Arizona Mining Reform Coalition – Apache Stronghold – Center for Biological Diversity – Concerned Citizens and Retired Miners Coalition – Earthworks– Maricopa Audubon Society – Native Youth Unite – Patagonia Area Resource Alliance – Save the Scenic Santa Ritas – Save Tonto National Forest – Sierra Club, Grand Canyon Chapter –Spirit of the Mountain Runners

Via Email: southwestern-tonto-globe@fs.fed.us

April 2, 2015

Mr. Richard Reitz, District Ranger
USFS Globe District Office
7680 S. Sixshooter Canyon Rd.
Globe, AZ 85501

Re: Scoping Comments on Copper King and Red Top Mineral Exploration Projects

Dear Ranger Reitz:

Per the U.S. Forest Service's ("USFS") March 2, 2015 Forest User public scoping notice letter, this letter (and attachments) contain comments on the proposed Copper King and Red Top Mineral Exploration Projects and the request by Desert Star Resources ("DSR") for approval of its Plans of Operations ("PoOs") for the Projects.

These comments are submitted on behalf of Arizona Mining Reform Coalition ("AMRC"), Apache – Stronghold, Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Earthworks, Maricopa Audubon Society, Native Youth Unite, Patagonia Area Resource Alliance, Save the Scenic Santa Ritas, Save Tonto National Forest, Sierra Club, Grand Canyon Chapter, and Spirit of the Mountain Runners. Any or all of these organizations may also submit additional comments apart from these comments that are also incorporated into these comments.

Arizona Mining Reform Coalition works in Arizona to improve state and federal laws, rules, and regulations governing hard rock mining to protect communities and the environment. AMRC works to hold mining operations to the highest environmental and social standards to provide for the long term environmental, cultural, and economic health of Arizona. Members of the Coalition include: Apache – Stronghold, Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Dragoon Conservation Alliance, EARTHWORKS, Empire Fagan Coalition, Environment Arizona, Groundwater Awareness League, Maricopa Audubon Society, Save the Scenic Santa Ritas, Grand Canyon Chapter of the Sierra Club, Sky Island Alliance, Spirit of the Mountain Runners, and Tucson Audubon Society.

Apache – Stronghold works in Arizona and across the United States to protect Oak Flat and other sacred sites important to Apache people as well as sacred sites across Indian country. Apache – Stronghold has more than 125 Native people and their supporters.

The **Center for Biological Diversity** is a non-profit public interest organization with an office located in Tucson, Arizona, representing more than 825,000 members and supporters nationwide

dedicated to the conservation and recovery of threatened and endangered species and their habitats. The Center has long-standing interest in projects of ecological significance undertaken in the National Forests of the Southwest, including mining projects.

The **Concerned Citizens and Retired Miners Coalition** is a group of citizens who: 1) reside in Superior, Arizona, or do not reside in Superior, Arizona, but are affiliated with relatives who are residents; and 2) are retired hard-rock miners who previously worked in the now non-operational mine in Superior, Arizona, and were displaced due to mine closure or personal disability.

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

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

Native Youth Unite is a multi-tribal youth organization that wishes to bring about a change to the indigenous youth throughout the world. Native Youth Unite looks to unify all indigenous tribes as one, because we believe that together we are stronger in solidarity and spiritually. The time has arrived where we insist that we be heard by all people all around the world. We wish to amplify the message indigenous people are resilient and are maintaining the resistance. Currently Native Youth Unite consists of members from several different nations including San Carlos Apache, White Mountain Apache, Navajo, Hopi, Tohono O'odham, Gila River, Lakota, Salt River and we continue to expand.

Patagonia Area Resource Alliance is a non-profit community watchdog organization that monitors the activities of mining companies, as well as ensures government agencies' due diligence, to make sure their actions have long-term, sustainable benefits to public lands and water resources in Patagonia and the State of Arizona.

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

Save Tonto National Forest works to protect our National Forest and promote safe and responsible use by all groups of outdoor enthusiasts. We are based in Queen Valley, Arizona and have around 260 members concerned about the direction the Tonto National Forest is going.

Sierra Club is one of the nation's oldest and most influential grassroots organizations whose mission is "to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to

protect and restore the quality of the natural and human environments." Sierra Club has more than 2.4 million members and supporters with 35,000 in Arizona as part of the Grand Canyon (Arizona) Chapter. Our members have long been committed to protecting and enjoying the Tonto National Forest.

The **Spirit of the Mountain Runners** are San Carlos Apache and supporters that are protecting their spiritual and cultural heritage on places important to their heritage.

As shown in more detail below, the proposed PoO approval and use of a Categorical Exclusion ("CE") contains numerous legal and factual errors and as such should be revised in order to comply with federal law. In addition, any USFS plan to continue its review of the PoO must comply with federal law as detailed herein. At a minimum, if the agency proceeds with its review, an Environmental Impact Statement ("EIS") should be prepared, due to the potential for significant impacts from the Projects alone, and especially when viewed with its cumulative impacts from other and/or related activities as well as connected actions. Whether the agency decides to prepare an Environmental Assessment ("EA") first, or directly prepare an EIS, the requirements noted herein must be met for either document.

Any EA or EIS that is prepared must fully review all reasonable alternatives, provide for mitigation and an analysis of the effectiveness of all mitigation measures, review all direct, indirect, and cumulative impacts, fully analyze all baseline conditions of the potentially affected environment, among other NEPA requirements.

1. The USFS Cannot Utilize a Categorical Exclusion

A. Background for NEPA and Categorical Exclusions

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA "prevent[s] or eliminate[s] damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). By focusing the agency's attention on the environmental consequences of the proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 CFR § 1500.1(b).

NEPA has "twin aims." First, it requires federal agencies "to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." Kern v. BLM, 284 F.3d 1062, 1066 (9th Cir. 2002), *quoting* Baltimore Gas & Electric Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983). 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. NEPA requires federal agencies to take a "hard look" at the environmental effects of their proposed action. Marsh, 490 U.S. at 374.

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. 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 will have significant environmental effects and whether an EIS is necessary. 40 C.F.R. § 1501.4(b).

In narrow situations, neither an EA nor an EIS is required and federal agencies may invoke a "categorical exclusion" (CE) from NEPA. 40 C.F.R. § 1508.4. A "categorical exclusion" is defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations …." 40 C.F.R. § 1508.4.

Each federal agency must develop "specific criteria for and identification of" actions that qualify for a categorical exclusion. 40 C.F.R. § 1507.3. Federal agencies are required to "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. Extraordinary circumstances prevent reliance on a categorical exclusion. Jones v. Gordon, 792 F.2d 821, 827-28 (9th Cir. 1986). Extraordinary circumstances has been defined as those "in which normally excluded activities may have a significant effect." California v. Norton, 311 F.3d 1162, 1168 (9th Cir. 2002).

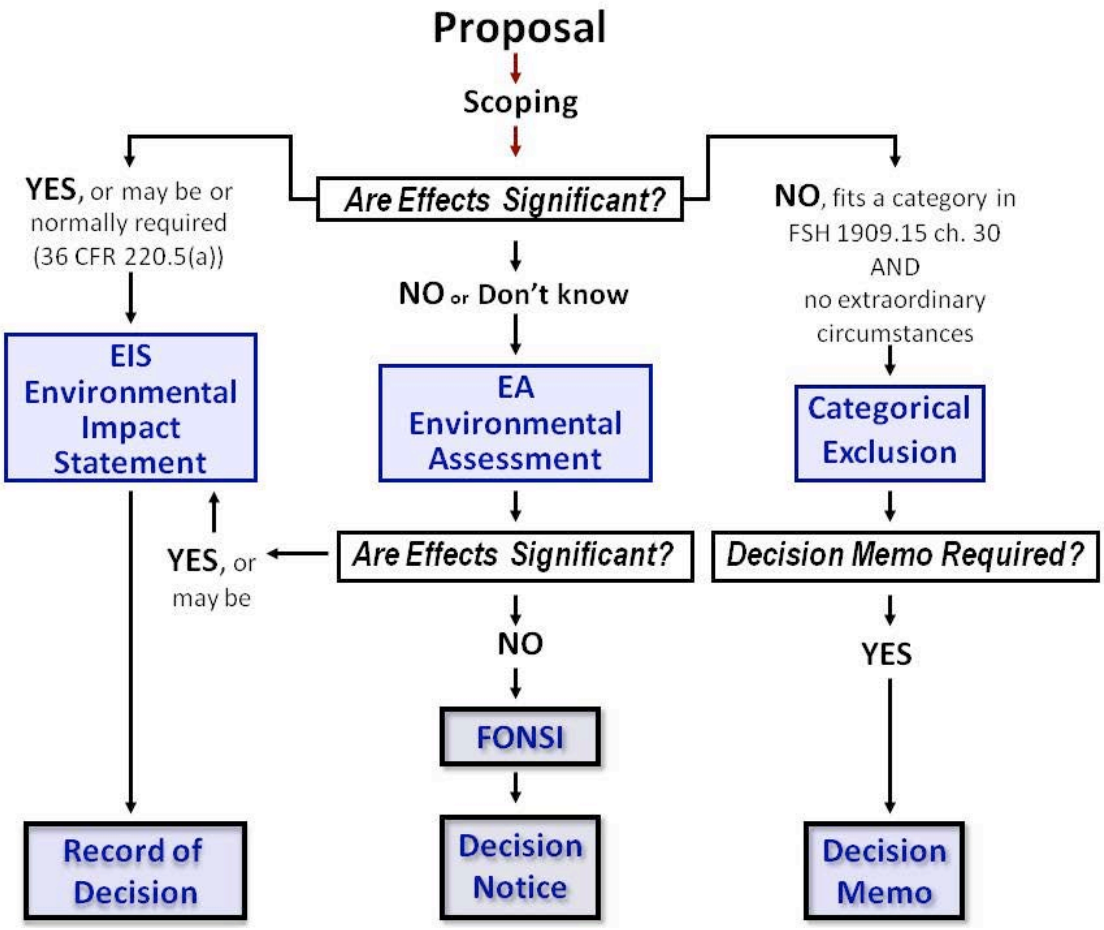
The USFS's categorical exclusion regulations require "scoping" prior to the use of a categorical exclusion. "If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS." 36 C.F.R. § 220.6(c).

When an agency's action is not justified under a CE, courts will invalidate the action. *See* West v. Secretary of Department of Transportation, 206 F.3d 920, 928-29 (9th Cir. 2000) (rejecting reliance on categorical exclusion for highway interchange); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004). Courts must review "whether the path taken to reach the conclusion was the right one in light of NEPA's procedural requirements." West, 206 F.3d at 929. The Arizona District Court invalidated the USFS's issuance of a CE for a mineral exploration project when the CE was inappropriate. *See*, Center for Biological Diversity v. Stahn, Order, at 2-4, CV-08-8031 (D. Ariz. 2008)(attached).

The Forest Service NEPA Handbook depicts the decisionmaking process for approval through a CE. FSH, 1909.15 § 11.6:

Figure 1

11.6 - Exhibit 01
NEPA Documentation Overview



Thus, as acknowledged by the agency, the determination of whether there is the potential for significant impacts is a critical, and threshold, decision under NEPA.

B. *The "Extraordinary Circumstances" Affected by the Projects Preclude the Use of a Categorical Exclusion*

An Extraordinary Circumstance ("EC") exists when "a normally excluded action *may* have a significant environmental impact." 40 C.F.R. § 1508.4 (emphasis added). The USFS NEPA regulations and NEPA Handbook outlines the limited circumstances when a CE may be used.

> § 220.6 Categorical exclusions.
> (a) *General.* A proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action and if: (1) The proposed action is within one of the categories established by the Secretary at 7 CFR part 1b.3; or (2) The proposed action is within a category listed in § 220.6(d) and (e).

(b) *Resource conditions.*
(1) Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS are:
(i) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;
(ii) Flood plains, wetlands, or municipal watersheds;
(iii) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas;
(iv) Inventoried roadless area or potential wilderness area;
(v) Research natural areas;
(vi) American Indians and Alaska Native religious or cultural sites; and
(vii) Archaeological sites, or historic properties or areas.
(2) The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion (CE). It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

36 CFR 220.6. As the NEPA Handbook states:

> In considering extraordinary circumstances, the responsible official should determine whether or not any of the listed resources are present, and if so, the degree of the potential effects on the listed resources. If the degree of potential effect raises uncertainty over its significance, then an extraordinary circumstance exists, precluding use of a categorical exclusion.

USFS NEPA Handbook, Section 31. Failure to properly review and justify the lack of ECs violates NEPA. *See* California ex rel. Lockyer v. U.S. Dept. of Agriculture, 575 F.3d 999, 1017-18 (9th Cir. 2009).

Here, at least one Exceptional Circumstance exists, and more importantly, will be adversely affected by the Projects – especially the Red Top Project. As shown in the PoOs and scoping letter, the Red Top Project will be essentially adjacent to the Congressionally-designated Superstition Wilderness. One of the drill locations is a mere 28 feet from the Wilderness boundary. Many of the drill locations would be located along or near the primitive dirt road forming the southern boundary of the Wilderness.

Indeed, the USFS informed DSR that it was concerned about impacts to the Wilderness from the Red Top Project. For example, regarding Drill Pad FE-P-11, the agency stated: "We have a concern about this pads' [sic] proximity to wilderness boundary. The north edge of this drill pad is within 28' of wilderness boundary." September 2, 2014 letter from Bronco Creek Exploration (DSR) to District Ranger Reitz, at 5. The company's answer admitted that "the proximity to the wilderness is a concern." Id. Yet the company merely stated that the Wilderness would not be affected due to the drill pad's location (along with other pads and facilities) due to the recreational use of the area. "We strongly believe that our proposed operations will not have any

adverse effect on the wilderness area as they are placed immediately adjacent to a route utilized by recreational and other Forest users." Id.

Such a simple statement by the project applicant does not eliminate the fact that Wilderness users, and the Wilderness itself, will be adversely affected. Indeed, the route chosen by the company is an important access route into the Wilderness and the company's statement acknowledges that these users will be affected.

As stated on the USFS's national website for Wilderness:

> Wilderness is the land *that is* rare, wild places where one can retreat from civilization, reconnect with the Earth, and find healing, meaning and significance

http://www.fs.fed.us/recreation/programs/cda/wilderness.shtml (emphasis in original). In this case, it will be impossible for users of the Superstition Wilderness to "retreat from civilization" when they can view and hear the drilling, construction, travel, and other project operations from inside the Wilderness. This certain adverse effect on the Wilderness and users of the Wilderness is clear an "extraordinary circumstance" that precludes use of a CE.

Even though the project operations will be adjacent, but not directly inside, the Wilderness, does not mean that there will not be any adverse effect on the Wilderness, and the wilderness experience and values for which Congress designation the Superstition Wilderness. The proposed exploration projects are located north of the town of Superior and would directly impact 2 access routes to the popular Rogers Trough Trailhead located on the southern Superstition Wilderness boundary. These access routes are the Whitford Canyon Road (FS route 650) and Queen Creek Canyon Road (FS route 342). The noise and congestion from the drilling of approximately 2 dozen boreholes to a depth of up to 5,000 feet over about a year's time would detract from the overall wilderness experience of getting to and hiking in the Superstitions.

Noise and congestion would be generated by drill rigs, road improvements and maintenance, helicopters, water trucks, generators, light plants, trailers, and crew trucks. A third route, Hewitt Canyon road (FS route 172) just to the west of the proposed projects provides access to Roger's Trough as well as Woodbury Trailhead and also could be impacted.

The USFS must consider the obvious adverse impacts to forest users accessing the Wilderness, as well as adverse impacts to users within the Wilderness and the Wilderness itself. For example, it is likely that many people will not attempt to access the Wilderness due to the truck traffic, safety, noise, dirt, visual blight, and other impacts from the projects' drilling, construction, traffic and other activities.

In addition to affecting access to the Superstitions, areas within the Wilderness itself could be affected. To the northeast, the Bull Basin Trail, together with the Haunted Canyon Trail and historic Tony's Cabin appear to be within about 2 miles of some of the proposed drills sites in the Copper King project area. Higher elevations especially around Government Hill could be affected by noise and visual impacts. To the northwest, Roger Trough appears to be about 2

miles from the Red Top sites, and higher areas around Iron Mountain could be impacted by the drilling and detract from a visitor's right to solitude and a wilderness experience.

Thus, the certain adverse impacts to the Wilderness itself, wilderness values, and users of the Wilderness from the noise, visual intrusions, and other direct adverse effects, constitute an EC precluding the use of a CE.

Regarding other ECs ((vi) American Indians and Alaska Native religious or cultural sites; and (vii) Archaeological sites, or historic properties or areas), the documentation supplied upon which the Forest Service wishes to make a determination to permit these plans of operation are lacking in detail as to whether or not the projects' area contains Archaeological features or is currently significant for cultural use.

The Queen Creek basin is rich in archaeology, history, and cultural associations, none of which would be addressed in a CE. Numerous archaeological sites have been recorded along Queen Creek and its northern tributaries between Whitlow Dam and the Superior area, including a major pueblo that was recently excavated within the Superior town limits. Many sites have also been recorded in the interior of the Superstition Mountains, including the cliff dwellings at Rogers Canyon and Tonto National Monument, the Circlestone Ruin, and a group of masonry compounds in upper Campaign Creek. These sites are generally associated with the prehistoric Hohokam culture (ancestors of the Pima) and the prehistoric Salado culture (pueblo and cliff-dwelling people who may be connected with the Hopi, Zuni, and other modern-day Puebloan communities).

While making a casual scan of the project area on Google Earth, we noticed what looks to be a masonry compound on a hilltop just off one the access roads. Similar features have been found in other parts of the Superstitions, and they are believed to date to the period between approximately A.D. 1150 and 1300. Has this site been recorded by the Forest Service? Is it within the Area of Potential Effect (APE) for any of the proposed actions? We don't know, and the CE process does not accommodate any such information, therefore creating uncertainty as to the effect on archaeological sites. The APE (including access roads) would need to be archaeologically surveyed in order to find out. This area is likely to contain additional archaeological sites associated with the prehistoric Hohokam (ancestors of the Pima) and the prehistoric Salado (pueblo and cliff-dwelling people who may be connected with the Hopi and Zuni as well as the Hohokam). Numerous such sites have been recorded along Queen Creek (especially in the Whitlow Dam area), along US 60 between Florence Junction and Superior, throughout the Superior area itself (including the pueblo recently excavated by ADOT in front of the Mormon church), and in the interior of the Superstitions (including the Rogers Canyon cliff dwellings, the Circlestone Ruin, and a group of compounds in upper Campaign Creek, which is topographically and environmentally similar to the canyons of ridgetops of the Copper King and Red Top project areas).

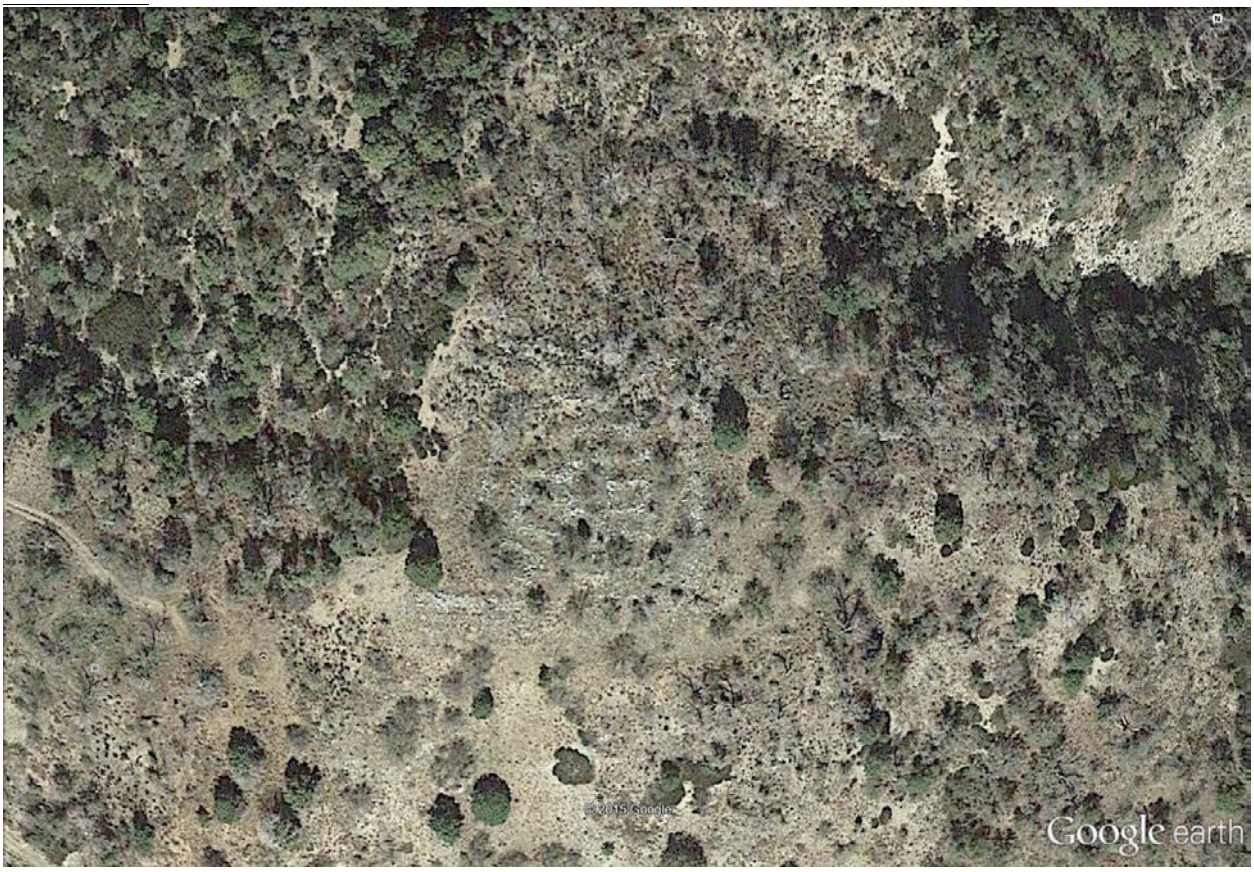
In addition, the area could contain archaeological sites, Traditional Cultural Properties, and sacred places or landscapes associated with the southeastern Yavapai, San Carlos Apache, and/or the Pima. The agency has not provided evidence that such sites are not present within the APE. Numerous professional publications and unpublished archives suggest a good likelihood that

important cultural resources are present within or immediately adjacent to the APE. Consultation with the nearby Native American communities is necessary to understand traditional land uses and cultural affiliations. Thus, there is a good deal of uncertainty regarding the presence and significance of cultural resources – and uncertainty should trigger an EA, not a CE.

We are attaching a Google Earth image (exhibit 1) of the possible hilltop compound. It is a close-up with no identifying locational markers, because such information is confidential, but we would be happy to disclose it to the Forest Service archaeologist if the opportunity arose. At the center of the image are two straight lines of light-colored rock that intersect at a right angle (like a backwards L), partially enclosing an area that contains at least one smaller but very distinct rectangular feature and several other less distinct rock features. This could be a masonry-walled compound (measuring approximately 135 feet east-west by 100 feet north-south) with an associated plaza that contains at least one masonry-walled room (about 18 x 22 feet). The site is located on a high ridgetop that would have afforded excellent visibility over the surrounding country, suggesting that it was an observation point associated with control of a trade/travel route; although it could also be a tactical lookout or a fortified retreat used during times of conflict.

The possibility of un-surveyed or undocumented archeological features could also constitute an Extraordinary Circumstance and thus would trigger, at the very least, an EA. At a minimum, the agency must undertake a detailed analysis of these issues.

Exhibit 1



C. The Agency Failed to Properly Determine the Significance of the Projects' Impacts

i. NEPA Requires the USFS to Analyze the Cumulative Impacts of the Projects In Order to Determine Whether There Is a Potential For Significant Impacts

NEPA's statutory framework discussed above, as well as USFS's own regulatory policies enumerated in the Forest Service Handbook (FSH), Section 1909.15 *et seq.*, require the agency to consider potentially significant environmental effects, including cumulative impacts, before deciding to invoke a categorical exclusion and moving forward with a proposed action in the absence of an EA or EIS. If the proposed action may have a significant effect, USFS must prepare an EIS. *See* 36 C.F.R. § 220.6(c). If, in contrast, USFS is uncertain whether the proposed action may have a significant effect, it must prepare an EA. Id.

The Forest Service cannot rely on a NEPA categorical exclusion if the action may have significant impacts individually or cumulatively. According to NEPA regulations, the categorically excluded action must "not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (emphasis added). The Forest Service's NEPA Handbook similarly provides that if "the proposed action may have a significant environment effect, prepare an EIS," and not a categorical exclusion. FSH 1909.5, Section 31.3.

As the Ninth Circuit has held, plaintiffs "need not show that significant impacts will in fact occur, but raising 'substantial questions' that a project may have significant impacts is sufficient." Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005) (emphasis in original); Citizens for a Better Forestry v. Dept. of Agriculture, 481F.Supp.2d 1059, 1090 (N.D. Cal. 2007) ("invocation of any CE is inappropriate if the agency action may have significant effects on the environment as defined by the CEQ regulations."). "[A]ll that is required to render the CE [Categorical Exclusion] inappropriate is the possibility of significant effects." Citizens for a Better Forestry, 481 F.Supp.2d at 1088 (emphasis added).

As provided in the FSH:

> If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment, prepare an EA. If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS. (36 C.F.R. 220.6(c))

FSH 1909.5, Section 31.3.

> Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded […]. Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS. **Scoping should also**

reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.

Id. (emphasis added). *See* Sierra Club v. United States, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) ("In determining whether an action requires an EA or EIS or is categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts.") (citing 40 C.F.R. §§ 1508.7,1508.8)).

Thus, the Forest Service's first step in analyzing the proposed mining exploration plan is to determine what type of NEPA analysis is appropriate. Before the agency begins to consider whether a proposed activity fits within the specified criteria in which a CE was promulgated, the first question is whether there might be significant effects necessitating an EIS, or if there is uncertainty, an EA. "[A]ll that is required to render the CE inappropriate is the *possibility* of significant effects." Citizens for a Better Forestry, 481 F.Supp.2d at 1087-88. Here, the Forest Service failed to fully consider possible significant effects, and, in particular, the cumulative impacts of nearby current and proposed mining and exploration projects, violating NEPA.

The duty of the Forest Service to analyze cumulative impacts in determining whether the proposed projects may have significant impacts was confirmed in the recent case of in Hells Canyon Preservation Council v. Connaughton, 2013 WL 665134, *6-8 (D. Or. 2013), where the court relied on the scoping sections of 36 C.F.R. §220.6(c) and FSH 31.3 as the basis for requiring the USFS to do at least an EA to determine whether their "may be significant impacts."

> [O]nly where the potential effect on the resource condition is known to be insignificant, and scoping does not reveal otherwise or raise uncertainty, does the action comply with USFS's policy on extraordinary circumstances. Accordingly, only where the potential effects of a proposed action are certain to be insignificant may USFS invoke a categorical exclusion. The determination of the significance of the potential effects requires USFS to consider the cumulative effects and impacts of past, present, and reasonably foreseeable future actions. See FSH 1909.5, Section 31.3.

Hells Canyon, * 6. "[I]n order to provide for extraordinary circumstances under § 1508.4, the agency must consider cumulative impacts. Hells Canyon, * 7.

ii. The USFS Failed To Adequately Consider the Cumulative Impacts of Other Development in the Area of the Projects

In determining that the Red Top and Copper King Projects would pose no potential for significant impacts, the USFS failed to fully analyze the cumulative impacts of other past, present, and reasonably foreseeable future actions in the nearby area. "Cumulative effects" are defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

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

40 CFR § 1508.7. In a cumulative impact analysis, an agency must take a "hard look" at all actions.

> [A]nalysis 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, 608 F.3d 592, 603 (9th Cir. 2010). A cumulative impact analysis must provide a "useful analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. Blue Mountains, 161 F.3d at 1214-15; Kern, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region).

As the Ninth Circuit has further held:

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

inadequate when "it only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007). Note that the requirement for a full cumulative impacts analysis is required in an EA, as well as in an EIS. See Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

At the outset, the cumulative impacts from the two projects must be reviewed together, as they are very close together, and adversely affect the same resources (e.g., air quality, wildlife, recreation, etc.). Indeed, although the agency states that the proejcts are distinct so as to avoid reviewing in one NEPA process, it is clear that the projects are proposed by the same company, in the same general area, using the same basic equipment and plans and should be considered as one project. In any event, even if considered two separate projects, their cumulative impacts must be reviewed.

Further, the USFS is reviewing several other proposals for exploratory drilling and mineral operations on USFS and private lands in the area. These include the Resolution Copper proposal for baseline geotechnical and other drilling currently under review in an EA by the USFS. http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2425252.pdf. Indeed, the agency is currently accepting comments on the Preliminary EA: http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2425266.pdf

Each of these projects involves drilling multiple exploratory holes or other mining-related operations such as roads and support facilities. The noise, traffic, impacts, and physical footprint of these projects, combined, will be substantial. Other drilling activities are already taking place on private land in the same area and these private land projects further exacerbate the environmental impacts of the proposed federal projects.

As held by the Ninth Circuit, however, a brief mention of other proposed projects, without any detailed analysis of their cumulative impacts, violates NEPA. Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010)(requiring "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.").

Thus, the USFS's decision that the Projects are appropriate for a categorical exclusion from detailed NEPA review does not adequately analyze the potential for significant cumulative impacts resulting from the mineral and other activities and actions noted above, in violation of NEPA and its implementing regulations and the agency's own policy requirements.

2. The USFS Must Fully Minimize All Adverse Impacts

The limited review by the agency has not demonstrated that that the USFS has fully minimized all adverse impacts to the environment and public resources in the area. This violates the Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. §551, and the USFS's implementing mining regulations at 36 CFR part 228. The Forest Service's authority to regulate mining operations is governed by the Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. §551, among other laws, which authorizes the agency to promulgate rules and regulations for the national forests in order "to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ."

As noted by the Ninth Circuit in Clouser v. Espy, a leading case on the Forest Service's authority over mining, the Organic Act "specifies that persons entering the national forests for the purpose of exploiting mineral resources 'must comply with the rules and regulations covering such national forests.'" Clouser v. Espy, 42 F.3d 1522, 1529, n.7 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995), *and reh'g. denied*, 116 S. Ct. 18 (1995).

The Supreme Court noted the connection between the Organic Act and the Part 228 regulations: "Through this delegation of authority, the Department of Agriculture's Forest Service has promulgated regulations so that 'use of the surface of National Forest System lands . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources.'" California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 582 (1987) (quoting 36 CFR § 228.1).

In United States v. Richardson, the Ninth Circuit Court of Appeals discussed the relationship between the Organic Act and mining rights, affirming a District of Oregon decision enjoining a particular prospecting method. United States v. Richardson, 599 F.2d 290 (9th Cir. 1979) (limiting mining proponent to non-destructive exploration methods). Both courts upheld the Forest Service's prohibition against "destructive" methods, noting "the Forest Service may require the locator of an unpatented mining claim on national forest lands to use nondestructive methods of prospecting." Id. at 291. Since the dispute arose just before the adoption of the current Forest Service mining regulations, the court based its decision on the "interrelationship of federal statutes concerning the national forests and mining on public lands [, namely] Rule 5.2, 30 U.S.C. § 26, 30 U.S.C. § 612, 16 U.S.C. § 551, and 16 U.S.C. § 478." Id. at 291-92.

In Clouser v. Espy, the Ninth Circuit affirmed the Forest Service's authority to impose significant restrictions on a mining operation, in that case limiting the claimant to access via pack-mule only. Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994). The court rejected the claimant's argument that such a restriction violated federal mining laws:

> In light of the broad language of [Organic Administration Act §] 551's grant of authority, [Organic Administration Act §] 478's clarification that activities of miners on national forest lands are subject to regulation under the statute, and this substantial body of case law, there can be no doubt that the Department of Agriculture possesses statutory authority to regulate activities related to mining—even in non-wilderness areas—in order to preserve the national forests.

Id. at 1530. Recent decisions have reinforced the USFS's broad authority over mining. "[T]he Secretary of Agriculture has long had the authority to restrict motorized access to specified areas

of national forests, including to mining claims. *See* Clouser [v. Espy], 42 F.3d 1522, 1530 (9th Cir. 1994)." Public Lands for the People v. U.S. Dept. of Agriculture, 697, F.3d 1192, 1198 (9th Cir. 2012)(emphasis added)(upholding denial of access routes to mining claims in travel management plan).

Indeed, in Clouser, the court affirmed the ability of the agency to restrict mining even to the point that the project would no longer be economically viable. **"Virtually all forms of Forest Service regulation of mining claims—for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity**." Id. In fact, under the Mining Law itself, the expense associated with compliance with environmental regulations may so increase the cost of mining as to render a claim not valuable. United States v. Kosanke Sand Corp., 12 IBLA 282, 299 (1973). *See also* Great Basin Mine Watch, 146 IBLA 248, 256 (1998).

Thus, any argument that the agency is precluded from meeting its statutory and regulatory obligations because they allegedly make a mine operation "too expensive" is not supported by federal law and applicable court decisions and thus can be rejected.

Further, under the Organic Act, and the 36 CFR Part 228 regulations, the agency cannot approve a mining PoO unless it can be demonstrated that all feasible measures have been taken to "minimize adverse impacts" on National Forest resources, including all measures to protect wildlife and habitat. The "operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat." 36 CFR 228.8(e).

This language was recently relied upon by the federal courts in overturning a USFS-approved mining operation that did not adequately protect wildlife. "The operator also has a separate regulatory obligation to 'take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.' 36 C.F.R.§ 228.8(e)." Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1164 (D. Montana 2010) (Forest Service PoO approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries). "Under the Organic Act the Forest Service must minimize adverse environmental impacts where feasible and must require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat." Id. at 1170. In summary, the Forest Service's Organic Act requires that the agency "must . . . ensure that its approval of a plan or project does not result in the 'destruction' and 'degradation' of the public forests." Clouser v. Madigan, 1992 WL 694368, at *4 (D. Or. 1992), *aff'd sub nom.* Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994).

The USFS failed to meet these mandates in this case. The agency appears to have acceded to DSR's desires for all, or almost all, of the proposed drill sites and access routes. No mention is made of keeping all operations away from visual and audible impacts on the Wilderness, for example.

3. The Agency Must Comply with the National Historic Preservation Act (NHPA) and Other Requirements to Protect Native American Interests and Resources.

The USFS has not provided evidence that it has complied with the NHPA and requirements regarding Native American interests and resources. Due to the likelihood of cultural and religious sites and resources in the APE, it would be a violation of the NHPA (and NEPA as noted above) to approve the projects without the required review of cultural/historical resources.

Federal guidelines require consultation with modern Native American communities who may have cultural ties to specific archaeological sites and/or geographical locations, including traditional cultural places that are still used for ceremonies, food-gathering, and acquisition of medicinal plants. In this case, the modern communities of interest may include the Pima, Hopi, Zuni, Yavapai, and Apache.

> [T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources. *See* 16 U.S.C. § 470a(d)(1)(A) (requiring the Secretary to "promulgate regulations to assist Indian tribes in preserving their particular historic properties" and "to encourage coordination ... in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties"); *see also Nat'l Indian Youth Council v. Watt,* 664 F.2d 220, 226 (10th Cir.1981) ("The purpose of the National Historic Preservation Act (NHPA), is the preservation of historic resources."). Early consultation with tribes is encouraged by the regulations "to ensure that all types of historic properties and all public interests in such properties are given due consideration...." 16 U.S.C. § 470a(d)(1)(A).

Te-Moak Tribe of Western Shoshone v. U.S. Department of the Interior, 608 F.3d 592, 609 (9th Cir. 2010).

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c)**.** The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). *See also* 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.")

The Advisory Council on Historic Preservation ("ACHP"), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. *See* National Center for Preservation Law v. Landrieu, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam,* 635 F.2d 324

(4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. Id. *See* National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of the Projects, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See* Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2). *See also* Pueblo of Sandia, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties). Consultation "must be 'initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR § 800.2(c)(2)(ii). "The agency official **shall ensure that the section 106 process is initiated early in the undertaking's planning**, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added).

The NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). *See also* Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

The USFS must also protect archeological and grave resources, Sacred Sites and Native American religious and cultural uses pursuant to the above laws and requirements as well as: (1) the American Indian Religious Freedom Act (AIFRA), 42 U.S.C. 1996 et seq.; (2) the Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470aa-mm ; and (3) the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq.

Also, under the Tonto Forest Plan:

> For any proposed surface disturbing activity, the following standards will apply:
>
> 1. The Forest Service will comply with the National Historic Preservation Act (as amended) and the PA.
>
> 2. The standards specified in the PA will be followed. Where the settlement document does not specify standards, those in the Forest Service Manual and Handbook will apply.
>
> 3. During the conduct of undertakings, the preferred management of sites listed in, nominated to, eligible for, or potentially eligible for the National Register is avoidance and protection. Exceptions may occur in specific cases where consultation with the SHPO indicates that the best use of the resource is data recovery and interpretation.
>
> 4. Sites listed in, nominated to, eligible for, or potentially eligible for the National Register will be managed during the conduct of undertakings to achieve a "No Effect" finding, in consultation with the State Historic Preservation Officer.

Forest Plan Amendment No. 21, 5/3/1995, Replacement Page – 38-1.

Under NEPA, the NHPA, and the other laws, policies and requirements noted herein, the USFS cannot approve the projects until full government-to-government consultation with all potentially affected Tribes has been completed.

4. Compliance with the Forest Plan and NFMA is Required

It also appears that approval of the projects would violate the National Forest Management Act (NFMA). The NFMA requires all site-specific actions authorized by the Forest Service to be consistent with Forest Plan standards and guidelines. Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 n.4 (9th Cir. 1998). Forest Service authorization of mining and mineral exploration must comply with all Forest Plan and NFMA requirements. *See* Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *7-*10 (D. Oregon 2006) (finding ROD and PoO approval for mining violated Forest Plan and other standards); Rock Creek Alliance v. U.S. Forest Service, 703 F.Supp.2d 1152, 1187, n. 23 (D. Mont. 2010)(same).

First, as noted above, the Forest Plan requires that: "Sites listed in, nominated to, eligible for, or potentially eligible for the National Register will be managed during the conduct of undertakings to achieve a 'No Effect' finding, in consultation with the State Historic Preservation Officer." That has not yet occurred here.

Secondly, the Tonto National Forest is currently revising its Travel Management Plan (http://data.ecosystem-management.org/nepaweb/fs-usda-pop.php?project=28967). A draft DEIS has been published on this action. At least one of the alternatives for this plan contemplated closing several roads within the project area. For example a user created road (FS road 2448), would be closed. Yet it appears that one of the projects would use this road, and drill

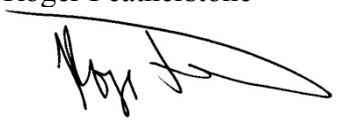
on/adjacent to it. There is no discussion about how this project would impact that ongoing Forest Service action and potential closure of the road.

CONCLUSION

We appreciate the opportunity to comment on these Projects. Please continue to include Arizona Mining Reform Coalition, the Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Earthworks, Maricopa Audubon Society, Native Youth Unite, Patagonia Area Resource Alliance, Save the Scenic Santa Ritas, Save Tonto National Forest, Sierra Club, Grand Canyon Chapter, and Spirit of the Mountain Runners, as interested parties and direct all future public notices and documents to us at the addresses below.

Sincerely,

Roger Featherstone



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