Arizona Mining Reform Coalition – San Carlos Apache Tribe – Access Fund – Center for Biological Diversity – Concerned Citizens and Retired Miners Coalition – Concerned Climbers of Arizona – Earthworks – Environment Arizona – Maricopa Audubon Society – Native Youth Unite – Save the Scenic Santa Ritas – Sierra Club, Grand Canyon Chapter – Spirit of the Mountain Runners – Tucson Audubon Society

with John Krieg and Roger Featherstone as individuals

Via Email, Facsimile, and Mail

June 23, 2014

Mr. Neil Bosworth, Forest Supervisor
Tonto National Forest
2324 East McDowell Road
Phoenix, AZ 85006,

Re: Scoping Comments on **Resolution Baseline Hydrological & Geotechnical Data Gathering Activities**:

Dear Supervisor Bosworth:

Per the U.S. Forest Service's ("USFS") May 13, 2014 Interested Party public scoping notice letter, this letter (and attachments) contain comments on the proposed Resolution Baseline Hydrological & Geotechnical Data Gathering Activities (the "Project") and the request by Resolution Copper (and its parents or affiliates such as Rio Tinto)("Resolution") for approval of a Plan of Operations ("PoO") for the Project.

These comments are submitted on behalf of Arizona Mining Reform Coalition ("AMRC"), the San Carlos Apache Tribe, the Access Fund, Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Earthworks, Environment Arizona, Maricopa Audubon Society, Native Youth Unite, Save the Scenic Santa Ritas, the Sierra Club – Grand Canyon (Arizona) Chapter and the Spirit of the Mountain Runners, Tucson Audubon Society, John Krieg, and Roger Featherstone, and supplement and incorporate any prior or related comments from these organizations and/or individual members of these organizations regarding this Project or the related mining proposals submitted by Resolution. Any or all of these organizations and individuals may also submit additional comments apart from these comments that are also incorporated into these comments. We also incorporate by reference and in total, comments titled *Scoping Comments of The Inter Tribal Council of Arizona, Inc. on Resolution Baseline Hydrological & Geotechnical Data Gathering Activities* submitted by the Inter Tribal Council of Arizona.

AMRC works in Arizona to improve state and federal laws, rules, and regulations governing hard rock mining to protect communities and the environment. AMRC works to hold mining operations to the highest environmental and social standards to provide for the long term

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

The **San Carlos Apache Tribe**, a federally recognized Indian Tribe pursuant to the Apache Treaty of 1852, July 1, 1852, 10 Stat. 979, and Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). The Resolution Copper's Proposed Plan of Operations is located within the ancestral lands of the San Carlos Apache Tribe, just west of the San Carlos Apache Reservation. The Tribe's Reservation provides a permanent home to more than 12,000 enrolled Tribal members. The Tonto National Forest has long been aware of the religious, cultural, and historic importance of the Forest Service lands, which Resolution plans to exploit, to the Tribe. Tonto National Forest has also long been aware of the Tribe's vigorous opposition to Resolution Copper's mining venture. Resolution Copper's Proposed Plan of Operations will adversely impact the Apaches' ability to harvest and use certain plants within the Operations area for ceremonial, religious, medicinal, and sustenance purposes.

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

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

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

The **Concerned Climbers of Arizona** was organized in 2010 for the purpose of preserving climbing access and the climbing environment. The group advocates for continued recreational access to climbing area that are threatened by development or other forms of encroachment.

Based in Phoenix, Arizona, the Concerned Climbers of Arizona is the primary group representing the interests of rock climbers in central Arizona.

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

Environment Arizona is a state-wide citizen based environmental advocacy organization working for clean air, clean water and open space. Environment Arizona is a proud member of the Arizona Mining Reform Coalition and has worked to educate the public and decision makers about preserving many areas in Arizona from destructive and polluting mining practices, including in the Tonto National Forest, the Oak Flat Campground and in the surrounding community.

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

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.

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.

Sierra Club is one of the nation's oldest and most influential grassroots organizations whose mission is "to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments." Sierra Club has more than 2.4 million members and supporters with 35,000 in Arizona as part of the Grand Canyon (Arizona) Chapter. Our members have long been committed to protecting and enjoying the Tonto National Forest and have a significant interest in the proposed Resolution Copper Mine and related activities.

The **Spirit of the Mountain Runners** are San Carlos Apache and supporters that are protecting their spiritual and cultural heritage on *Dzil Nchaa Si'an*, Oak Flat and other places important to

their heritage. Among other activities, the Spirit of the Mountain Runners hold and annual sacred run from Oak Flat to the top of Mount Graham. The Spirit of the Mountain Runners celebrate the sacred nature of all of *Dzil Nchaa Si'an* and Oak Flat and work to protect them by their actions.

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

As shown in more detail below, the US Forest Service's ("USFS's") review outlined in the scoping letter 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") must be prepared, due to the potential for significant impacts from the Project alone, and especially when viewed with its cumulative impacts from other and/or related activities as well as connected actions. Whether the agency decides to prepare an Environmental Assessment ("EA") first, or directly prepare an EIS, the requirements noted herein must be met for either document.

I. THE EIS or EA MUST FULLY ANALYZE ALL DIRECT, INDIRECT, AND CUMULATIVE IMPACTS – INCLUDING FROM RESOLUTION'S MAIN MINE PROPOSAL

The scoping letter states that the agency will unilaterally limit its review of direct, indirect, and cumulative environmental impacts and ignore the impacts from Resolution's proposed large mine which is directly linked to the Project. Yet under the National Environmental Policy Act ("NEPA"), the USFS must fully review the impacts from all "past, present, and reasonably foreseeable future actions." These are the "cumulative effect/impacts" under NEPA. To comply with NEPA, the USFS must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 1502.16, 1508.8, 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. Cumulative effects are defined as:

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

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

> An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. … Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

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

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

As the Ninth Circuit has further held:

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

not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

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

NEPA regulations also require that the agency obtain the missing "quantitative assessment" information:

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

40 CFR § 1502.22. "If there is 'essential' information at the plan- or site-specific development and production stage, [the agency] will be required to perform the analysis under § 1502.22(b)." Native Village of Point Hope v. Jewell, --- F.3d ----, 2014 WL 223716, *7 (9th Cir. 2014). Here, the adverse impacts from the Project when added to other past, present or reasonably foreseeable future actions is clearly essential to the USFS' determination (and duty to ensure) that the Project complies with all legal requirements and minimizes all adverse environmental impacts.

"[W]hen the nature of the effect is reasonably foreseeable but its extent is not, we think that the agency may not simply ignore the effect. The CEQ has devised a specific procedure for 'evaluating reasonably foreseeable significant adverse effects on the human environment' when

'there is incomplete or unavailable information.' 40 C.F.R. § 1502.22." Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 549-550 (8th Cir. 2003) (emphasis in original).

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

At the outset, the scoping letter is based on a seriously deficient view regarding its duties to review these impacts. The agency admits that Resolution has proposed a large-scale mine in the area – indeed this Project is part of that proposal. Yet, the scoping letter states that the USFS does not intend on reviewing the cumulative impacts (or any impacts at all) from Resolution's proposed mine.

> Resolution has submitted other minerals-related proposals to the Forest, such as the General Plan of Operations. However, **the impacts of that and other proposals would be evaluated in separate NEPA reviews.**

Scoping letter at 4 (emphasis added). The agency's attempt to bypass review of what clearly is a proposed mining plan for the "General Mine" (or "Main Mine") violates NEPA. The fact that the agency has yet to complete its review of this proposed Main Mine does not mean that it is not "reasonably foreseeable" under NEPA, as the company already acknowledges it as a viable "proposed project."

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

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

The Ninth Circuit has clearly held that proposed mining projects must be fully reviewed in NEPA documents for nearby projects. *See* Te-Moak Tribe of Western Shoshone v. U.S. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations). Even projects that have not reached the formal proposal stage (which is not the case here, since Resolution has

already submitted its Main Mine proposal to the USFS) are considered "reasonably foreseeable" and must be reviewed in this EA or EIS.[1]

> [P]rojects need not be finalized before they are reasonably foreseeable. "NEPA requires that an EIS engage in reasonable forecasting. Because speculation is ... implicit in NEPA, [ ] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." Selkirk, 336 F.3d at 962 (internal quotation marks and citation omitted). As the Environmental Protection Agency (EPA) also has noted, "reasonably foreseeable future actions need to be considered even if they are not specific proposals." EPA, Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents, Office of Federal Activities, 12–13 (May 1999), available at http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf. (Attachment A)

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

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

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

In New Mexico ex rel. Richardson v. Bureau of Land Management, 565 F.3d 683, 718-19 (10th Cir. 2009), the Tenth Circuit determined that future mineral activity was "reasonably foreseeable" due to the fact that "considerable exploration has already occurred on parcels adjacent to the [challenged] parcel," a developable mineral deposit "is known to exist beneath

[1] On June 4, 2014, the Arizona Mining Reform Coalition submitted a Freedom of Information Act (FOIA) (2014-FS-R3-03882-F) request to the Tonto National Forest to receive the latest version of the Main Mine PoO and all related documents. To date, the USFS has not provided the requested documents.

these parcels," and the company "has concrete plans to build" a mineral project on these lands. All of these conditions are present here – as acknowledged by Resolution. http://resolutioncopper.com/the-project/mine-plan-of-operations/ (viewed June 22, 2014) (Attachment B)

As such, Resolution's Main Mine, along with the "other minerals-related proposals to the Forest" submitted by Resolution, scoping letter at 4, must be fully reviewed in the Draft EA/EIS. This is in addition to any other "past, present, or reasonably foreseeable future activity" in the area (e.g., grazing, ORV use, road use, etc.). For example, federal and state agencies are planning a major re-route/improvement of Highway 60 in the immediate area of the Project, with obvious effects on natural resources, recreation, etc. *See* ADOT, "U.S. Route 60 Superior to Globe Design Concept and Environmental Impact Study," https://www.azdot.gov/projects/south-central/US-60-Superior-to-Globe-Design-Concept-and-EIS (viewed June 22, 2014) (Attachment C); ADOT, "Scoping Report, US 60 Superior to Globe," (Attachment D).

The scoping letter is wrong to argue that because this Project is aimed at providing technical analysis for the Main Mine, this means that the Main Mine is somehow not "reasonably foreseeable." Scoping letter at 5. NEPA does not allow the agency to bifurcate its review on these grounds. The USFS cannot ignore the undisputed fact that the Main Mine is a proposal that has been submitted by Resolution.

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

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

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

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

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

"A Milestone: Filing our Mine Plan of Operations", Resolution News Release dated Nov. 22, 2013. http://resolutioncopper.com/in-the-news/a-milestone-filing-our-mine-plan-of-operations/ (viewed June 22, 2014)(Attachment F). Indeed, Resolution has already begun initial work on the Main Mine (on its private lands). *See* "Sinking America's Deepest Shaft, Development and Blast Applications for Resolution Copper's #10 Shaft," Engineering and Mining Journal, April 2014, at 28-32 (Attachment G).

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

Chapter One of the Main Mine PoO also lists additional activities related to Main Mine that have been proposed and/or approved (Tables 1.3-2 and 1.1.-3). Shown at: http://49ghjw30ttw221aqro12vwhmu6s.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/resolution-copper-plan-of-operations-volume-one-introduction.pdf (viewed June 22, 2014) (attachment H). Each of these activities are either direct, indirect, or cumulative impacts that must be fully reviewed.

Thus, the EA/EIS must fully consider all the impacts from the proposed Main Mine, along with all other past, present, and reasonably foreseeable future activities.

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

In addition to, and separate from, the agency's duty to review the cumulative and other impacts from the Main Mine, NEPA requires that the Main Mine and the Project be considered in one EA/EIS (certainly an EIS in this case) as a "connected action" under NEPA. This is because the Main Mine and the Project are part of one interdependent mining project, as acknowledged by Resolution. *See* Table 1.3-2 of the Main Mine PoO http://49ghjw30ttw221aqro12vwhmu6s.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/resolution-copper-plan-of-operations-volume-one-introduction.pdf (Attachment I) In that PoO Table and associated text, Resolution admits that the "Baseline Hydrological & Geotechnical Data Gathering Activities" "is being conducted in support of the Resolution Copper Project [the Main Mine]." Main Mine PoO at Vol. 1, p. 5.

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

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

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

That is certainly the case here, as acknowledged by Resolution, that the Project is an integral part of the Main Mine, and would not occur but for the Main Mine. Similarly, as also admitted by Resolution, the Main Mine would not occur without this Project. As such, they are considered "connected actions" under NEPA and must be considered in one EIS.

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

The scoping letter states that: "Resolution is entitled to conduct operations that are reasonably incidental to exploration and development of mineral deposits on its unpatented mining claims pursuant to U.S. Mining Laws." Scoping letter at 1. The agency further states, that due to this alleged "entitlement," the agency must approve the Project and cannot choose the no action alternative: "[D]ue to the statutory rights afforded by the U.S. Mining Laws; the Forest Service cannot select the *No Action* alternative as a preferred alternative." Scoping letter at 4. "The statutory right of Resolution to mine mineral resources on federally administered lands is recognized in the *General Mining Law of* 1872." Id.

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

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

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

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

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

Thus, the USFS must require the company to submit right-of-way or other special use permit authorizations and require that all mandates of Title V of the Federal Land Policy Management Act ("FLPMA") and its implementing regulations are adhered to (e.g., no permit can be issued unless it can be shown that the issuance of the permits is in the best interests of the public, payment of fair market value, etc.). *See* 36 CFR Part 251 (USFS special use permit regulations).

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

Roads, even those across public land related to a mining operation, are not covered by statutory

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

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

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

Operations not conducted on "valid and perfected claims" must comply with all of FLPMA's requirements, including Title V's SUP/ROW requirements. Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 49-51 ("[I]f there is no valid claim and the claimant is doing more than engaging in initial exploration activities on lands open to location, the claimants' activity is not explicitly protected by the Mining Law."). Id. at 50.

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

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

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

FLPMA, § 1765(b).

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

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

The federal courts have recently and repeatedly held that the USFS not only has the authority to consider the adverse impacts on lands and waters outside the immediate ROW corridor, it has an obligation to protect these resources under FLPMA. In County of Okanogan v. National Marine

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

Fisheries Service, 347 F.3d 1081 (9th Cir. 2003), the court affirmed the Forest Service's imposition of mandatory minimum stream flows as a condition of granting a ROW for a water pipeline across USFS land. This was true even when the condition/requirement restricted or denied vested property rights (in that case, water rights). Id. at 1085-86.

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

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

The Department of Interior, interpreting FLPMA V and its similar right-of-way regulations, has held that: "A right-of-way application may be denied, however, if the authorized officer determines that the grant of the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed or if the grant of the proposed right-of-way would not be in the public interest or would be inconsistent with applicable laws." Clifford Bryden, 139 IBLA 387, 389-90 (1997) 1997 WL 558400 at *3 (affirming denial of right-of-way for water pipeline, where diversion from spring would be inconsistent with BLM wetland protection standards).

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

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

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

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

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

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

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

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

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

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

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

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

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

As noted above, the scoping letter states that: "Resolution is entitled to conduct operations that are reasonably incidental to exploration and development of mineral deposits on its unpatented mining claims pursuant to U.S. Mining Laws." Scoping letter at 1. The agency further states, that due to this alleged "entitlement," the agency must approve the Project and cannot choose the no action alternative: "[D]ue to the statutory rights afforded by the U.S. Mining Laws; the Forest Service cannot select the *No Action* alternative as a preferred alternative." Scoping letter at 4. "The statutory right of Resolution to mine mineral resources on federally administered lands is recognized in the *General Mining Law of* 1872." Id.

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

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

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

> [A]lthough a claimant may explore for mineral deposits before perfecting a mining claim, without a discovery, the claimant has no right to the property against the United States or an intervenor. 30 U.S.C. § 23 (mining claim perfected when there is a "discovery of the vein or lode"); *see also* Cole v. Ralph, 252 U.S. 286, 295–96 (1920)) ; Waskey v. Hammer, 223 U.S. 85, 90 (1912) (noting that discovery is "a prerequisite to the location of the claim"); Am. Colloid Co. v. Babbitt, 145 F.3d 1152, 1156 (10th Cir.1998) ("Before one may obtain any rights in a mining claim, one must 'locate' a valuable deposit of a mineral."); Mineral Policy Ctr. v. Norton, 292 F.Supp.2d 30, 48 (D.D.C.2003) ("'A mining claim does not create any rights against the United States and is not valid unless and until all requirements of the mining laws have been satisfied.' " (quoting Skaw v. United States, 13 Cl.Ct. 7, 28 (1987))).

Freeman v. U.S. Dept. of Interior, 2014 WL 1491248, *3 (D.D.C. 2014).

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

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

292 F.Supp.2d at 47 (emphasis added). Although the "UUD standard" was at issue in that case

(BLM's duty to "prevent unnecessary or undue degradation" under FLPMA), the holding that development "rights" under the mining laws only apply to lands covered by valid claims applies equally to the USFS and BLM. The court was equally clear as to what was required to "perfect" a mining claim:

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

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

> **[b]efore an operator perfects her claim, because there are no rights under the Mining Law that must be respected, BLM has wide discretion in deciding whether to approve or disapprove of a miner's proposed plan of operations.**

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

The fact that Resolution proposes to use mining claims for ancillary operations does not mean, automatically, that each mining claim is invalid. The Mining Law does not prohibit any and all uses of a mining claim for milling or processing activities. Indeed, a 1955 enactment of Congress specifically authorizes the use of mining claims for "prospecting, mining or processing operations and uses reasonably incident thereto." Surface Resources Act of 1955, 30 U.S.C. § 601,603, 611-615.[3]

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

Consequently, if a mining claim is proposed to be used solely for activities that are "reasonably incident" to extracting minerals from other lands, it must be supported by the requisite discovery.

[3] As noted above, for Resolution/USFS to consider the Project under alleged "entitlements" under the Mining Law, even with the limitation on those "entitlements" noted herein, the Project must be "reasonably incident" to a mineral development operation – something the Scoping letter argues is not the case (in an attempt to avoid NEPA review of the Main Mine).

This is especially true because federal courts have long and consistently held that a mining claimant's right to use an unpatented mining claim is limited to purposes connected with the removal of minerals from that claim, and not for other purposes. *See, e.g.,* Teller v. United States, 113 F. 273 (8th Cir. 1901); United States v. Rizzinelli, 182 F. 675 (D. Idaho 191 0). As one mining industry author stated:

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

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

The leading mining industry treatise stated:

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

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

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

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

> Operations neither conducted pursuant to valid mining claims nor otherwise explicitly protected by FLPMA or the Mining Law (*i.e.*, exploration activities,

> ingress and egress, and limited utilization of mill sites) must be evaluated in light of Congress's expressed policy goal for the United States to "receive fair market value of the use of the public lands and their resources." 43 U.S.C. § 1701(a)(9).

Mineral Policy Center, at 51.

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

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

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

Center for Biological Diversity, 162 IBLA 268, 278 (2004). "[T]he location of a mining claim does not render a claim presumptively valid and the Department may require a claimant to provide evidence of validity before approving an MPO or allowing other surface disturbance in connection with the claim." Id. at 281. As stated in the USFS Minerals Manual: "**In order to successfully defend rights to occupy and use a claim** for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the USFS. These **require a claimant to: … 2. Discover a valuable mineral deposit. … (and) 7. Be prepared to show evidence of mineral discovery**." FSM 2813.2 (emphasis added).

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

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

FSM § 28115.

> [U]npatented claims amount to a potential property interest, since it is the discovery of a valuable mineral deposit and satisfaction of statutory and regulatory requirements that bestows possessory rights. *See* Ickes v. Underwood, 141 F.2d 546, 548–49 (D.C.Cir.1944) (until there has been a determination that there has been a valuable discovery, claimants had only a gratuity from the United States); Payne v. United States, 31 Fed.Cl. 709, 711 (1994) (rejecting plaintiff's argument that in the absence of a challenge to validity, the court must take at face value their assertion that claims are supported by an adequate mineral discovery).

Freeman v. U.S. Dept. of Interior, 2014 WL 1491248, *4 (D.D.C. 2014). The holding of this case is instructive, as the court affirmed the rule "rejecting plaintiff's argument that in the absence of a challenge to validity, the court must take at face value their assertion that claims are supported by an adequate mineral discovery."

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

Although a complete mineral report and claim validity verification is not required for every single proposal, the agency must have evidence that the claims meet the legal prerequisites to establish rights under the Mining Law. At a minimum, evidence needs to be in the record supporting valid rights under the mining law **if** the agency reviews and approves land uses under an assumed right under the Mining Law – rights that accrue only if based on valid claims as shown by the legal decisions noted herein. As stated in the USFS Minerals Manual: "In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the USFS. These require a claimant to: … 2. Discover a valuable mineral deposit. … (and) 7. **Be prepared to show evidence of mineral discovery**." FSM 2813.2 (emphasis added).

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

VI. THE DRAFT EA OR EIS MUST FULLY EXPLAIN ALL BASELINE CONDITIONS PRIOR TO ANALYZING OR APPROVING THE PROJECT

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

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

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

Half Moon Bay Fisherman's Mark't Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). "In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F.Supp.2d 1113, 1126 (D. Nev. 2008). "The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council of Environmental Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999).

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

consider an important aspect of the problem, resulting in an arbitrary and capricious decision." Id. at 1085.

In Idaho Conservation League, 2012 WL 3758161 (D. Idaho 2012), the Idaho federal court concluded that the Forest Service acted arbitrarily and capriciously by authorizing exploratory hardrock mineral drilling without fully analyzing the baseline groundwater and hydrology. Id. at *17. Such analysis should include "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." Idaho Conservation League, 2012 WL 3758161, at *16. See also Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011).

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

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

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

The Project poses potentially significant risks to wildlife (including indicator, sensitive, threatened and endangered species) and wildlife habitat, groundwater and surface water resources, cultural/historical, air quality, recreation, and other resources. It should be noted that, without the required baseline analysis, it is impossible to fully ascertain the level of threats to public land resources. Because of the potentially significant impacts, an EIS is required.

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

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

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

> The [agency] cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. See Alaska Ctr. for Env't v. United States Forest Serv., 189 F.3d 851, 859 (9th Cir.1999). If an agency, such as the Corps, opts not to prepare an EIS, it must put forth a "convincing statement of reasons" that explain why the project will impact the environment no more than insignificantly. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir.1998). This account proves crucial to evaluating whether the Corps took the requisite "hard look" at the potential impact of the dock extension. Id.
>
> "[A]n EIS must be prepared if 'substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.' " Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir.1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992)). "To trigger this requirement a 'plaintiff need not show that significant effects will in fact occur,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient." Id. at 1150 (quoting Greenpeace, 14 F.3d at 1332).
>
> The Council on Environmental Quality has adopted regulations governing the implementation of NEPA. In determining whether a federal action requires an EIS because it significantly affects the quality of the human environment, an agency must consider what "significantly" means. The regulations give it two components: context and intensity. 40 C.F.R. § 1508.27. Context refers to the setting in which the proposed

> action takes place, in this case Cherry Point. See id. § 1508.27(a). Intensity means "the severity of the impact." Id. § 1508.27(b).
>
> In considering the severity of the potential environmental impact, a reviewing agency may consider up to ten factors that help inform the "significance" of a project, such as the unique characteristics of the geographic area, including proximity to an ecologically sensitive area; whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts; the level of uncertainty of the risk and to what degree it involves unique or unknown risks; and whether the action threatens violation of an environmental law. Id. § 1508.27(b)(3), (5), (7), (10). We have held that one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances. See Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir.2001).

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

Thus, in this case, the agency's admitted failure to fully review all direct, indirect, and cumulative impacts, and connected and cumulative actions, will necessarily render the EA deficient. As such, the USFS cannot issue a FONSI. Without the required review of baseline information, and the potential direct, indirect, and cumulative impacts of the Project, any decision not to prepare an EIS would be without sufficient evidentiary support.

VIII. THE DRAFT EA OR EIS MUST INCLUDE AN ADEQUATE MITIGATION PLAN, INCLUDING A DETAIELD REVIEW OF THE IMPACTS FROM, AND EFFECTIVENESS OF, ANY MITIGATION MEASURES

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

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

> An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. Compare Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998)

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

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

IX. THE DRAFT EA OR EIS MUST FULLY REVIEW ALL REASONABLE ALTERNATIVES

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

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

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

benefit balance." NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place. Informed and meaningful consideration of alternatives--including the no action alternative-- is thus an integral part of the statutory scheme.

Moreover, consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. See id. § 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement.

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

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

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

X. THE FOREST SERVICE MUST MINIMIZE ALL ADVERSE IMPACTS FROM THE PROJECT AND ENSURE COMPLIANCE WITH ALL ENVIRONMENTAL AND PUBLIC LAND LAWS

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

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

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

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

The agency must demonstrate that all feasible means have been required to minimize all adverse impacts to all potentially affected resources. For example, the Ninth Circuit Court of Appeals

recently held that the Forest Service had the authority to strictly limit mining claimants' vehicular access to mining claims. Public Lands for the People v. U.S. Dept. of Agriculture, 697 F.3d 1192 (9th Cir. 2012). As held by the court:

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

Id. at 1197.

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

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

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

Northwest Environmental Defense Center v. Brown, 640 F.3d 1063, 1070-71 (9th Cir. 2011) (culverts directing stormwater flows are point sources subject to NPDES permitting) overturned on other grounds Decker v. Nw. Envtl. Def. Ctr., 133 S.Ct. 1326 (2013). The Ninth Circuit recently reiterated, in light of the Supreme Court's and its previous decision in those cases, that:

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

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

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

Compliance with the NFMA is also required. The NFMA requires that all site-specific actions authorized by the USFS be consistent with Forest Plan standards and guidelines. 16 U.S.C. § 1604(i). "Pursuant to the NFMA, the Forest Service must demonstrate that a site-specific project would be consistent with the land resource management plan of the entire forest." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1377 (9th Cir.1998). "[W]e must affirm the district court's decision to enjoin the [Project] if that [Project] is inconsistent with the Land Management Plan." Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068 (9th Cir. 1998). "All site specific actions must be consistent with adopted forest plans." Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 966 (9th Coir. 2002). "Specific projects . . . must be analyzed by the Forest Service and the analysis must show that each project is consistent with the plan." Neighbors of Cuddy Mountain v. Alexandar, 303 F.3d 1059, 1062 (9th Cir. 2002).

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

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

XI. USFS MUST FULLY ANALYZE THE PROJECT'S IMPACTS TO THREATENED AND ENDANGERED SPECIES.

NEPA requires that the USFS fully disclose the Project's impacts on all potentially affected threatened and endangered species and their designated critical habitats. See 40 C.F.R. § 1508.27(b)(9). Impacts to threatened or endangered species short of "jeopardy" or the "destruction or adverse modification of critical habitat" (the standard used under Section 7 of the

ESA, 16 U.S.C. § 1536(a)(2)) may still be significant and must be examined under NEPA. This includes engaging in the ESA Section 7 consultation process with the U. S. Fish and Wildlife Service (FWS).

XII. USFS MUST FULLY COMPLY WITH THE NATIONAL HISTORIC PRESERVATION ACT (NHPA)

The agency must fully comply with the NHPA. It would be a violation of the NHPA and NEPA to complete the EA/EIS before consultation and a complete review of cultural/historical resources has been completed.[4]

> [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.")

[4] The Tonto National Forest and the San Carlos Apache Tribe are jointly conducting an ethnographic survey of the entire Oak Flat area potentially impacted by Resolution Copper's mine plans included this project area. The survey should be allowed to run is course before scoping moves ahead. The Yavapai people also have a religious, cultural and traditional connection to this area, though they view it differently than the Apache and should also be consulted about this project.

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 Project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See* 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 the NFMA and NHPA, thus, there must be "no effect" to these resources.

Further, it appears that lands to be used or disturbed by the Project are currently the subject of an Ethnographic Study conducted by or for the USFS and/or Resolution to attempt to ascertain the cultural, religious, and historical resources of the area. Under NEPA, the NHPA, and the other laws, policies and requirements noted herein, the USFS cannot approve this Project until the Ethnographic Study has been completed and subject to public review (as part of the NEPA process) and full government-to-government consultation with all potentially affected Tribes.

XIII. WE RESERVE THE RIGHT TO SUPPLIMENT THESE COMMENTS IF THE SCOPING COMMENT DEADLINE IS EXTENDED BEYOND THE CURRENT JUNE 23 DEADLINE

On June 4, 2014, the Arizona Mining Reform Coalition send a Freedom of Information Act (FOIA) request to the USFS (Attachment K) (2014-FS-R3-03882-F) asking for:

> "…the most recent copy of a proposed "General Plan of Operations" for the Resolution Copper Mine Project proposed by Resolution Copper Mining LLC and submitted to the Tonto National Forest initially on or about November 15, 2013 along with all appendices and supporting documents." And, that, …"This request includes all agency records or communications, between the Resolution Copper Mining LLC, its parent Rio Tinto, and any of its affiliates and the Tonto National Forest or other organizational units within the Forest Service or the Department of Agriculture in the possession of the Tonto National Forest regarding

the proposed General Plan of Operation for the Resolution Copper Mine Project from November 1, 2013 to the date this FOIA request is satisfactorily completed."

On June 5, 2014, the Arizona Mining Reform Coalition sent a second FOIA request (attached) (2014-FS-R3-03883-F)[5] (Attachment L) asking for:

> "…all records and documents regarding the Resolution Copper Baseline Hydrological & Geotechnical Data Gathering Activities Plan for the Resolution Copper Mine Project (the subject of the May 13th scoping letter) from June 1, 2013 to the date this FOIA request is satisfactorily completed. This request includes all agency records and communications, between the Resolution Copper Mining LLC, its parent Rio Tinto, and any of its affiliates and the Tonto National Forest or other organizational units within the Forest Service or the Department of Agriculture in the possession of the Tonto National Forest regarding the Resolution Baseline Hydrological & Geotechnical Data Gathering Activities Plan for the Resolution Copper Mine Project since June 1, 2013."

As AMRC explained in a letter to USFS dated June 11, 2014, *Request for Extension of Deadline for Scoping Comments on* ***Resolution Baseline Hydrological & Geotechnical Data Gathering Activities*** (Attachment M)**:**

> "The purpose of the NEPA process is to provide you, the decision-maker in this case, with a complete, robust, and wide range of alternatives to assist you in your decision. Adhering to a timeline that will not allow this to happen would not serve the public or the Forest well."

On June 20, 2014, Chairman /Terry Rambler of the San Carlos Apache Tribal Council send a letter to USFS (Attachment N) asking for an extension to the comment deadline

> "... the Notice and the concurrent legal affects of that Notice runs counter to the MOU that the Tribe signed with TNF in June 2013, regarding the ongoing Ethnographic-Ethnohistorical Survey. The purpose of the Survey is to inform the very scoping that is to be undertaken by the Baseline Activities. It is premature to go to this scoping while the Ethnographic-Ethnohistorical Survey is incomplete.
>
> The entire purpose of the MOU between the Tribe and TNF is to avoid situations such as this. The purpose of the MOU was to establish an informed process to gather information directly applicable to the Proposed Plan. Section VI. A. of the MOU provides, "*The parties shall manage their respective resources and activities in a separate, coordinated, and mutually beneficial manner to meet the purposes of the MOU.*" Jumping to scoping on the Proposed

[5] On June 17, 2014, the USFS sent a partial response to this FOIA request on a CD containing 569 pages and 24 figures "…pertaining to the proposed Plan of Operations, Resolution Baseline Hydrological & Geotechnical Data Gathering Activities, released in its entirety, representing the proposed plan by Resolution Copper Mining, LLC, dated February 14, 2014. However, the version of the Plan of Operations that resides on the USFS website http://www.fs.usda.gov/wps/portal/fsinternet/!ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gDfxMDT8MwRydLA1cj72BTUwMTAwgAykeaxRtBeY4WBv4eHmF-YT4GMHkidBvgAI6EdIeDXIvfdrAJuM3388jPTdUvyA2NMMgyUQQAyrgQmg!!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfS000MjZOMDcxT1RVODBJN0o2MTJQRDMwODQ!/?project=44494 (viewed June 22, 2014), is dated May 6, 2014.

Plan ***before*** the Survey is complete violates this provision and disregards the Tribe's processes and timetables. This is an egregious violation of TNF's trust and fiduciary obligations to the Tribe. In short, the Tribe and TNF agreed to rules for the Survey consultation and the timelines built in to that process. The Tribe is playing by the rules, and so should TNF.

Accordingly, the Tribe respectfully requests that TNF postpone the public comment period on Resolution's Proposed Plan until completion of TNF's Management Plan and the Ethnographic-Ethnohistorical Survey called for in the MOU. Alternatively, the Tribe requests that TNF extend the time for providing comments by the Tribe for 180 days so that the Tribe may fully develop its comments to the Notice."

We anticipate that we will have additional comments based on new information contained in the AMRC FOIA responses (when eventually fulfilled) and upon receipt of additional studies completed pertaining to the area to be impacted by the proposed action (such as the Ethnographic Survey mentioned in Chairmen Rambler's comment extension letter referenced earlier in these comments.

Should the USFS decide to extend the comment deadline beyond the current June 23, 2014 deadline, we assert the right to supplement, augment, or replace these comments within the time frame of the new comment deadline.

XIV. WE RESERVE THE RIGHT TO SUPPLIMENT THESE COMMENTS IF THE SCOPING COMMENT DEADLINE IS NOT EXTENDED BEYOND THE CURRENT JUNE 23 DEADLINE

In response to an AMRC June 11, 2014, letter to USFS referenced above, the USFS replied on June 18, 2014, USFS denied the request for an extension. However, in its denial (Attachment O), USFS states:

"Therefore, the scoping period will not be extended, however we welcome your comments at any time during the *National Environmental Policy Act* process."

We anticipate that we will have additional comments based on new information contained in our FOIA responses (when eventually fulfilled) and upon receipt of additional studies completed pertaining to the area to be impacted by the proposed action (such as the Ethnographic Survey mentioned in Chairmen Rambler's comment extension letter referenced earlier in these comments.

Therefore, we assert the right to supplement or augment these comments beyond the June 23 comment deadline.

XV. CONCLUSION

We appreciate the opportunity to comment on this Project. Please continue to include Arizona Mining Reform Coalition, the San Carlos Apache Tribe, The Access Fund, the Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Earthworks, Environment Arizona, Maricopa Audubon Society, Native Youth Unite, Save the Scenic Santa Ritas, the Sierra Club, the Spirit of the Mountain Runners, Tucson Audubon Society, Roger Featherstone, and John Krieg as interested parties and direct all future public notices and documents to us at the addresses below.

Sincerely,

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Attachments A – O are contained on a digital disk send via surface mail with a hard copy of these comments.