.F.R. § 1500.1(a). It makes
 16 | environmental protection a part of the mandate of every federal agency. 42
 17 | U.S.C. § 4332(1). Its purpose is to “help public officials make decisions that
 18 | are based on understanding of environmental consequences, and take actions
 19 | that protect, restore, and enhance the environment.” *Id.* at § 1500.1(c).

22 | 37. NEPA seeks to ensure that federal agencies take a “hard look”
 23 | at environmental concerns. One of NEPA’s primary purposes is to ensure
 24 | that an agency, ““in reaching its decision, will have available, and will
 25 | carefully consider, detailed information concerning significant
 26 | environmental impacts.”” *Robertson v. Methow Valley Citizens Council*, 490

1 U.S. 332, 349 (1989). NEPA also “guarantees that the relevant information
2 [concerning environmental impacts] will be made available to the larger
3 audience,” including the public, “that may also play a role in the
4 decisionmaking process and the implementation of the decision.” *Center for*
5 *Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010).
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8 38. NEPA requires that all federal agencies “[m]ake diligent efforts
9 to involve the public in preparing and implementing their NEPA
10 procedures.” 40 C.F.R. § 1506.6(a). The agencies “shall involve
11 environmental agencies, applicants, and the public, to the extent practicable,
12 in preparing assessments required by [40 C.F.R. §] 1508.9(a)(1).” 40 C.F.R.
13 § 1501.4(b).
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16 39. NEPA requires agencies to fully disclose all of the potential
17 adverse environmental impacts of its decisions before deciding to proceed.
18 42 U.S.C. § 4332(C). NEPA also requires agencies to use high quality,
19 accurate scientific information and to ensure the scientific integrity of the
20 analysis. 40 C.F.R. §§ 1500.1(b), 1502.24. NEPA also requires federal
21 agencies to take a “hard look” at the environmental effects of their proposed
22 action. *March v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989).
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25 40. If an agency action has adverse effects that are “significant,”
26 they need to be analyzed in an environmental impact statement (“EIS”). 40
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1 C.F.R. § 1501.4. If it is unclear whether impacts are significant enough to
 2 warrant an EIS, it may prepare an “environmental assessment” (“EA”) to
 3 assist in making that determination. *Id.* If the agency determines that no
 4 EIS is required, it must document that finding in a “finding of no significant
 5 impact” (“FONSI”).
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 8 41. Under NEPA, federal agencies are required to prepare an
 9 environmental impact statement (“EIS”) regarding all “major Federal actions
 10 significantly affecting the quality of the human environment” 42
 11 U.S.C. § 4332(C). An EIS must describe (1) the “environmental impact of
 12 the proposed action,” (2) “any adverse environmental effects which cannot
 13 be avoided should the proposal be implemented,” (3) any “alternatives to the
 14 proposed action,” (4) “the relationship between local short-term uses of
 15 man’s environment and the maintenance and enhancement of long-term
 16 productivity,” and (5) “any irreversible and irretrievable commitments of
 17 resources which would be involved in the proposed action should it be
 18 implemented.” *Id.*
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22 42. An environmental impact statement must specify the purpose
 23 and need to which the agency is responding in proposing the alternatives
 24 including the proposed action. 40 C.F.R. § 1502.13. The agency’s
 25 objectives may not be defined in unreasonably narrow terms that pre-ordain
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1 the proposed action or foreclose reasonable alternatives, nor may the
 2 purpose and need be defined in terms of the applicant's private objectives.

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 4 43. NEPA's governing regulations define what "range of actions,
 5 alternatives, and impacts [must] be considered in an environmental impact
 6 statement." 40 C.F.R. § 1508.25. The alternatives analysis "is the heart of
 7 the [EIS]." 40 C.F.R. § 1502.14.

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 9 44. "[A]n agency is required to consider more than one action in a
 10 single EIS if they are 'connected actions,' or 'similar actions.'" *Kleppe v.*
 11 *Sierra Club*, 427 U.S. 390, 408 (1976). "[P]roposals for . . . actions that will
 12 have cumulative or synergistic environmental impact upon a region . . .
 13 pending concurrently before an agency . . . must be considered together.
 14 Only through comprehensive consideration of pending proposals can the
 15 agency evaluate different courses of action." *Kleppe*, 427 U.S. at 410.

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 18 45. Federal agencies must also analyze the impacts of "connected"
 19 actions in a single EA or EIS. 40 C.F.R. § 1508.25(a). Actions are
 20 connected if they "automatically trigger other actions which may require
 21 [EISs]," "cannot or will not proceed unless other actions are taken
 22 previously or simultaneously," or "are interdependent parts of a larger action
 23 and depend on the larger action for their justification." 40 C.F.R. §
 24 1508.25(a)(1). Two projects, even though apparently separate, are legally
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1 considered connected and must be reviewed in the same EIS if one cannot
2 proceed without the other (i.e., “but for” the other project), or if the first
3 project is not “independent” of the second project. *Thomas v. Peterson*, 753
4 F.2d 754, 758-60 (9th Cir. 1985). “The purpose of this requirement is to
5 prevent an agency from dividing a project into multiple ‘actions,’ each of
6 which individually has an insignificant environmental impact, but which
7 collectively have a substantial impact. . . . The crux of the test is whether
8 each of the two projects would have taken place with or without the other
9 and thus had independent utility.” *Great Basin Mine Watch v. Hankings*,
10 456 F.3d 955, at 969 (9th Cir. 2006)(EISs for two mineral projects violated
11 NEPA by failing to adequately analyze “cumulative impacts” from each
12 project, even though both were not “connected actions”). The duty to
13 review the impacts from connected actions is separate from the duty under
14 NEPA to review the cumulative impacts from all “past, present, and
15 reasonably foreseeable future actions.” *Id.*

21 45. The EIS must consider direct and indirect effects. The direct
22 effects of an action are those effects “which are caused by the action and
23 occur at the same time and place.” 40 C.F.R. § 1508.8(a). The indirect
24 effects of an action are those effects “which are caused by the action and are
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1 later in time or farther removed in distance, but are still reasonably
 2 foreseeable.” 40 C.F.R. § 1508.8(b).

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 4 46. In determining whether a proposed project may result in
 5 significant impacts, the agency must analyze the criteria listed in 40 C.F.R. §
 6 1508.27(b), including: “Whether the action is related to other actions with
 7 individually insignificant but cumulatively significant impacts. Significance
 8 exists if it is reasonable to anticipate a cumulatively significant impact on
 9 the environment. Significance cannot be avoided by terming an action
 10 temporary or by breaking it down into small component parts”, 40 C.F.R.
 11 §1508.27(b)(7), and “[w]hether the action threatens a violation of Federal,
 12 State, or local law or requirements imposed for the protection of the
 13 environment.” 40 C.F.R. §1508.27(b)(10)).

14
 15
 16
 17 47. “If *any* ‘significant’ environmental impacts might result from
 18 the proposed agency action then an EIS must be prepared *before* agency
 19 action is taken.” *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340 (D.C.
 20 Cir. 2002), *citing Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir.
 21 1983) (emphases in original). The potential presence of even one
 22 significance factor is sufficient to require the preparation of an EIS. *Ocean*
 23 *Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005)
 24
 25
 26
 27
 28

1 | *citing Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731 (9th
2 | Cir. 2001).

3 |
4 | 48. An agency must also analyze and address the cumulative
5 | impacts of a proposed project. 40 C.F.R. § 1508.25(c)(3). Cumulative
6 | impacts are the result of any past, present, or future actions that are
7 | reasonably certain to occur. Such effects “can result from individually
8 | minor but collectively significant actions taking place over a period of time.”
9 | 40 C.F.R. § 1508.7. A cumulative impact analysis requires an agency to
10 | take a “hard look” at all actions. *Te-Moak Tribe of Western Shoshone v.*
11 | *U.S. Dept. of Interior*, 608 F. 3d 592, 603 (9th Cir. 2010)(rejecting an EA for
12 | mineral exploration which failed to include a detailed analysis of impacts
13 | from other nearby proposed mining operations).

14 |
15 | 49. An agency must consider all direct, indirect, and cumulative
16 | impacts of the proposed action. 40 CFR §§ 1502.16, 1508.8, 1508.25(c).
17 | Direct effects are caused by the action and occur at the same time and place
18 | as the proposed project. 40 CFR § 1508.8(a). Indirect effects are caused by
19 | the action and are later in time or farther removed in distance, but are still
20 | reasonably foreseeable. 40 CFR § 1508.8(b). Both types of impacts include
21 | “effects on natural resources and on the components, structures, and
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1 functioning of affected ecosystems,” as well as “aesthetic, historic, cultural,
2 economic, social or health [effects].” *Id.*

3
4 50. An agency that has prepared an EIS or an EA cannot simply
5 rest on the original document. NEPA imposes a continuing duty on agencies
6 to supplement previous environmental documents. An agency must prepare
7 a supplemental environmental document if there are substantial changes to
8 the action that are relevant to environmental concerns, or there are
9 significant new circumstances or information relevant to environmental
10 concerns and bearing on the actions or its impacts. 40 C.F.R. § 1502.9(c). In
11 determining whether new circumstances or information is “significant,”
12 agencies consider certain “significance factors,” under NEPA. *Id.* §
13 1508.27(b)

14
15
16
17 51. An agency’s Record of Decision (“ROD”) must state whether
18 all practicable means to avoid or minimize environmental harm from the
19 alternative selected have been adopted, and if not, why they were not. 40
20 C.F.R. § 1505.2(c). A monitoring and enforcement program shall be
21 adopted and summarized where applicable for any mitigation. *Id.*

22
23
24 **E. The National Defense Authorization Act for FY 2015 and Section**
25 **3003**

26 52. On December 19, 2014, President Obama signed into law the
27 Carl Levin and Howard P. “Buck” McKeon National Defense Authorization
28

1 Act (“NDAA”) for Fiscal Year 2015 (H.R. 3979). Section 3003 of the
 2 NDAA provided for the exchange of land between the United States and
 3 RCM.
 4

5 53. Resolution Copper Mining will obtain title to approximately
 6 2,422 acres of TNF lands, including 760 acres of land in the Oak Flat
 7 Withdrawal Area. The Oak Flat Withdrawal Area had been withdrawn from
 8 appropriation under the mining laws of the United States by Public Land
 9 Orders 1229 and 5132.
 10

11 54. NDAA Section 3003(c)(9) requires the Secretary of Agriculture
 12 to “prepare a single environmental impact statement under the National
 13 Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), which shall be
 14 used as the basis for all decisions under Federal law related to the proposed
 15 mine and the Resolution mine plan of operations and any related major
 16 Federal actions significantly affecting the quality of the human environment,
 17 including the granting of any permits, rights-of-way, or approvals for the
 18 construction of associated power, water, transportation, processing, tailings,
 19 waste disposal, or other ancillary facilities.” *Id.* § 3003(c)(9)(B)(emphasis
 20 supplied).
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 22
 23
 24

25 55. The single EIS to be prepared under NDAA § 3003(c)(9)(B)
 26 must: “(i) assess the effects of the mining and related activities on the
 27
 28

1 Federal land conveyed to Resolution Copper under this section on the
 2 cultural and archeological resources that may be located on the Federal land;
 3 and (ii) identify measures that may be taken, to the extent practicable, to
 4 minimize potential adverse impacts on those resources, if any.” *Id.* §
 5 3003(c)(9)(C).
 6

7
 8 56. The Secretary of Agriculture may use “separate environmental
 9 review documents prepared in accordance with the [NEPA] or other
 10 applicable laws for exploration or other activities not involving - - (i) the
 11 land exchange; or (ii) the extraction of minerals in commercial quantities by
 12 Resolution Copper on or under the Federal land.” *Id.* § 3003(c)(9)(D). The
 13 Congressional Record is silent on what was intended by this paragraph or its
 14 procedural relation to the single EIS, although there was significant
 15 opposition to the bill before it was buried in the NDAA.
 16

17
 18 57. The Secretary of Agriculture is required to “engage in
 19 government-to-government consultation with affected Indian tribes
 20 concerning issues of concern to the affected Indian tribes related to the land
 21 exchange.” *Id.* § 3003(c)(3)(A). Following consultation with the affected
 22 Indian tribes, the Secretary of Agriculture is required to consult with RCM
 23 “and seek to find mutually acceptable measures to -- (i) address the concerns
 24 of the affected Indian tribes; and (ii) minimize the adverse effects on the
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1 affected Indian tribes resulting from mining and related activities on the
2 Federal land conveyed to Resolution Copper under this section.” *Id.* §
3 3003(c)(3)(B).
4

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 58. The Tribe has opposed the RCM mining project for over a
7 decade. RCM’s mining project will destroy a number of sites and locations
8 which have significant cultural, historic and religious significance to the
9 Tribe and its members. The RCM mining project will also have devastating
10 long-term impacts upon the air, earth and water in the vicinity of the mining
11 project and in the region as a whole. The destruction of the environment is
12 an abhorrence to the Tribe and its members which will adversely impact the
13 well-being and spiritually of the Tribe’s members.
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17 59. Oak Flat, known to the Apache People as Chí’chil Bildagoteel,
18 has specific historic and contemporary cultural and religious significance to
19 the Western Apache People and particularly to members of the San Carlos
20 Apache Tribe. Members of the Tribe recall Chí’chil Bildagoteel as the
21 ancestral home of several still extant clans, as a location pivotal to Apache
22 tribal history, and as an area of particular religious significance that
23 continues to play a role in the traditional lifestyle of the Tribe and its
24 members. Members of the Tribe have visited and continue to visit Chi'chil
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1 Bidagoteel for generations to collect traditional plant foods and medicines,
2 perform sweat lodge ceremonies and the traditional women’s puberty
3 ceremonies.
4

5 60. In March of 2013, Defendant Neil Bosworth invited the Tribe
6 to participate as a consulting party for an ethnographic survey of the Oak
7 Flat area. On April 8, 2013, Chairman Terry Rambler accepted Mr.
8 Bosworth’s invitation on behalf of the Tribe.
9

10 61. In August of 2013, TNF and the Tribe entered into a
11 Memorandum of Understanding (“MOU”) to cooperate and participate in the
12 preparation of an “Ethnographic and Ethnohistoric Study of the Superior
13 Area, Arizona” (“Study”).
14

15 62. Also in 2013, TNF staff worked with staff from the Tribe to
16 prepare a nomination request and registration form for listing the Chi'chil
17 Bidagoteel Historic District as a Traditional Cultural Property (“TCP”) on
18 the National Register of Historic Places (“NRHP”) with the National Park
19 Service (“NPS”).
20

21 63. On November 15, 2013, RCM filed its initial “General Plan of
22 Operations” (“initial GPO”) with TNF. RCM submitted additional
23 information to TNF during its initial review of the initial GPO. TNF
24 provided RCM with a completeness certification for the initial GPO on
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1 December 5, 2014, certifying that the initial GPO was complete for
2 information required by 36 C.F.R. Part 228. TNF's completeness
3 certification further stated: "The timing for beginning the final
4 environmental statement is somewhat contingent upon the completion of the
5 on-going but separate Environmental Assessment for 'Baseline Hydrological
6 and Geotechnical Data Gathering Activities' and the subsequent acquisition
7 of important sub-surface data to inform baseline conditions and provide
8 needed geotechnical and hydrological data for the proposed tailings facilities
9 site."
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11

12
13 64. The work on the NRHP registration continued throughout 2013
14 and 2014. The work on the Study also continued throughout 2013 and 2014.
15

16 65. In May of 2014, TNF publically announced that RCM had filed
17 with it a Baseline Plan of Operations, and solicited scoping comments from
18 the public and the Tribe. The Tribe requested government-to-government
19 consultation with TNF on the Baseline Plan.
20

21 66. The Tribe filed comments on RCM's Baseline Plan on June 20
22 and June 23, 2014, based, in part, upon the information that TNF had made
23 available regarding RCM's proposed activities. Public scoping comments
24 closed in June of 2014.
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1 67. Plaintiff commented that the main RCM mine was already
2 proposed to TNF and thus was a “reasonably foreseeable future action”
3 whose cumulative impacts were required to be analyzed in TNF’s
4 Preliminary Environmental Assessment (“PEA”) for the Baseline Plan. *See*
5 scoping comments by Plaintiff.
6

7
8 68. Plaintiff’s comment questioned the purpose of RCM’s Baseline
9 Plan and the adequacy of the proposed Baseline Plan.

10 69. Plaintiff commented that approval of RCM’s Baseline Plan
11 should await the completion of the Study in order to accurately identify all
12 cultural resources which would be impacted by the Baseline Plan and RCM
13 mining operations.
14

15
16 70. On August 21, 2014, Defendant Neil Bosworth corresponded
17 directly with the Tribe regarding the Tribe’s comments. Specifically, Mr.
18 Bosworth informed the Tribe that the Forest Service would consider and
19 include an analysis of all direct, indirect and cumulative impacts of RCM’s
20 proposed Baseline Plan. Mr. Bosworth noted that the Baseline Plan was
21 separate from RCM’s main mine GPO and that information derived from the
22 Baseline Plan would be used to inform, later separate action related to
23 RCM’s main mine.
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1 71. Mr. Bosworth's August 21, 2014 correspondence
2 acknowledged a series of questions raised by the Tribe in its June 23, 2014
3 comment letter. In response, Mr. Bosworth acknowledged that RCM's
4 Baseline Plan did not indicate whether the data would be used to respond to
5 those questions. The questions posed by the Tribe all dealt directly with
6 fundamental details pertaining to a tailing site for RCM's main mine.
7

8
9 72. Mr. Bosworth's letter of August 21, 2014, stated that the MOU
10 for the Study was not tied to any single RCM activity and that data from the
11 Study would be used in the NEPA analysis of RCM's Baseline Plan. The
12 letter reaffirmed TNF's commitment to government-to-government
13 consultation with the Tribe.
14

15
16 73. Mr. Bosworth's August 21, 2014 letter also acknowledged the
17 Tribe's endorsement and incorporation of the comments made by the
18 Arizona Mining Reform Coalition and that specific written comments made
19 by the Coalition pursuant to 36 C.F.R. § 218.2 would be addressed in the
20 final environmental analysis.
21

22 74. TNF published a Preliminary Environmental Assessment
23 ("PEA") in March 2015. The PEA acknowledged that the Study was in
24 process to identify traditional cultural resources and anticipated its
25 completion in mid-2015. PEA at 3-56 to 3-57. The PEA promised that once
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1 the Study was concluded, the data would be examined by the Forest Service
2 to address effects on NHRP eligible cultural resources before making a
3 decision on the Baseline Plan. PEA at 3-57. According to the PEA, the
4 analysis of the effects of the Baseline Plan in the PEA was based upon “the
5 best, most current and most complete information available to the Forest at
6 this time” and that additional information derived from the Study would be
7 evaluated in the final EA. PEA at 3-58.
8
9

10
11 75. The PEA failed to list and consider the RCM main mine as a
12 reasonably foreseeable action for purposes of the cumulative impacts
13 review. *See* PEA, March 2015, Figure 3-1 (map of cumulative impacts area
14 and activities); Table 3-1 (listing projects in the cumulative impacts area).
15 Indeed, the PEA specifically stated that the “development of Resolution’s
16 deep core ore body . . . [had] . . . not been included in the cumulative effects
17 analysis” because “there is no overlap in time and space. . . .” PEA at 3-5.
18 The PEA went onto to state that the development of the deep core ore body
19 was “speculative at this time.” *Id.*
20
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23 76. The PEA also failed to list the Superior West Exploration
24 activities which constituted past, present, and reasonably foreseeable future
25 actions for the purposes of the cumulative impacts analysis. TNF had
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1 previously approved a magnetotelluric geophysical investigation and
2 exploration drilling adjacent to existing roads on Forest Service Lands in
3 2010 and 2011. The past Superior West activities were in direct proximity
4 to RCM's Baseline Plan.
5

6 77. Superior West is a porphyry copper project located about two
7 kilometers west of RCM's deep ore body deposit. The Superior West
8 project comprises more than 680 federal mining claims covering more than
9 12,600 acres. Kennecott Exploration Company ("Kennecott"), which is part
10 of the Rio Tinto Group, the majority and controlling group in RCM, signed
11 an Exploration and Option to Purchase Agreement with Bronco Creek
12 Exploration on or about May 4, 2015.
13
14

15 78. The PEA rationalized its failure to analyze the cumulative
16 impacts of Resolution main mine and development of Resolution's deep
17 copper ore body in Section 1.5.1.4. PEA at 1-11 to 1-12. The PEA justified
18 the failure to consider RCM's main mine operations and the Baseline Plan as
19 lacking a "but for" relationship. PEA at 1-11. The PEA concluded that the
20 Baseline Plan and RCM's main mine development were not connected
21 actions. PEA at 1-11. The PEA also concluded that the Baseline Plan and
22 NDAA Section 3003 were not connected actions. PEA at 1-12.
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1 79. The PEA stated that several RCM activities were not connected
2 actions. PEA at 1-10 to PEA 1-12. The Forest Service refused to analyze
3 RCM ongoing mine dewatering of the No. 9 and 10 shafts, the water
4 pipeline within the Magma Arizona Railroad Company right-of way, the
5 Forest Service Travel Management Plan or the RCM main mine and the land
6 exchange directed in NDAA Section 3003 as connected actions. *Id.*

7
8
9 80. The cumulative impacts from RCM's main mine and the
10 Superior West exploration activities were never provided to the public or
11 analyzed by the Forest Service in the PEA. The public comment period on
12 the PEA was the last opportunity for the public to comment on the Baseline
13 Plan during the Forest Service's NEPA review prior to the issuance of the
14 Final Environmental Assessment ("Final EA") in January of 2016.

15
16
17 81. The connected actions from RCM's main mine, NDAA Section
18 3003 and the Baseline Plan were never analyzed by the Forest Service in the
19 PEA. The public and the Tribe were never provided with an opportunity to
20 comment on RCM's Baseline Plan's connection to other environmentally
21 and culturally connected actions by the Forest Service. Clearly, the Forest
22 Service failed to take a hard look at the RCM's Baseline Plan by not
23 considering cumulative impacts or connected activities.
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1 82. On September 30, 2015, Mr. Bosworth presented the Study to
2 the Tribe. Mr. Bosworth transmittal correspondence of that date indicates
3 that the report had been prepared at the request of the Tonto National Forest
4 and that:
5

6 The purpose of the Study was to assist Tonto National Forest
7 with 1) the identification of traditional cultural properties of
8 Native American tribes with traditional ties to the study area,
9 and the evaluation of the eligibility of those properties for
10 inclusion in the National Register of Historic Places pursuant to
11 the National Historic Preservation Act (NHPA) and 2) the
12 identification of cultural resources pursuant to National
13 Environmental Protection Act (NEPA). The Study was to be
14 used by Tonto National Forest in compliance activities related
15 to the implementation of NHPA, NEPA and other relevant
16 federal laws and policies with respect to the proposed
17 Resolution Copper Mine.

18 83. In January 2016, TNF published the Final EA for the Baseline
19 Plan. Between the time of the completion of the Study and the publication
20 of the Final EA, TNF did not engage in government-to-government
21 consultation with the Tribe or otherwise engage with the Tribe regarding any
22 information contained in the Study.

23 84. The Final EA states that RCM main mining operation was now
24 a “reasonably foreseeable future action” that must be considered under
25 NEPA. Final EA at 3-10. However, the Final EA failed to conduct a
26 detailed analysis of the cumulative impacts from the RCM’s main mine
27 operations. TNF simply stated that: “Impacts from the MPO [Resolution
28

1 Copper Mining Plan of Operations] will be analyzed in more detail in a
2 separate EIS before such operations are approved.” Final EA at 3-25. The
3 Final EA never addressed the cumulative impacts of the Superior West
4 project.
5

6 85. After Mr. Bosworth’s August 21, 2014, TNF did not engage in
7 government-to-government consultation with the Tribe or otherwise engage
8 with the Tribe regarding any information pertaining to “connected actions”,
9 “cumulative effects” or the Tribe’s other concerns regarding the Baseline
10 Plan, including cultural and environmental issues, or the very purposes and
11 goals of the Baseline Plan, and thus does not amount to a hard look at
12 potential impacts.
13

14
15
16 86. On January 15, 2016, TNF Supervisor Neil Bosworth published
17 the legal notice of the objection for the Final EA for Baseline Plan and the
18 Draft Decision Notice. On February 29, 2016, the Tribe filed its objection to
19 the Final EA, the Draft Decision Notice (“DN”) and the Draft Finding of No
20 Significant Impact (“FONSI”).
21

22 87. The Tribe objected that the Final EA states that RCM main
23 mining operation was now a “reasonably foreseeable future action” that
24 must be considered under NEPA, Final EA at 3-10, while the PEA had
25 characterized RCM’s main mine as “speculative”, thus precluding the
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1 Tribe's ability to comment upon the impacts of the main mine operations.
2 The Tribe objected that NEPA required a full and public review of the
3 RCM's main mine operations in conjunction with the Baseline Plan. The
4 Tribe objected that it had not been given the opportunity to comment upon
5 the Baseline Plan based upon the Study which had been issued after the
6 publication of the PEA. The Tribe reiterated its objection that the Final EA,
7 Draft DN and FONSI each failed to address the deficiencies pertaining to the
8 purposes and goals for the Baseline Plan, particularly as it relates to the
9 Plan's deep groundwater wells, and failed to address all direct, indirect and
10 cumulative impacts and connected actions. The Tribe requested that the
11 Final EA, Draft DN and Draft FONSI be rejected by the reviewing officer.
12 The Tribe reaffirmed its request for government-to-government
13 consultations.
14
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19 88. On March 4, 2016, Dr. Stephanie Toothman of the National
20 Park Service serving as the Keeper of the National Register of Historic
21 Places ("NRHP") approved the nomination and listing of Chi'chil
22 Bildagoteel (Oak Flat) as submitted by the Tonto National Forest on the
23 NRHP. The Chi'chil Bildagoteel National Register Historic District is
24 comprised of 17 distinct sites and associated landscapes that represent
25 historic and current uses of 4,309 acres of public lands managed by the TNF.
26
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28

1 TNF was the federal agency which was actively involved in nominating
2 Chi'chil Bildagoteel for listing on the NRHP.

3
4 89. On April 6, 2016, the Tribe requested that Defendant Neil
5 Bosworth and the Forest Service withdraw the Final EA, Draft DN and Draft
6 FONSI.

7
8 90. On August 22, 2016, Defendant Neil Bosworth issued the DN
9 and FONSI for the Baseline Plan.

10
11 **COUNT I**
12 **Violation of the National Historic Preservation Act**

13
14 91. Plaintiff hereby realleges and incorporates the allegations of the
15 preceding paragraphs of this Complaint herein by reference.

16
17 92. The purpose of the NHPA, enacted in 1966, is to preserve the
18 history and prehistory of this country and protect for future generations the
19 historical and cultural resources that are part of the nation's heritage.

20
21 93. Section 106 of the NHPA requires all federal agencies to "take
22 into account" the impact of their actions on historic properties, including
23 sites listed on or eligible for the National Register of Historic Places, and to
24 do so "prior to" approving the action. 54 U.S.C. § 306108. Section 106 also
25 requires that the agency afford the Advisory Council on Historic
26 Preservation ("ACHP") "a reasonable opportunity to comment" on the
27 project. *Id.*; *see also* 36 C.F.R. §§ 800.1, 800.16(1).

28

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1 94. The ACHP has promulgated regulations implementing Section
2 106, which are binding on all federal agencies. 54 U.S.C. § 304108; 36
3 C.P.R. Part 800. The Section 106 regulations require a federal agency to
4 engage in a consultation process that involves the State Historic Preservation
5 Office, ACHP, Native American tribes, consulting parties, and interested
6 members of the public. 36 C.P.R. §§ 800.1(a), 800.2.

9 95. The NHPA requires the agency to make a reasonable and good
10 faith effort to identify historic properties; determine whether identified
11 properties are eligible for listing on the National Register based on criteria in
12 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible
13 historic properties found; determine whether the effect will be adverse; and
14 avoid or mitigate any adverse effects. 36 C.F.R. §§ 800.4, 800.5,
15 800.8(c)(4).

18 96. The NHPA specifies that “[p]roperties of traditional religious
19 and cultural importance to an Indian tribe . . . may be determined to be
20 eligible for inclusion on the National Register” and are therefore subject to
21 the procedural safeguards of Section 106 of the NHPA. 54 U.S.C. §§
22 302706(a); *see also* 36 C.F.R. § 800.16(l)(1).

25 97. Project planning activities conducted before completing
26 compliance with section 106 cannot restrict the subsequent consideration of
27

28

1 alternatives to avoid, minimize, or mitigate the undertaking’s adverse effects
2 on historic properties. 36 C.F.R. § 800.1.

3
4 98. Once Section 106 is triggered, the federal agency undertaking
5 the proposed project must identify the area of potential effects, locate all
6 historic properties in that area, and assess the actual effect of the project
7 upon those specific properties. 36 C.F.R. §§ 800.4, 800.5.

8
9 99. Federal agencies must “make a reasonable and good faith effort
10 to identify any Indian tribes . . . that might attach religious and cultural
11 significance to historic properties in the area of potential effects and invite
12 them to be consulting parties.” 36 C.F.R. § 800.3(f)(2).

13
14 100. The agency official must involve all of the “consulting parties”
15 in “all findings and determinations made during the Section 106 process.” 36
16 C.F.R. § 800.2(a)(4).

17
18 101. The “consulting parties” for off-Reservation projects must
19 include the State Historic Preservation Officer (SHPO) and “any Indian tribe
20 that attaches religious and cultural significance to historic properties that
21 may be affected by an undertaking.” 36 C.F.R. §§ 800.2(c)(1),
22 800.2(c)(2)(ii).

23
24
25 102. The NHPA requires that in carrying out their responsibilities
26 under Section 106, federal agencies “shall consult with any Indian tribe . . .
27
28

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1 that attaches religious and cultural significance to [historic] properties.” 54
2 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2)(ii).
3

4 103. Consultation must provide an Indian tribe “a reasonable
5 opportunity to identify its concerns about historic properties, advise on the
6 identification and evaluation of historic properties, including those of
7 traditional religious and cultural importance, articulate its views on the
8 undertaking’s effects on such properties, and participate in the resolution of
9 adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii).
10

11
12 104. In the initial stage of the consultation, agencies must gather
13 information from any Indian tribe to assist in identifying properties,
14 including those located off tribal lands, which may be of religious and
15 cultural significance to them and may be eligible for the National Register.
16 36 C.F.R. § 800.4(a)(3).
17

18 105. The federal agency must continue to consult the Tribe(s) at each
19 stage of the Section 106 process:
20

21 The agency official shall ensure that consultation in the section
22 106 process provides the Indian tribe . . . a reasonable
23 opportunity to identify its concerns about historic properties,
24 advise on the identification and evaluation of historic
25 properties, including those of traditional religious and cultural
26 importance, articulate its views on the undertaking’s effects on
27 such properties, and participate in the resolution of adverse
28 effects.

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1 36 C.F.R. § 800.2(c)(2)(ii)(A). Additionally, the federal agency is under an
2 obligation to consult with Indian tribal governments pursuant to Executive
3 Order 13175, Presidential Executive Memorandum entitled “Government-to-
4 Government Relations with Native American Tribal Governments” (April
5 29, 1994), 59 Fed. Reg. 22951, Presidential Executive Memorandum entitled
6 “Consultation and Coordination with Indian Tribal Governments”
7 (November 5, 2009), 65 Fed. Reg. 67249 and Forest Service Manual
8 (“FSM”) Section 1563.8c
9
10

11
12 106. If an adverse effect is found, the agency must document it and
13 must consult further to develop and evaluate alternatives or modifications to
14 the undertaking that could avoid, minimize, or mitigate adverse effects on
15 historic properties. 36 C.F.R. §§ 800.5, 800.6, 800.11.
16

17 107. Agency officials are to reevaluate historic properties if a prior
18 evaluation is incomplete. 36 C.F.R. § 800.4(c)(1).
19

20 108. A determination or finding required by the NHPA regulations
21 must be “supported by sufficient documentation to enable any reviewing
22 parties to understand its basis.” 36 C.F.R. 800.11(a).
23

24 109. The Section 106 regulations stress the importance of
25 considering the effects of a federal project at the earliest possible time
26 during project planning, “so that a broad range of alternatives may be
27
28

1 considered during the planning process for the undertaking.” 36 C.F.R. §
2 800.I(c). The regulations reiterate the statutory requirement that Section 106
3 review must be completed “prior to” the approval of any expenditure of
4 federal funds on the project, and prohibit actions that may “restrict the
5 subsequent consideration of alternatives to avoid, minimize or mitigate” the
6 project’s adverse effects on historic properties. *Id.* The Section 106
7 regulations state that a “[c]hange of the character of the property’s use . . .
8 that contribute[s] to its historic significance” is an adverse effect. 36 C.F.R.
9 § 800.5(a)(2)(iv).
10
11
12

13 110. Defendants’ approval of the Baseline Plan is a federal
14 “undertaking” subject to Section 106 of the NHPA.
15

16 111. Several sites and locations within the Baseline Plan project
17 boundaries are “eligible” under the NHPA as properties of traditional
18 religious and cultural importance to the Tribe.
19

20 112. Instead of initiating consultation with the SHPO under NHPA
21 section 106 (per 36 C.F.R. Part 800) for the review of the Baseline Plan, the
22 Forest Service relied on its determination that the Baseline Plan would not
23 impact properties of traditional religious and cultural importance or which
24 are eligible properties under the NHPA.
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1 113. The Forest Service’s determination that properties of traditional
2 religious and cultural importance or which are eligible properties under the
3 NHPA would not be impacted by the Baseline Plan resulted because TNF
4 failed to conduct an appropriate cumulative effects analysis for the Baseline
5 Plan.
6

7 114. The Forest Service’s determination that properties of traditional
8 religious and cultural importance or which are eligible properties under the
9 NHPA would not be impacted by the Baseline Plan resulted because TNF
10 failed to recognize and analyze connected actions when evaluating the
11 Baseline Plan.
12

13 115. The Forest Service’s determination that the Baseline Plan
14 would have no adverse effects on any properties of traditional religious and
15 cultural importance or which are eligible properties under the NHPA was
16 arbitrary, capricious, an abuse of discretion and otherwise contrary to law.
17

18 116. Defendants did not initiate consultation with the Arizona SHPO
19 during the Baseline Plan project review and approval.
20

21 117. Defendants did not initiate consultation with the ACHP during
22 the Baseline Plan project review and approval.
23

24 118. Defendants’ failure to engage in any form of consultation with
25 the Tribe or SHPO or ACHP when making its findings and determinations
26
27
28

1 violated the NHPA, Executive Order 13175, and the Presidential Executive
2 Memoranda dated April 29, 1994 and November 5, 2009 and FSM Section
3 1563.8c.
4

5 119. Plaintiff Tribe and its members have suffered legal wrongs
6 because of the Defendants' actions and omissions as set forth herein and are
7 adversely affected and aggrieved by the Forest Service's action within the
8 meaning of the APA, 5 U.S.C. 702.
9

10 120. Defendants' actions and omissions set forth herein are arbitrary
11 and capricious, an abuse of discretion, otherwise not in accordance with law,
12 and without observance of procedures required by law within the meaning of
13 the APA, 5 U.S.C. 706(1) & (2)(A), and should therefore be declared
14 unlawful and set aside by this Court.
15
16

17 121. Plaintiff is entitled to its reasonable fees, costs, and expenses
18 associated with this litigation pursuant to the Equal Access to Justice Act, 28
19 U.S.C. 2412.
20

21 **COUNT II**
22 **Violation of the National Environmental Protection Act**

23 122. Plaintiff realleges and incorporates the allegations of the
24 preceding paragraphs of this Complaint herein by reference.
25

26 123. NEPA requires federal agencies to provide the public full and
27 adequate opportunity to comment upon and participate in the agency's
28

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1 review of the proposed project under review, including all direct, indirect,
2 and cumulative impacts and effects. The Forest Service failed to include or
3 mention RCMs main mine and its impacts in the PEA. The Forest Service
4 then included a review RCM's main mine's cumulative impacts in the Final
5 EA without any opportunity for the Tribe or the public to review and
6 comment upon the agency's altered analysis.
7
8

9 124. The Forest Service violated the public review and comment
10 requirements of NEPA and its implementing regulations when it failed to
11 allow for a full public review and comment on the Baseline Plan.
12

13 125. The issuance of DN and FONSI based upon the Final EA
14 violated NEPA for the reasons stated above.
15

16 126. Defendants' actions and omissions set forth herein are arbitrary
17 and capricious, an abuse of discretion, otherwise not in accordance with law,
18 and without observance of procedures required by law within the meaning of
19 the APA, 5 U.S.C. §§ 706(1) & (2)(A), and should therefore be declared
20 unlawful and set aside by this Court.
21

22 127. Plaintiff is entitled to its reasonable fees, costs, and expenses
23 associated with this litigation pursuant to the Equal Access to Justice Act, 28
24 U.S.C. § 2412.
25
26
27
28

COUNT III
Violation of the National Environmental Protection Act

1
2
3 128. Plaintiff realleges and incorporates the allegations of the
4 preceding paragraphs of this Complaint herein by reference.

5
6 129. NEPA requires federal agencies to review actions that are
7 connected in a single NEPA document. Defendants failed to review the
8 impacts associated with connected actions to the Baseline Plan.
9 Specifically, the Forest Service rejected that RCM's main mine project as a
10 connected action despite the fact that the Baseline Plan project was designed
11 to facilitate the main mine operations. Defendants failed to prepare a single
12 NEPA-compliant document that included analysis of the impacts associated
13 with the connected RCM mine proposal.

14
15
16 130. Defendants failed to adequately consider and evaluate the
17 impacts associated with several connected actions as listed in the PEA
18 including the RCM main mine operations and therefore Defendants violated
19 NEPA and its implementing regulations, and the agency's own policy.

20
21
22 131. Defendants' actions and omissions set forth herein are arbitrary
23 and capricious, an abuse of discretion, otherwise not in accordance with law,
24 and without observance of procedures required by law within the meaning of
25 the APA, 5 U.S.C. §§ 706(1) & (2)(A), and should therefore be declared
26 unlawful and set aside by this Court.
27
28

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1 132. Plaintiff is entitled to its reasonable fees, costs, and expenses
2 associated with this litigation pursuant to the Equal Access to Justice Act, 28
3 U.S.C. § 2412.
4

5 **COUNT IV**
6 **Violation of the National Environmental Protection Act**

7 133. Plaintiff realleges and incorporates the allegations of the
8 preceding paragraphs of this Complaint herein by reference.
9

10 134. NEPA requires federal agencies to include in a NEPA
11 document an analysis of the cumulative impacts of all past, present, and
12 reasonably foreseeable future actions. Defendants failed to adequately
13 review and analyze the cumulative impacts to the environment and human
14 and cultural resources from all past, present, and reasonably foreseeable
15 future actions in the Baseline Plan Final EA, as required by NEPA.
16

17 135. Defendants ignored or neglected to include past, present and
18 reasonably foreseeable future actions of which Defendants were aware,
19 including other mineral exploration and mining activities, in the Baseline
20 Plan Final EA as required by NEPA.
21

22 136. Because Defendants failed to adequately consider the
23 cumulative effects and impacts of all past, present, and reasonably
24 foreseeable future actions in its consideration of the Baseline Plan,
25 Defendants violated NEPA and its implementing regulations.
26
27
28

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1 137. Defendants' actions and omissions set forth herein are arbitrary
2 and capricious, an abuse of discretion, otherwise not in accordance with law,
3 and without observance of procedures required by law within the meaning of
4 the APA, 5 U.S.C. §§ 706(1) & (2)(A), and should therefore be declared
5 unlawful and set aside by this Court.
6

7
8 138. Plaintiff is entitled to its reasonable fees, costs, and expenses
9 associated with this litigation pursuant to the Equal Access to Justice Act, 28
10 U.S.C. § 2412.
11

12 **COUNT V**
13 **Violation of the National Environmental Protection Act**

14 139. Plaintiff realleges and incorporates the allegations of the
15 preceding paragraphs of this Complaint herein by reference.
16

17 140. NEPA requires federal agencies to prepare an Environmental
18 Impact Statement ("EIS") when the impacts associated with a proposed
19 action may be significant. Defendants did not prepare an EIS for the
20 Baseline Plan. Defendants failed to adequately review and analyze the
21 impacts and connected actions associated with the Baseline Plan, including
22 the direct, indirect, and cumulative impacts, in order to demonstrate that the
23 Baseline Plan may not have significant impacts, and failed to prepare an EIS
24 as required by NEPA for the Baseline Plan.
25
26
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1 141. Defendants’ determination in the DN and FONSI that none of
2 the “significance” considerations listed in 40 C.F.R. §1508.27(b) were
3 present was arbitrary, capricious and in violation of NEPA.
4

5 142. Defendants failed to consider and evaluate the impacts of the
6 Baseline Plan and demonstrate that there may not be significant impacts as a
7 result of the proposed Baseline Plan, including the cumulative impacts and
8 connected actions of other projects. Defendants’ issuance of the FONSI
9 based on an inadequate Final EA violates NEPA.
10

11 143. Defendants’ actions and omissions violated NEPA and its
12 implementing regulations, and the Forest Service’s own policies.
13

14 144. NEPA requires an EIS to present the full scope of a project, to
15 include all impacts and connected actions which may proceed under the
16 project.
17

18 145. Defendants’ decision to issue the Final EA and approve the
19 Baseline Plan without the NEPA required Environmental Impact Statement
20 is arbitrary, capricious, not in accordance with law, and without observance
21 of the procedures required by law, within the meaning of the APA, 5 U.S.C.
22 § 706.
23

24 146. Defendants’ actions and omissions set forth herein are arbitrary
25 and capricious, an abuse of discretion, otherwise not in accordance with law,
26
27
28

1 and without observance of procedures required by law within the meaning of
2 the APA, 5 U.S.C. §§ 706(1) & (2)(A), and should therefore be declared
3 unlawful and set aside by this Court.
4

5 147. Plaintiff is entitled to its reasonable fees, costs, and expenses
6 associated with this litigation pursuant to the Equal Access to Justice Act, 28
7 U.S.C. § 2412.
8

9 **COUNT VI**
10 **Violation of the National Environmental Protection Act**

11 148. Plaintiff realleges and incorporates the allegations of the
12 preceding paragraphs of this Complaint herein by reference.
13

14 149. NEPA requires federal agencies to review and analyze the
15 existing environmental conditions at a proposed project site in order to
16 ensure a NEPA-compliant analysis of the impacts associated with a
17 proposed action. Defendants failed to a review and analyze the existing
18 environmental conditions at the site of the Baseline Plan including impacts
19 on surface and groundwater resources, as required by NEPA.
20

21
22 150. Defendants violated NEPA and its implementing regulations
23 because Defendants failed to adequately consider and evaluate the existing
24 environmental conditions at the site of the proposed Baseline Plan.
25

26 151. Defendants' decision to issue the Final EA and approve the
27 Baseline Plan via a DN/FONSI without the NEPA-required existing
28

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1 environmental condition analysis is arbitrary, capricious, not in accordance
2 with law, and without observance of the procedures required by law, within
3 the meaning of the APA, 5 U.S.C. § 706.
4

5 152. Plaintiff is entitled to its reasonable fees, costs, and expenses
6 associated with this litigation pursuant to the Equal Access to Justice Act, 28
7 U.S.C. § 2412.
8

9 **COUNT VII**
10 **Violation of the National Environmental Protection Act**

11 153. Plaintiff realleges and incorporates the allegations of the
12 preceding paragraphs of this Complaint herein by reference.
13

14 154. NEPA requires federal agencies to include in its NEPA
15 documents a reasonably complete discussion of mitigation measures relied
16 upon by the agency to reduce the impacts of a proposed action. The analysis
17 of mitigation must include an assessment as to the effectiveness of proposed
18 mitigation measures.
19

20 155. Defendants failed to adequately review and analyze mitigation
21 measures, and their effectiveness, in the Baseline Plan Final EA.
22

23 156. Defendants violated NEPA and its implementing regulations
24 because they failed to adequately consider and evaluate mitigation measures
25 in the Baseline Plan Final EA.
26
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1 157. Defendants' actions and omissions set forth herein are arbitrary
 2 and capricious, an abuse of discretion, otherwise not in accordance with law,
 3 and without observance of procedures required by law within the meaning of
 4 the APA, 5 U.S.C. §§ 706(1) & (2)(A), and should therefore be declared
 5 unlawful and set aside by this Court.
 6

7
 8 158. Plaintiff is entitled to its reasonable fees, costs, and expenses
 9 associated with this litigation pursuant to the Equal Access to Justice Act, 28
 10 U.S.C. § 2412.
 11

12 **COUNT VIII**
 13 **Violation of Section 3003 of the National Defense Authorization Act**

14 159. Plaintiff realleges and incorporates the allegations of the
 15 preceding paragraphs of this Complaint herein by reference.
 16

17 160. Section 3003 of the Carl Levin and Howard P. "Buck" McKeon
 18 National Defense Authorization Act ("NDAA") for Fiscal Year 2015
 19 addresses NEPA review of all aspects of the Resolution Copper mine
 20 operations.
 21

22 161. NDAA Section 3003(c)(9) requires the Secretary of Agriculture
 23 to "prepare a single environmental impact statement under the National
 24 Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), which shall be
 25 used as the basis for all decisions under Federal law related to the proposed
 26 mine and the Resolution mine plan of operations and any related major
 27
 28

1 Federal actions significantly affecting the quality of the human environment,
2 including the granting of any permits, rights-of-way, or approvals for the
3 construction of associated power, water, transportation, processing, *tailings*,
4 waste disposal, or other ancillary facilities.” *Id.* § 3003(c)(9)(B)(emphasis
5 supplied).
6

7
8 162. Defendants have not prepared a single EIS under NEPA which
9 addresses the RCM mine plan of operations including tailings.

10 163. The single EIS to be prepared under NDAA § 3003(c)(9)(B)
11 must: “(i) assess the effects of the mining and related activities on the
12 Federal land conveyed to Resolution Copper under this section on the
13 cultural and archeological resources that may be located on the Federal land;
14 and (ii) identify measures that may be taken, to the extent practicable, to
15 minimize potential adverse impacts on those resources, if any.” *Id.* §
16 3003(c)(9)(C).
17

18
19 164. Instead, Defendants prepared a Final EA and approved the
20 Baseline Plan by a DN and FONSI.
21

22 165. Defendants have violated NDAA Section 3003(c)(9)(B) & (C).
23

24 166. Defendants’ actions and omissions set forth herein are arbitrary
25 and capricious, an abuse of discretion, otherwise not in accordance with law,
26 and without observance of procedures required by law within the meaning of
27
28

1 the APA, 5 U.S.C. §§ 706(1) & (2)(A), and should therefore be declared
2 unlawful and set aside by this Court.

3
4 167. Plaintiff is entitled to its reasonable fees, costs, and expenses
5 associated with this litigation pursuant to the Equal Access to Justice Act, 28
6 U.S.C. § 2412.

7
8 **PRAYER FOR RELIEF**

9 Plaintiffs respectfully ask this Court to:

10 A. Declare that Defendants have acted in a manner that is
11 arbitrary, capricious, an abuse of discretion, and/or contrary to law
12 pursuant to NHPA and NEPA (and their implementing regulations),
13 NDAA Section 3003(c)(9)(B) & (C), and the APA in issuing the Final
14 EA and approving the Baseline Plan;

15
16 B. Vacate, reverse and set aside Defendants' decision approving
17 the Baseline Plan, including the DN and FONSI;

18
19 C. Enjoin the Defendants from implementing the Baseline Plan
20 approval unless and until Defendants demonstrates compliance with all
21 applicable laws;

22
23 D. Award the Plaintiff its reasonable attorney's fees, expenses and
24 costs incurred in this action pursuant to the Equal Access to Justice Act, 28
25 U.S.C. § 2412, or other provisions of law; and
26
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28

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1 E. Grant the Plaintiff such injunctive and additional relief as the
2 Court deems just and equitable.

3
4 Respectfully submitted, this 15th day of September, 2016.

5
6 **San Carlos Apache Tribe**
7 **Office of the Attorney General**

8 By: A. B. Ritchie /s/
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