

March 1, 2021

Reviewing Official, Regional Forester
333 Broadway Boulevard SE
Albuquerque, NM 87102

Re: Resolution Copper Project; Final EIS and Draft Record of Decision for the Resolution Copper Project and Land Exchange

Dear Reviewing Official,

Thank you for the opportunity for interested parties who have previously submitted formal comments to file an objection to the proposed action. As previous commenters (comment ID 1499) and Arizona residents with an interest in public land management in Arizona, we exercise this opportunity and are now filing an objection and request for reconsideration of the Final Environmental Impact Statement (Final EIS) and draft Record of Decision (ROD).

We request the U.S. Forest Service withdraw the Final EIS and draft ROD, published on January 15, 2021, for further review and reconsideration. The publication of these materials, kicking off the 60-day timeline for the land exchange, occurred mere days before the end of one presidential Administration in a manner that would bind the hands of the incoming Administration. According to tribes who hold the lands sacred, local USFS officials admitted the Final EIS publication date was rushed by up to a full year in order to initiate the land exchange timeline before the presidential transition.¹ Therefore, further review of the Final EIS will ensure that it represents the culmination of a proper and thorough environmental analysis and that the requirements of NEPA and other applicable laws have been met.

There are a number of issues, which we describe below, in the Final EIS and draft ROD that merit further review and reconsideration in light of the changed policy priorities of the Biden Administration. The Biden Administration has promulgated Executive Orders requiring every agency to ensure that all agency actions are guided by the best science and conducted with integrity,² advance environmental justice,³ and support underserved communities⁴ including consultation and substantive engagement with tribal communities.⁵ The White House “directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations

¹ Annete McGivney, “Revealed: Trump officials rush to mine desert haven native tribes consider holy,” The Guardian, Nov. 24, 2020,

<https://www.theguardian.com/environment/2020/nov/24/trump-mining-arizona-holy-land-oak-flat-tribes>.

² “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” Executive Order 13990 of January 20, 2021, 86 Fed. Reg. 7037 (Jan. 25, 2021).

³ Id.; “Tackling the Climate Crisis at Home and Abroad,” Executive Order 14008 of January 27, 2021, 86 Fed. Reg. 7619 (Feb. 1, 2021), at “Part II - Taking a Government-Wide Approach to the Climate Crisis.”

⁴ “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” Executive Order 13985 of January 20, 2021, 86 Fed. Reg. 7009 (Jan. 25, 2021).

⁵ EO 14008, *supra*.

and other actions during the last 4 years that conflict with these important national objectives.”⁶ These directives and commitments must be incorporated into the final ROD, Final EIS, and all other final project documents at issue here. Withdrawal and/or revocation of the Final EIS for these reasons has also been requested by others, including a number of Members of Congress led by House Natural Resources Committee Chairman Raul Grijalva of Arizona.⁷ Equally important, the 60-day timeline for the land exchange should stop and start over only upon republication of the Final EIS.

Addressing Water Scarcity

USFS responded to our comments on water scarcity 1499-2 generally in their response WT4 (Appendix R, R-342) and specifically in response WT4_J (Appendix R, R-347), stating that the Final EIS has expanded the cumulative effects analysis “to quantify the cumulative effects of competing water uses in the region and the ramifications of ongoing drought or climate change.” However, this response appears conclusory and does not sufficiently address the lingering concerns over water scarcity in the region. A review of the Final EIS and draft ROD should address these issues more thoroughly and provide evidence to support the conclusions drawn, along with analysis and modeling that treats uncertainty appropriately.

Appendix H, page H-7 of the final EIS addresses the Desert Wellfield and the mine’s need to either pump groundwater or rely on Colorado River water delivered through the Central Arizona Project (CAP). Resolution Copper states that it intends to obtain a contract for Non-Indian Agriculture (NIA) water to be delivered through the CAP for its Municipal and Industrial (M&I) use. However, as stated in the paragraph above Figure H-10, Resolution Copper neither has an approved or completed CAP water delivery contract. It is far from clear that such a contract is achievable.

The Colorado River Basin is in the midst of one of the worst droughts in modern history. The river is overallocated in that there are more paper water rights than “wet” water to supply those rights in the lower basin, and Arizona just agreed to take its first reductions in CAP water under the new Drought Contingency Plan.⁸ The mine’s proposition to obtain contracts to NIA water is a possibility given the reallocation of NIA water available for allocation by the Secretary of Interior, but it remains unclear how much of that water can be relied upon for the 46 years this mine is proposed to operate.⁹ The Final EIS does not mention this issue nor does it mention the overall

⁶ EO 13985, *supra*.

⁷ Letter to Acting Secretary of Agriculture Kevin Shea from U.S. House Committee on Natural Resources, Feb. 19, 2021, available at https://www.eenews.net/assets/2021/02/23/document_daily_03.pdf as linked in article by James Marshall, “Democrats ask USDA to halt swap of Ariz. mine tract,” E&E News, Feb. 23, 2021, <https://www.eenews.net/eedaily/stories/1063725705>.

⁸ Ariana Brocius, *Report: Arizona’s Colorado River water supply will hold steady next year*, ArizonaPublicMedia, Apr. 18, 2020, <https://www.azpm.org/p/home-articles-news/2020/4/18/170439-report-arizonas-colorado-river-water-supply-will-hold-steady-next-year/>

⁹ ADWR, *Non-Indian Agriculture Priority Central Arizona Project Water Reallocation*, Jan. 17, 2014, <https://new.azwater.gov/crm/non-indian-agricultural-priority>

scarcity of Colorado River water upon which the mine may rely. Moreover, CAP water is given a Priority 4 ranking on the Colorado River which is the lowest ranking of assured water rights to the mainstem of the Colorado as Priority 5 & 6 are rights available for use when there is excess water available on the river.¹⁰ The final EIS is unclear about whether the mine intends to purchase higher priority water within the CAP deliveries, such as NIA Priority, or if it intends to purchase NIA Settlement water contracts, which are the lowest priority water rights held by CAP contractors and are scheduled to be reduced to zero deliveries by 2030.¹¹ NIA Priority water will be consistently available throughout the lifetime of the mine.¹²

The availability of CAP allocation is important because the Phoenix AMA, in which the Resolution Copper Mine's Desert Wellfield is located, has an AMA goal of sustainable yield. This means that within the AMA, water inputs must equal water outputs in the groundwater. Based on the modeling Resolution Copper conducted for Alternative 6 (which the Forest Service most favors for permitting) the total amount of groundwater Resolution Copper has stored does not meet the total amount of water needed for the life of the mine project. Thus, additional water will be withdrawn from the aquifer with expected drawdown of close to 200ft during the max withdrawal period and permanent aquifer drawdown of 16ft 200 years after mining is completed.¹³ How does this square with the management goals of the Phoenix AMA? Has Resolution Copper met with agricultural stakeholders in San Tan and nearby Magma, AZ who have groundwater wells that may be affected by the Desert Wellfield? Many of these agricultural users face decreased surface water supply and an already diminishing groundwater table. What actions or commitments will protect these existing users should Resolution Copper be unable to find a contract with CAP to deliver NIA water to the mine?

Alternatives to Mitigate Loss of Indigenous Sacred Sites and Artifacts

In section 3.14, the Final EIS discusses the Oaks Flat area as sacred to the tribes. It mentions many times that this area has religious ties for the tribes, but it does not discuss the connection tribal religions have to specific sacred sites and why the area is so important. Yet "Native American Religions are land based."¹⁴ Indeed, members of Apache Stronghold have testified that "the Apaches view Oak Flat as a 'direct corridor' to the Creator's spirit."¹⁵ Destroying the land that is connected to the religion would be effectively destroying the religion. The Final EIS mentions that the mine will have an irreversible effect on the land¹⁶, but it lacks further discussion about what effect the irreversible destruction of the land will have on the Apache

¹⁰ ADWR, *Colorado River Allocation*, <https://new.azwater.gov/crm/colorado-river-allocation>, (visited on Feb. 27, 2021).

¹¹ *Id.* <https://new.azwater.gov/crm/colorado-river-allocation>

¹² *Id.* <https://new.azwater.gov/crm/colorado-river-allocation>

¹³ Brittney Bates, Tim Bayley, Hale Barter, *Technical Memorandum: Simulation of Drawdown Impacts from Desert Wellfield*, Montgomery&Associates, Sept. 13, 2018, <https://www.resolutionmineeis.us/sites/default/files/references/bates-bayley-barter-2018.pdf>

¹⁴ Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012).

¹⁵ Order Denying Preliminary Injunction, D. Ariz., No. CV-21-00050-PHX-SPL, Feb. 13, 2021.

¹⁶ 3.14.4.9

religion. The Final EIS states, “The mitigation strategies will have, and are having, positive impact on tribal communities such as providing jobs, funding tribal visits for evaluation of special interest areas, and increasing access to Emory oak resources.”¹⁷ None of these mitigation measures adequately discuss the detrimental effects on the Apache religion by destroying the lands to which they are inseparably connected.

USFS responded to our comment 1499-3 regarding mitigation in its response NEPA6, stating: “There is no mechanism in Federal law or regulation that allows for provision of financial compensation for loss of tribal, heritage, or cultural resources. Such compensation would require specific action from Congress. Rather, mitigation is developed through Section 106 consultation under the NHPA and specified in the PA and HPTP.”¹⁸ This response focuses specifically on the government’s inability to compensate for such loss, but does not address the sufficiency of any other mitigation measures. Yet the Advisory Council on Historic Preservation (ACHP) notes that “it is clear that the proposed undertaking would destroy significant historic properties, including the highly significant Oak Flat, and the measures in the PA are not sufficient to adequately resolve those adverse effects.”¹⁹ Citing this irreconcilable conflict between historic preservation and the project alternatives, the ACHP ended consultation. It appears none of the alternatives considered and none of the mitigation measures proposed, except rejection of the land exchange, will adequately preserve the sacred sites.²⁰ Withdrawal of the Final EIS and reconsideration of the project documents should proceed in light of this.

Ensuring Neutrality in Decisionmaking

USFS responded to our comment on the neutrality (or lack thereof) of the EIS development process in their response NEPA45 (Appendix R, R-262), characterizing the phrase “We are doing it. LOL” on page 310 of the DEIS as “unrelated text.” The phrase, however, is related to the EIS, as it suggests that someone, somewhere in the process of drafting the DEIS, deemed the approval of the mine a preordained conclusion (“it” clearly being approval of the mine). USFS also showed no sign that they investigated who inserted the phrase. At a minimum, this phrase calls into question the “professional integrity” required of an agency while performing an EIS. 40 CFR § 1502.23. The fact that someone involved in the EIS process seemed to deem this a preordained conclusion calls into question the integrity of the entire process. If this was the attitude of at least one of the drafters, it is unlikely that they adequately and appropriately considered alternatives and unlikely therefore that the agency took the required ‘hard look’ at the environmental consequences of the project.

¹⁷ 3.14.4.8

¹⁸ Final EIS, Appendix R at R-238.

¹⁹ Letter from Advisory Council on Historic Preservation to Tom Torres, Acting Supervisor, Tonto National Forest, Feb. 11, 2021, available at https://www.eenews.net/assets/2021/02/23/document_daily_04.pdf as linked in article by James Marshall, “Democrats ask USDA to halt swap of Ariz. mine tract,” E&E News, Feb. 23, 2021, <https://www.eenews.net/eedaily/stories/1063725705>.

²⁰ 3.14.4.8

Conclusion

For the reasons described above, we do not believe that the Final EIS and draft ROD adequately addressed the concerns we had previously raised. Finally, in response to our comments 1499-1 and 1499-5 requesting that the Draft EIS be revised to incorporate a full analysis, USFS responded in NEPA²¹ that “the land exchange is not a Forest Service decision” and that “the objection process provides another opportunity for public involvement” after Final EIS is published, without admitting that the Final EIS publication step is indeed a USFS decision point because that step would start the land exchange process.

We request the U.S. Forest Service withdraw the Final EIS and draft ROD and review them to ensure that the analysis and decisions contained are sufficiently justified, in compliance with the requirements of NEPA and other applicable laws, and in line with the Biden Administration’s priorities and commitments.

Sincerely,

/s

Priya Sundareshan and other students and staff with the Natural Resource Use and Management Clinic at the James E. Rogers College of Law, University of Arizona

²¹ Final EIS, Appendix R at R-237.