

WESTERN MINING ACTION PROJECT

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Reviewing Official, Regional Forester
USDA Forest Service, Southwest Region,
Southwestern Region
333 Broadway SE
Albuquerque, NM 87102

RE: **OBJECTION to the
Pinto Valley Mine
Final Environmental Impact Statement (“FEIS”) and
Draft Record of Decision (“Draft ROD” or “DROD”)**

**Responsible Official/Authorized Officer:
Neil Bosworth, Forest Supervisor, Tonto National Forest**

Pursuant to 36 CFR Part 218, on behalf of the **Arizona Mining Reform Coalition (“AMRC”)**(Lead Objector), **Sierra Club Grand Canyon Chapter, Maricopa Audubon Society, the Concerned Citizens and Retired Miners Coalition, and Save Tonto National Forest (Collectively AMRC)**, by and through their undersigned attorneys, file this Objection to the FEIS and Draft ROD for the Pinto Valley Mine (“Mine” or “Project”) issued by Neil Bosworth. “Tonto National Forest (Tonto) officials released the final EIS along with a draft Record of Decision (ROD) for the Pinto Valley Mine project on April 9, 2021.”
<http://www.pintovalleymineeis.us/>.

Because the DROD is based on the FEIS, these Objections show that both the DROD and FEIS fail to comply with numerous federal laws, including the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”); Forest Service Organic Administration Act of 1897, 16 U.S.C. §§ 475, 478, 551 (“Organic Act”); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq.* (“FLPMA”); Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA”); National Forest Management Act, 16 U.S.C. §§ 1600-1614 (“NFMA”); the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (“CAA”); Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”); Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (“MBTA”); the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“APA”), and the implementing regulations, Executive Orders, and policies of these laws.

The remedy for these violations is for the Forest Service to withdraw the FEIS and DROD and not issue any decision or take any action based on the inadequate FEIS. The Forest Service must not take any action until a revised FEIS and revised DROD demonstrates full compliance with each and every law, regulation, policy, and Executive Order noted herein. The Regional Forester must withdraw the FEIS and DROD with instructions to the Tonto National Forest to correct all errors noted herein before the Agency can consider approving or taking any actions.

All of the Objectors filed comments on the Draft EIS in January, 2020 and have fully participated in the Forest Service's ("USFS") review of the Project. Pursuant to 36 CFR 218.8, the parties state that the following content of this Objection demonstrates the connections between the 2020 comments ("previous comments") for all issues raised herein, unless the issue or statement in the FEIS or DROD arose or was made after the opportunity for comment on the Draft EIS closed, as detailed herein. The Objectors' Comments are listed as Comment Doc. # S-259 in FEIS Appendix J. Pursuant to the Administrative Procedure Act, 5 U.S.C. §553-706, and USFS requirements, the Regional Forester's Office must provide a detailed response to each of the issues/objections raised in this Objection.

All of the previous comments submitted by the Objectors, including all exhibits and attachments submitted to the Forest Service by the Objectors, are hereby incorporated into this Objection and into the administrative record and hereby submitted to the Reviewing Officer for its review and consideration.

These Objections also contain internet citations to relevant documents, and these documents are also submitted into the administrative record for this case. If the Reviewing Officer cannot for some reason access these documents for its review, please immediately provide the undersigned the reason for such inability, and let the undersigned know as soon as possible and the Objectors will make arrangements to provide the documents. Otherwise, Objectors have no reason to believe that the documents cited/referred to in these Objections have not been considered by the Reviewing Officer, and thus are part of the administrative record for this case.

Interests and Description of Objectors

The **Arizona Mining Reform Coalition ("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 government agencies and mining operations to the highest environmental and social standards to provide for the long term environmental, cultural, and economic health of Arizona.

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

Maricopa Audubon Society (MAS) is a non-profit organization that works to conserve Arizona's environment, particularly native birds, wildlife and plants and their habitats. MAS promotes wildlife-oriented education and recreational activities, particularly through birding field trips. MAS members have led the Superior Christmas Bird Count, which tallies population sizes for many bird species within the Tonto National Forest, for many years. MAS has litigated to protect Arizona bird species, including the Southwest Willow Flycatcher and Yellow-billed Cuckoo, and habitats, for decades.

Concerned Citizens and Retired Miners Coalition (CCRMC) is a group of citizens who: (1) reside in Superior, Arizona, or do not reside in Superior, Arizona, but are affiliated with relatives who are residents; and (2) are retired hard-rock miners who previously worked in now non-operational mines in and around Superior, Arizona, and were displaced due to mine closure or personal disability. CCRMC is committed to ensuring that government consideration and review of mining projects, such as the Pinto Valley Mine, comply with all applicable laws.

Save Tonto National Forest (STNF) works to protect the Tonto National Forest and promote safe and responsible use by all groups of outdoor enthusiasts. STNF is based in Queen Valley, Arizona and has around 260 members concerned about the direction the Tonto National Forest is going including approval of destructive mining projects.

Members of all the Objector groups use and enjoy the lands and waters on the Tonto National Forest, including the lands at and around the Pinto Valley Mine, for recreational, aesthetic, scientific, conservation, and other uses – uses that will be significantly and adversely affected by the USFS's approval of the expansion and continued operation of the Mine.

The FEIS and DROD Based on the Wrong Regulatory Structure

(Objectors' Comment Document S-259, Comments C-001 to C-003, Also, Comment Response C-036 to C-038)

The USFS is under the mistaken belief that its review and approval of Pinto Valley Mine Corp.'s (PVMC's) proposed uses of federal land, and all of the proposed activities have satisfied the requirements for valid statutory rights under the 1872 Mining law and are solely under the agency's locatable/hardrock mining regulations at 36 CFR Part 228 Subpart A.

The Mining Law of 1872 states, "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," subject to applicable regulations and laws. Therefore, **the agency need only to ensure that the proposed activities are conducted on lands "free and open" to the mining law and that the activities are reasonably incident to mining, which would include mining activities such as waste rock and tailings facilities.**

FEIS at J-103 (response to Objectors' comments)(emphasis added). According to the agency, this is because there are unpatented mining claims on some/all of the USFS lands to be covered/used by project facilities. The FEIS is based on the agency's position that:

3.9.1.1.3 Surface Resources Act of 1955

The Surface Resources Act of 1955, commonly referred to as the Multi-Use or Mining Act, amended the General Mining Act of 1872 and reaffirms **the right to conduct mining activities on public lands, including mine processing facilities and the placement of mining tailings and waste rock. Although a right to conduct mining activities exists**, proposals must comply with applicable Federal and State environmental protection laws, and the Forest Service can require reasonable measures, within its authority, to minimize impacts on surface resources (see 30 U.S. Code 612 and 36 CFR 228.1). This act also removed common varieties of minerals, such as sand and gravel, clay, building stone, and cinders, from the category of locatable minerals and provided for multiple uses of the lands and surface resources on mining claims.

FEIS at 3-224 (emphasis added). *See also* FEIS at 1-7 to 1-8. The DROD also relies on this erroneous view of federal mining and public land laws:

6.1.1 General Mining Act of 1872

The General Mining Act of 1872, as amended, gives U.S. citizens the right to explore, locate mining claims, make discoveries, patent claims, and develop mines on National Forest System lands open to mineral entry.

The selected action proposing to expand mining operations on lands open to mineral entry in search of valuable mineral deposits along with the measures described in this ROD demonstrate that Pinto Valley Mining Corp.'s proposed mining plan of operations can be implemented in a manner that meets the required applicable laws. Therefore, the selected action meets the intent of the General Mining Act of 1872.

DROD at 27. Further, as shown by the FEIS and the mining plan of operations (PoO), except for arguably the 19 acres of public land proposed for the expansion of the pit, PVMC is **not** "in search of valuable mineral deposits." *Id.* Thus, any right under the Mining Law to explore/search for minerals does not apply to all of the other lands slated for the tailings, borrow/riprap sources, and other facilities/roads.

The mere fact that the company submitted a PoO does not mean that all, indeed any, aspects of the project on federal land are regulated only under Part 228 Subpart A or that approving the PoO is the USFS's only choice. Indeed, because the record lacks any evidence that the company has statutory rights under federal mining laws, including the 1872 Mining Law, to all of the lands slated for the expansion in the proposed action (outside of arguably the mine pit), review and regulation of the project areas not covered by valid statutory rights under the Mining Law is not under Part 228 Subpart A, but rather the agency's special use and multiple use authorities (36 CFR Part 251/261), including Rights-of-Way (ROWs) under the Federal Land Policy and Management Act (FLPMA).

The USFS' overly-restricted interpretation of its authority was recently rejected by the federal court in Arizona. In July of 2019, the federal district court for the District of Arizona issued its decision in Center for Biological Diversity v. U.S. Fish and Wildlife Service, 409 F.Supp.3d 738 (D. Ariz. 2019), in which the court vacated and remanded the USFS's approval of a large copper

mine (the Rosemont Mine) due to the agency's erroneous interpretation and application of the 1872 Mining Law, the 1897 Organic Act, federal public land law, and NEPA.

The Arizona federal court squarely rejected the same federal government position taken by the Pinto Valley FEIS/DROD – that mining claimants are entitled to use and occupy mining claims even without having any evidence that the claims are valid under the Mining Law, or that the Part 228 Subpart A regulations are the proper regulatory vehicle for operations proposed off of valid claims – and ruled that the government's statutory interpretation was contrary to the plain language and controlling caselaw under the Mining Law, 1897 Organic Act, NEPA, and other laws. The Rosemont decision rejected the government's position that it has no authority to apply its broader public land regulations to mining operations proposed on lands that fail to meet the Mining Law's statutory prerequisites for rights against the United States.

The FEIS's review of the project is based on the legal view that the entire expansion onto USFS lands is regulated by the Part 228 Subpart A regulations based on the fact that it involves mining. Here, based on PVMC's unpatented mining claims, the agency believes that it is precluded from rejecting or seriously restricting the company's proposed expansion onto USFS lands and choosing the no-action alternative, as well as being significantly restricted in its review authority over the Project.¹

The Arizona federal court decision ruled that the USFS' position erroneously interprets the 1872 Mining Law as well as other public land and mining laws. The court held that unless sufficient evidence exists in the agency record that mining claims proposed for use and occupancy met the requirements of the Mining Law and were valid (i.e., each mining claim contained the requisite "valuable minerals"), neither the Mining Law, nor the Part 228 Subpart A locatable mineral regulations, govern the agency's review of the proposed use/occupancy of those lands. The agency could not simply assume rights under the Mining Law that limit the federal land agency's full and broad authority to protect public land and resources.

[H]aving a piece of paper reflecting that one has unpatented mining claims does not show that one actually has *valid* unpatented mining claims. If there is no valuable mineral deposit beneath the purported unpatented mining claims, the unpatented mining claims are completely *invalid* under the Mining Law of 1872, and no property rights attach to those invalid unpatented mining claims.

Center for Biological Diversity, 409 F.Supp.3d at 747-48 (emphasis in original).

The Forest Service's review of the Pinto Valley Mine is very similar, and based on the same legal positions, as its illegal review of the Rosemont Mine. The Arizona court detailed how the agency never inquired into whether the mining claims away from the mine pit met the Mining Law's prerequisite for use/occupancy rights (discovery of valuable minerals), yet the agency

¹ Based on PoO/MPO Appendix C (claims map), the company's unpatented mining claims on USFS lands are on the east side of the expansion area, where the borrow/rip-rap pits, tailings expansion, dumps, and other new disturbances are proposed.
http://www.pintovalleymineeis.us/documents/mpo/Appendix_C.pdf (viewed April 30, 2021).

“accepted, without question, that those unpatented mining claims were valid” and “assumed that Rosemont had the right to use those 2,447 acres to support its mining operation (i.e., by dumping 1.9 billion tons of waste on that land).” Center for Biological Diversity, at 747. “This was a crucial error as it tainted the Forest Service’s evaluation of the Rosemont Mine from the start.” Id.² The court held that such use/occupancy, without verification that such rights under the Mining Law actually exist on those lands/claims, was **not** authorized by the Mining Law, and thus was not governed by the agency’s locatable/hardrock mining regulations.

The court also noted that its ruling does not require that the federal agency conduct a full-scale mineral validity review for every proposed long-term or permanent use/occupancy.

The Forest Service argues that it is not required to conduct a validity determination before approving a mining plan of operations. However, a validity determination differs significantly from establishing a factual basis upon which the Forest Service can determine rights. A validity determination invokes a separate administrative procedure carried out by the BLM (which is within the Department of the Interior). **In contrast, the Forest Service** (which is within the Department of Agriculture) **merely needed a factual basis to support Rosemont’s assertion of rights.** Such a finding would not preclude another individual from bringing an adverse proceeding to determine mineral rights, or the Government from initiating a validity determination. As referenced above, the fact that Rosemont proposed to dump 1.9 billion tons of waste on its unpatented claims on 2,447 acres of the Coronado National Forest was a potent indication that Rosemont’s unpatented claims on the land in question were invalid (i.e., if Rosemont was voluntarily proposing to bury its unpatented claims under 1.9 billion tons of its own waste, there is a strong inference that there is no valuable mineral deposit lying below the waste site).

Center for Biological Diversity, at 761-62. The situation is the same here, as there is nothing in the record that provides “a factual basis to support [the claimant’s] assertion of rights.” Indeed, as shown in the FEIS, the evidence shows that the only arguable valuable mineral deposit is located in the mine pit, on PVMC’s private lands. *See* FEIS Section 3.9 (Geology) and Maps 3-7 and 3-8.

Under basic principles of administrative law, “Any decision made without first establishing the factual basis upon which the Forest Service could form an opinion on surface rights would entirely ignore an important aspect of the problem. *See State Farm*, 463 U.S. at 43. [Motor Vehicles Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)].” Center for Biological Diversity, at 757-58.

² At Rosemont and at Pinto Valley, the Mining Law’s provision that lands are “free and open to exploration,” 30 U.S.C. §22, is not at issue, as none of the alternatives involve exploration under the Mining Law, as compared to long-term or permanent use/occupancy of federal land which the USFS proposes to approve.

The court also relied on over a century of Mining Law court precedent which holds that the presence of valuable minerals on one claim (or on private land as is the case here) cannot support claim validity on adjacent or nearby claims or other federal lands. “A claimant may not use the deposit present in one location to lend validity to an adjacent location. *See Waskey v. Hammer*, 223 U.S. 85, 91 (1912) (“A discovery without the limits of the claim, no matter what its proximity, does not suffice.”); *Lombardo Turquoise Milling & Mining Co. v. Hemanes*, 430 F. Supp. 429, 443 (D. Nev. 1977).” Center for Biological Diversity, at 754.

Defendants also argue that the Forest Service must allow these extralimital activities because Rosemont owns valid claims in the mine pit area. However, as explained, a separate discovery must support each claim. *See Best*, 371 U.S. at 337; *Waskey*, 223 U.S. at 91; *Lara*, 820 F.2d at 1537. Discovery in one claim cannot lend validity to an adjacent claim in which no valuable mineral deposit exists. *See id.* Rosemont’s extralimital rights springing from its valid claims in the mine pit do not permit surface occupancy outside the boundaries of these claims. *See* 30 U.S.C. § 26. No limiting principle would conscript surface use under the Forest Service’s interpretation of the Mining Law. This interpretation would render the act of location moot – an individual would need only discover a deposit before gaining a right to all the surface of public lands not withdrawn. This simply does not comport with the plain language of the Mining Law.

Center for Biological Diversity, at 762-63.

Indeed, it is almost certain that these ancillary lands do not contain sufficient mineralization to qualify as “valuable mineral deposits” and are in fact simple “common varieties” of rock covering the non-mineralized portions of the Project site. Such lands are governed by the Common Varieties Act of 1955, 30 U.S.C. § 611, not the 1872 Mining Law. “Discoveries of ‘common varieties of sand, stone, gravel, pumice, pumicite, or cinders’ do not qualify as valuable mineral deposits and therefore do not confer validity upon a mining claim. *See* 30 U.S.C. § 611. Through section 611, Congress intended to remove the disposition of lands containing only common minerals from the Mining Laws. *See Coleman*, 390 U.S. at 604.” Center for Biological Diversity, at 753.

Based on USFS’s erroneous view of “rights” under the Mining Law, the FEIS asserts that only USFS mining regulations at 36 C.F.R. Part 228 Subpart A (which have no public interest requirement and no required compliance with the agency’s multiple use mandate) apply to every aspect of the project.

The Forest Service mining regulations at 36 C.F.R. Part 228 Subpart A only apply to “operations authorized by the mining laws.” 36 C.F.R. §228.1. The Arizona federal court held that only upon the satisfaction of the Mining Law’s prerequisite requirements for statutory rights against the United States are “operations authorized by the mining laws.”

[I]t does not follow that the Forest Service must use these Part 228 regulations merely because an action falls within the regulation’s definition of operations. The Forest Service’s reliance on its definition of operations ignores the purpose of its own

regulations. Part 228 regulates “use of the surface of National Forest System lands in connection with operations *authorized* by the United States mining laws (30 U.S.C. 21-54 [Mining Law of 1872]).” 36 C.F.R. § 228.1. Therefore, **authorization under the Mining Law of 1872 acts as a precursor to any regulation through Part 228.**

Center for Biological Diversity, at 764 (*italics emphasis in original, bold added*).

As the court held: “the regulations state that mining activities on Forest Service land are permitted only as specifically authorized by the Mining Law of 1872. As Rosemont has no rights under the Mining Law as to the land at issue, it follows that the regulations certainly do not create independent rights that do not exist under the Mining Law.” Center for Biological Diversity, at 749.

Here, at Pinto Valley, outside of arguably the mine pit, none of the proposed facilities on USFS lands and associated operations are “authorized by the Mining Law of 1872.” As such, use of the Part 228 Subpart A regulations, instead of the Part 251/261 special use regulations, is illegal. “Based on the administrative record, the Forest Service improperly applied its Part 228 regulations to actions not authorized under the Mining Law of 1872.” *Id.* at * 19.

The court also rejected the legal position taken by USFS here, where it asserts that it cannot choose the No-Action Alternative for the project. In rejecting the no-action alternative, the agency stated that: “The Forest Service cannot impose unreasonable regulations on mining activities and cannot impermissibly encroach on legitimate uses incident to mining and millsite claims under the General Mining Law of 1872.” FEIS at 2-25.

In the Rosemont Mine decision, after discussing the agency’s erroneous assumption of “rights” under the Mining Law (detailed above), the court discussed how this erroneous legal position also violated the agency’s duties under NEPA:

Based on the administrative record, the Forest Service improperly applied its Part 228 regulations to actions not authorized under the Mining Law of 1872. This mistake infected the FEIS and led to the Forest Service misinforming the public and failing to consider reasonable alternatives within the scope of its duties under the Organic Act.

For example, in response to a public comment requesting the Forest Service “give true consideration to selection of the No Action Alternative”, the Forest Service responded: “The Forest Service may reject an unreasonable Mine Plan of Operation but cannot categorically prohibit mining or deny reasonable and legal mineral operations under the mining laws.” *Id.* at G-10 [Final Rosemont EIS]. In response to a comment requesting the Forest Service “consider other locations for copper mining”, the Forest Service responded: “The Forest Service lacks the authority to deny Rosemont Copper’s proposal if it can be legally permitted.” *Id.* at G-12. And in response to a comment that the Forest Service “should scale down the size of the project or limit it to private lands only”, the Forest Service repeated: “The Forest Service may reject an unreasonable Mine Plan of Operation but cannot categorically prohibit mining or deny reasonable and legal mineral operations under the mining laws.” *Id.* These examples did not occur in isolation. Rather,

they illustrate how heavily the Forest Service relied upon this rationale in its decision-making process.

Under the Part 251 regulations, the Forest Service could limit the mine to any of the above options if it found they ran afoul of the public interest. The Forest Service failed to take the requisite hard look at these alternatives by informing the public that it could not truly consider any alternative that rejected the MPO or substantially modified it as to make the mine economically unfeasible. *See Nat. Res. Def. Council*, 421 F.3d at 813-14. A “thorough discussion of the significant aspects of the probable environmental consequences” will include the regulatory framework in which the Forest Service analyzes those consequences. *See California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). No amount of alternatives or depth of discussion could “foster[] informed decision-making and informed public participation” when the Forest Service bases its choice of alternatives on an erroneous view of the law. *See Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

Center for Biological Diversity, at 764-66 (internal footnotes omitted).

As the court stated, the agency’s erroneous interpretation of federal mining and public land law resulted in a violation of the Organic Act and NEPA. “[A] grant to use the surface when the administrative record shows such a right does not exist would contravene the Forest Service’s duty to protect the forest from depredations and offer an opinion that runs contrary to the evidence.” Ctr. for Biological Diversity, at 758. “In the absence of any statutory right on the part of Rosemont, the Forest Service could deny Rosemont’s off claim activities as part of the Forest Service’s Organic Act obligations.” Id. at 761.

The court further rejected the agency’s view that alternatives that greatly reduced environmental impacts to public land could be dismissed because they were too expensive for the company. “As discussed throughout this Order, the administrative record before the Forest Service reflects that Rosemont did not have valid surface rights for thousands of acres of its unpatented mining claims. Thus, rather than summarily rejecting this claim as ‘technically and financially infeasible,’ further consideration and evaluation of this alternative was warranted as it greatly reduced the impacts to the Coronado National Forest.” Id. at 765, n. 15. Thus, at Pinto Valley, the USFS must fully comply with all federal laws and is not constrained by the limits in Part 228 Subpart A.

Here, as at Rosemont, this means that the USFS must regulate the project under its Part 251/261 special use regulations, as well as FLPMA’s ROW provisions, and not under the Part 228 Subpart A regulations. The agency’s authority under the Part 251 regulations are very different from, and much more environmentally protective, than the Part 228 regulations. For example, the agency must deny the project if “[t]he proposed use would not be in the public interest.” 36 C.F.R. §251.54(e)(5)(ii).

The Forest Service could not apply its Part 228 regulations to these activities because the Mining Law did not authorize them.

In contrast, the Forest Service's Part 251 regulations apply to "all uses of National Forest System lands, improvements, and resources." 36 C.F.R. § 251.50. Any use not regulated under the Part 228, or several other groups of Forest Service regulations, falls into the Part 251 special use regulations. *See id.* These regulations provide a dual screening process in which the Forest Service may deny any activity that does not meet several standards or otherwise comport with the public interest. *See id.* § 251.54(e). **The Part 251 regulations provide significant authority and discretion to prohibit activity on Forest Service lands, whereas the Part 228 regulations merely balance competing interests.**

Center for Biological Diversity, at 764 (emphasis added).

The Part 251 regulations apply to occupancy and use of National Forest System lands. 36 C.F.R. §§ 251.54–251.64. The applicant must file a special use proposal with the District Ranger or Forest Supervisor having jurisdiction over the affected land. § 251.54(b). The Forest Service conducts an initial screening to determine whether the proposed use meets the "minimum requirements applicable to all special uses." § 251.54(e)(1). If the proposal passes this initial screening, the Forest Service conducts a second-level screening which requires, among other things, a showing that the proposed use is in the public interest. § 251.54(e)(5)(i)–(v). If the proposed use satisfies the Forest Service's screening criteria, the Forest Service may grant a special use permit, but must include terms and conditions to "[m]inimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment," among other requirements. § 251.56(a)(1)(i)(B). The Forest Service must also "[o]therwise protect the public interest." § 251.56(a)(1)(ii)(G). In addition, under the related Part 261 regulations, the Forest Service is required to prohibit the destruction of cultural resources on public lands, *see* 36 C.F.R. §§ 261.9(g)–(h), 261.10(a), (b).

- (a) *General.* (1) Each special use authorization must contain:
 - (i) Terms and conditions which will:
 - (A) Carry out the purposes of applicable statutes and rules and regulations issued thereunder;
 - (B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment;
 - (C) Require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and
 - (D) Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.
 - (ii) Such terms and conditions as the authorized officer deems necessary to:
 - (A) Protect Federal property and economic interests;
 - (B) Manage efficiently the lands subject to the use and adjacent thereto;
 - (C) Protect other lawful users of the lands adjacent to or occupied by such use;
 - (D) Protect lives and property;

- (E) Protect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes;
- (F) Require siting to cause the least damage to the environment, taking into consideration feasibility and other relevant factors; and
- (G) Otherwise protect the public interest

§ 251.56 Terms and conditions. These regulations also require the payment of fair market value for the of the public's land. "(a) ...special use authorizations shall require the payment in advance of an annual rental fee as determined by the authorized officer. (1) The fee shall be based on the fair market value of the rights and privileges authorized, as determined by appraisal or other sound business management principles." § 251.57 Rental fees.

Because the USFS makes the same errors here as it did at Rosemont, the agency must redo the FEIS and regulate the project under the correct legal regime. Further, USFS has not shown that the project would meet all the requirements in Parts 251/261 to protect the public interest and the natural and cultural resources at/around the site. As such, the USFS must deny the proposed uses of public land.

The Removal of Common Variety Minerals From the Borrow Pit Areas Can Only Be Considered Under a Mineral Material Sales Contract Regime

(Objectors' Comment Document S-259, Comment C-004)

In addition to fundamentally misconstruing its authority to expand the tailings and approve other facilities on USFS public land under assumed rights under the 1872 Mining Law which have not been shown to exist, the USFS proposes to erroneously approve the extraction and removal of common variety rock from the "Borrow and Riprap Sources" on public land under the Part 228 Subpart A locatable mineral regulations, rather than the Subpart C regulations applicable to common variety borrow/riprap materials. See FEIS Map 2-3 Proposed Action, and DROD Figure 1, Selected Action (showing Borrow/Riprap extraction areas). See also PoO/MPO Appendix D, 5-13-16 Memo "Borrow Sources at Pinto Valley Mine for Reclamation of Planned Activities on National Forest System Lands" http://www.pintovalleymineeis.us/documents/mpo/Appendix_D-13.pdf (viewed April 30, 2021)(detailing proposed uses for borrow/rip-rap removed from USFS lands).

In 1947 Congress passed the Materials Act, as amended, 30 U.S.C. §§ 601-604, authorizing the disposition of, inter alia, sand, stone, and gravel. Eight years later, Congress passed the Multiple Use Mining Act of 1955, also known as the Surface Resources Act or Common Varieties Act, 30 U.S.C. § 611, which declared that no deposit of common varieties of, inter alia, sand, stone, or gravel would be considered "a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws." Thus, Congress removed common varieties of those materials from the purview of the mining law and made them subject to the provisions of the Materials Act. United States v. Pitkin Iron Corp., 170 IBLA 352, 354 (2006); United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991).

The agency cannot regulate the extraction and use of the borrow and riprap minerals as a locatable mineral operation under 36 C.F.R. Part 228 Subpart A, as they should be regulated under a mineral material sales contract under Subpart C. Although it might be argued that a mining claimant could use mineral materials excavated from a mining claim to support legitimate locatable mineral operations **on that same claim** (if that claim was valid), that is not proposed here. Rather, PVMC proposes to excavate common variety rock from one (or more) claims for use on other, entirely separate, claims.

In response to the Objectors' Comment C-004, the FEIS asserts that simply because the borrow/rip-rap materials will be used for reclamation automatically means that excavation is authorized by the Mining Laws and regulated under Part 228A. Yet the fact that the company would use the excavated mineral materials to support mining-related activities on other mining claims or on private lands does not transform the removal of mineral materials (Subpart C) into a locatable minerals removal operation (Subpart A).

If that were the case, mining claimants could excavate common variety minerals from public lands for free simply because they might be used to support mining operations elsewhere, completely avoiding the requirements of Subpart C and the Common Varieties Act. In other words, although a claimant may use common variety minerals found on a mining claim that contains locatable minerals for reasonable uses on **that** claim, the claimant is not free to remove and transport the common variety rock off of that claim for uses elsewhere.

In addition, as discussed above, the claims that will receive the excavated common minerals have not been shown to be valid, or covered under any rights associated with the Mining Law. Similarly, for the claim(s) to be excavated for rip-rap/borrow, the use of these claim(s) for purely common variety mineral uses shows that these claim(s) are not valid under the Mining Law and that these uses are not authorized under the Mining Law or Part 228 Part A regulations.

Subpart C, not Subpart A, applies to the removal of mineral materials from the public lands, especially in cases such as this where the common minerals will not be used to support valid locatable mineral operations on the claim from which they were removed.

[D]isposal of mineral materials may be made by:

(a) *Competitive sale* to the highest qualified bidder after formal advertising and other appropriate public notice;

(b) *Sale by negotiated contract*. (1) For removal of materials to be used in connection with a public works improvement program on behalf of a Federal, State, or local government agency if the public exigency will not permit delays incident to advertising, or

(2) For the removal of mineral materials for which it is impracticable to obtain competition;

36 CFR §228.57 (italics in original). "Mineral Materials," which can only be excavated and sold via a minerals sales contract, are defined as:

(c) *Mineral materials to which this subpart applies.* This subpart applies to mineral materials which consist of petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinders, clay, and other similar materials. **Such mineral materials include deposits which, although they have economic value, are used for agriculture, animal husbandry, building, abrasion, construction, landscaping, and similar uses.** This subpart also applies to other materials which may not be minerals but are produced using mining methods, such as peat. The categories of these materials, including representative examples, are:

(1) *Agricultural supply and animal husbandry materials.* This category includes, but is not limited to, minerals and vegetative materials used as or for: Soil conditioners or amendments applied to physically alter soil properties such as direct applications to the soil of carbonate rocks, soil containing “trace elements” and peat; animal feed supplements; and other animal care products.

(2) *Building materials.* Except for minerals identified as *Uncommon Varieties*, this category includes, but is not limited to, minerals used as or for: Paint fillers or extenders; flagstone, ashlar, **rubble**, mortar, brick, tile, pipe, pottery, earthenware, stoneware, terrazzo, and other nonstructural components in floors, walls, roofs, fireplaces, and the like; and similar building uses.

(3) *Abrasive materials.* This category includes, but is not limited to, minerals used for: Filing; scouring; polishing; sanding; and sandblasting.

(4) *Construction materials.* **This category includes, but is not limited to, minerals such as sand, gravel, clay, crushed rock and cinders used as or for fill; borrow; rip-rap; ballast (including all ballast for railroad use); road base; road surfacing; concrete aggregate; clay sealants; and similar construction uses.**

(5) *Landscaping materials:* This category includes, but is not limited to minerals and peat used as or for: Chips, granules, sand, pebbles, scoria, cinders, cobbles, boulders, slabs, and other components in retaining walls, walkways, patios, yards, gardens, and the like; and similar landscaping uses.

36 CFR §228.41(c)(emphasis added).

Thus, at Pinto Valley, because the materials to be excavated are considered construction materials such as “borrow; rip-rap,” they are not covered by 36 C.F.R. Part 228 Subpart A, regulations, but rather by the Subpart C regulations. Note that there is no evidence in the record that the borrow/riprap materials have the required “distinct and special value” which might qualify the materials as “uncommon varieties” that would potentially be regulated under Subpart A. See PoO/MPO Appendix D, 5-13-16 Memo “Borrow Sources at Pinto Valley Mine for Reclamation of Planned Activities on National Forest System Lands” http://www.pintovalleymineeis.us/documents/mpo/Appendix_D-13.pdf (viewed April 30, 2021)(discussing common variety construction material properties of the borrow/rip-rap sources on USFS lands).

PVMC does have the option of applying for a mineral material sales contract to remove and sell the common variety borrow/riprap minerals. However, the legal and permitting regime for a permit under Subpart C (mineral materials) is very different from the permitting of locatable minerals mining under Subpart A and the agency would be required to re-analyze such a plan, with full public review, if such a proposal was submitted by the company.

At a minimum, the Subpart C rules, unlike the Subpart A rules, preclude USFS from authorizing any activity/sale without meeting the “public interest” and other standards at 36 C.F.R. § 228.43. In addition, the USFS must, after a qualified appraisal, obtain fair market value for all borrow/riprap materials: “Mineral materials may not be sold for less than the appraised value. The authorized officer may assess a fee to cover costs of issuing and administering a contract or permit.” § 228.43(b).

Improper Statement of Purpose and Need and Alternatives Analysis

(Objectors’ Comment Document S-259, Comments C-005 and C-006, Also Comments C-039 to C-043)

Given the erroneous application of federal mining and public land law discussed above, the FEIS’s “Purpose and Need” statements violate the standard for EISs under NEPA. The FEIS states that:

The Forest Service’s purpose is to process Pinto Valley Mining Corp.’s proposed mining plan of operations ... in accordance with 36 CFR, subpart A.

...

The need for the Forest Service’s action is to comply with regulations governing the use of surface resources for operations authorized by the United States mining laws on National Forest System lands under 36 CFR 228, subpart A.

FEIS at 1-6 to 1-7. Similarly the FEIS “Decision Framework” states:

The Forest Service’s consideration of operations authorized by the United States mining laws on National Forest System lands is governed by the General Mining Law of 1872 as amended, the Organic Administration Act of 1897, and the Surface Resources Act of 1955, among other statutory authorities. The Forest Service’s regulations at 36 CFR 228, subpart A set forth the rules through which use of the surface of National Forest System lands in connection with mining and mineral process operations shall be conducted so as to minimize adverse environmental impacts on surface resources where feasible.

However, the Forest Service cannot impose unreasonable mitigation on mining activities and cannot impermissibly encroach on legitimate uses incident to operations authorized under the General Mining Law of 1872.

FEIS at 1-7 (emphasis added).

As discussed above, these statements erroneously attach rights under the Mining Law where none have been shown to exist. In addition, the agency's view that "private land activities are not part of the proposed action and are not within the decision space of the Forest Service," *Id.*, is incorrect, for as shown below, the agency has broad authority to regulate activities on private land to protect public land resources. "It is well established that [the Property Clause] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." U.S. v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979).

A FEIS must give "full and meaningful consideration to all reasonable alternatives" to the action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). The alternatives considered may not be entirely driven by a private applicant's preferences. *See* Forty Most Asked Questions, at Question 2a. ("[T]he emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out the particular alternative."). Here, by narrowing its purpose and need statement, and basing its review of the proposed Project on an erroneous interpretation of federal law, USFS considered an unreasonably narrow range of alternatives and failed to take the required "hard look" at the Project and its alternatives and impacts.

The applicable Council on Environmental Quality's regulations implementing NEPA require all EISs to contain a statement that briefly specifies the underlying purpose and need for which the agency is responding to when proposing alternatives to the proposed action. 40 C.F.R. § 1502.13. The statement of purpose and need is crucially important because it dictates the range of reasonable alternatives to the proposed action. City of Carmel-By-The-Sea v. U.S. Dept. Trans., 123 F.3d 1142, 1155 ("The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms."). *See also* Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010). Agencies cannot avoid NEPA's requirements by unreasonably restricting the statement of purpose:

One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.

Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) ("an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action").

"[A]n applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable." Sylvester v. U.S. Army Corps of Engineers, 882 F.2d 407, 409 (9th Cir. 1989). While the USFS is permitted to take the applicant's purposes into consideration, it cannot draft a narrow purpose statement that restricts

the consideration of alternatives to one motivated by private interests. Nat'l Parks & Conservation Ass'n, 606 F.3d at 1072. Federal courts have routinely found that NEPA prevents federal agencies from effectively reducing the discussion of environmentally sound alternatives to a binary choice between granting and denying an application. *See e.g., Save Our Cumberland Mountains v. Kempthorne*, 453 F. 3d 334, 345 (6th Cir. 2006).

The FEIS fails to comply with these requirements. “No amount of alternatives or depth of discussion could ‘foster[] informed decision-making and informed public participation’ when the Forest Service bases its choice of alternatives on an erroneous view of the law. *See Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).” Center for Biological Diversity, at 766.

Hydrology/Streamflow Issues in the Pinto Creek Watershed

(Objectors’ Comment Document S-259, Comments C-008 to C-009)

The FEIS shows conclusively that severely depleted stream flows in Pinto Creek below the Pinto Valley Mine (PVM) have been caused by excessive groundwater pumping and/or lack of proper management of the Peak Well field. The FEIS, at 3-450, describes a study done by BCG Engineering in October of 2018 that was able to evaluate surface and baseline flows of Pinto Creek at the Magma Weir gauging station just below the mine site. A computer model (Australian Water Balance Model) used precipitation and evapotranspiration data from the watershed and compared the results from the model to actual streamflow data at the Magma Weir from 1996 to 2006. During these 10 years neither the PVM nor the Carlota Mine was in operation, making it an ideal time to measure baseline flow. The Model determined that baseflow should be about 1070 gallons per minute. Actual streamflows deteriorated greatly as soon as the new owner, Capstone Mining Inc. started pumping in 2013. Diminished flows have continued to the present, with many months showing no flows at all (FEIS, Table 3-127, p. 3-448). These stream flows decreased even though average annual rainfall increased while Capstone was pumping (Hydrologic Modeling of Pinto Creek, February 7, 2019 p. 17).

Die-off of riparian vegetation in Pinto Creek below the mine site was noticed shortly after Capstone reopened the mine in 2013. A recent field trip by Sierra Club members revealed about half a mile of dead and downed trees in the vicinity of the Magma Weir. Tree mortality of this magnitude has not been observed by our members in this area previously – Club members have been visiting Pinto Creek for many decades. Both Miller Ecological Consultants and Arizona Game and Fish Department (FEIS at 3-68 to 69) have studied and documented the die-off of vegetation and have noted that such impacts have not occurred on other nearby creeks. Clearly, groundwater pumping has lowered the water table and depleted flows to the point where major segments of the creek are being killed off. With no explanation, the FEIS removed much of this discussion that had been in the DEIS at 3-60 to 61.

Lower Pinto Creek was nominated by the Arizona Rivers Coalition in 1991 and found eligible by the USFS for Wild and Scenic River Designation in 1993. The eligible segment was 8.8 miles in length from roughly the Layton Ranch to the lower end of Pinto Box. Its outstanding remarkable values were scenic, riparian, and ecological and river character was perennial stream in low country with good riparian habitat. As described in the FEIS, the Creek continues to offer

habitat for the endangered southwestern willow flycatcher and yellow-billed cuckoo (FEIS at 3-69 to -70). Pinto Creek is undoubtedly an important stopover area for these and other migratory birds on their way to Roosevelt Lake and other locations. The creek historically also has provided habitat for desert sucker and longfin dace, as well as many other species that depend on desert riparian areas for their existence. The USFS's failure to protect these species and their habitat, including a failure to adequately consult with the U.S. FWS, violates the Endangered Species Act (ESA), USFS requirements in the Forest Plan/NFMA, and agency mining and public land regulations.

Groundwater modeling shows a drawdown area of 5 feet or greater extending to 38 square miles under the proposed alternative. Modeling also shows groundwater depletions affecting about 5 miles of Pinto Creek. Thus, it can be assumed that a significant stretch of Pinto Creek will experience die-off in addition to the reach that has already been lost.

Modeling also predicts that base flows in Pinto Creek will be greatly reduced even after the mine closes (FEIS, Appendix E, Section 3.0). Flows are expected to be near 1070 gpm for the first 10 years after closure in 2039 as the tailings piles drain, but from years 10 to 100 flows are expected to decrease to about 430 gpm due to the extreme cone of depression and water flowing into the pit. This 60% decrease from simulated baseline flows (1996-2006) will ensure that the riparian vegetation in Pinto Creek does not recover for a very long time – many generations. It appears that much of the water in the area will end up being lost to evaporation as the pit gradually fills with water to an expected depth of about 650 feet.

There are 7 perennial springs within the 38 square mile drawdown area – 12 other springs have already dried up. The DEIS says there is insufficient data to predict exactly what might happen to the 7 remaining springs, but that drying up and reduction in size of associated riparian areas is a possibility. At a minimum, the USFS must obtain and analyze, subject to public review, all current baseline conditions and potential impacts to water quantity and quality.

The FEIS admits that critical information is lacking: “The Forest Service recognizes that **additional data collection is necessary to better understand impacts and to inform appropriate mitigation of impacts.**” Response to Comment C-009 (emphasis added). Yet, instead of gathering the needed information, the agency improperly relies on future monitoring. Id. But under NEPA, the agency can't escape its duty to conduct the necessary reviews now based on future studies. 40 C.F.R. §1502.22.

The uncertainties concerning the extent of groundwater drawdown and its effect on springs/streams/riparian areas does not relieve USFS of the responsibility under NEPA to analyze the baseline conditions, impacts, and mitigation of impacts. As the Ninth Circuit has held in the mining context, NEPA requires the agency to obtain this necessary information before approving operations and cannot avoid this duty by labeling the extent of impacts as “uncertain.”

BLM argues that an effectiveness discussion was not required because it is impossible to predict the precise location and extent of groundwater reduction, and that problems should instead be identified and addressed as they arise. But NEPA requires that a hard

look be taken, if possible, *before* the environmentally harmful actions are put into effect. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 733 (9th Cir.2001).

In this instance, the EIS states that BLM has identified fifty perennial springs and one perennial creek that are the most likely to dry up, though among these it is impossible to “conclusively identify specific springs and seeps that would or would not be impacted.” **That these individual harms are somewhat uncertain due to BLM's limited understanding of the hydrologic features of the area does not relieve BLM of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset. See *National Parks*, 241 F.3d at 733 (“lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.”).** Even if the discussion must necessarily be tentative or contingent, NEPA requires that the agency give some sense of whether the drying up of these water resources could be avoided.

South Fork Band Council v. U.S. Department of the Interior, 588 F. 3d 718, 727 (9th Cir, 2009) (emphasis added). See also 40 C.F.R. §1502.22.

As mentioned, the pit is expected to act as a strong hydrologic sink. It will begin to take water the year the mine closes and, under the proposed alternative, fill to equilibrium-like status in 220 years. The pit is expected to take in a groundwater inflow of 121 gpm and evaporate 392 gpm, or about 600 acre feet per year. Water quality in the pit lake is expected to be so poor that wildlife will elect to not use it (Appendix E, p. xii, also Volume 1, p. 3-101).

The Forest Service holds an instream flow right to use 1,794.2 acre feet/year for recreation and wildlife, including fish, permit # 33-89109 (FEIS Appendix E at E-74. The priority date for this water right is December 14, 1983. Table 2-18 (Appendix E) shows monthly flow measurements from 1999 to 2018. Prior to 2014, instream flow rights, while failing to meet overall predictions of BCG’s model, only failed to meet annual volumes 3 times. After 2014, total annual flows fell far below required flows 3 times, and likely would have failed the 4th if proper data had been gathered. For many months in 2014 and after, there were no flows recorded at all. Id.

Inadequate Mitigation for Impacts to Water Resources

(Objectors’ Comment Document S-259, Comments C-010 and C-011)

There is little meaningful mitigation to prevent what may occur to Pinto Creek. As the drawdown area is so large, the fate of some of Pinto Creek’s tributaries and above-mentioned springs will be at risk as well. Of the 4 mitigation measures proposed, none require the mine owners to do anything beyond monitoring and reporting. FEIS at 3-486 to -487; Appendix H at H-33 to H-38 (also FEIS at 3-486).

WR-1 is a “Comprehensive Water Resources Monitoring plan” for both ground and surface water. Notably, this was not provided to the public with the Draft EIS and thus violates the public review requirements in NEPA. Regarding its merits, it is basically a monitoring plan, with little substance or actual mitigation.

WR-2 is a “Post-Closure Tailings Seepage Management Plan.” Like the Plan in WR-1, this plan was only developed in July of 2020, long after the NEPA public review period was over. Again, this is largely just a plan to monitor the Project impacts. Critically, the agency admits that seepage from the tailings is likely to pollute surface and ground waters, but requires no immediate action to prevent that (such as pumping and treating all seepage).

The seepage may migrate downgradient (outside of the Pinto Valley Mine project boundary) and potentially discharge as baseflow in Pinto Creek. The high total dissolved solids and sulfate concentrations in the seepage from the facilities could degrade water quality in the groundwater system and in Pinto Creek downgradient of these facilities during the post-closure period and affect potential beneficial uses.

FEIS at 3-486. Yet, as noted herein, under its Organic Act and NFMA duties, the agency cannot allow any aspects of the Project to adversely affect these critical public resources.

WR-3 is just a plan to hold meetings to review monitoring data and does nothing to protect water resources.

WR-4, like WR-1, is just a plan to monitor the impacts to federal water rights, with no plan to protect those rights as the agency is required to do.

In fact, some of the recommendations for future Adaptive Management measures do not appear at all viable. The mitigation measures for example state that PVMC will annually review sources of alternative water supply to offset pumping in the Peak wellfield, although the FEIS stated elsewhere that alternative sources are not available. Also, it is stated that the PVM will annually review the effectiveness of wellfield pumping configuration and may adjust the duration or frequency of pumping from specific wells, but elsewhere the FEIS states that PVMC has determined that this is not feasible. (FEIS Vol. 3 Comprehensive Water Resources Monitoring and Mitigation Plan, p. 16, and Vol. 1, 2-80, 81).

As noted herein, reliance on future plans not subject to current public review under NEPA, violates NEPA’s public review requirements. Such “wait and see” mitigation plans violate NEPA. NEPA requires that the agency review mitigation measures as part of the NEPA process -- not in some future decision shielded from public review. 40 CFR § 1502.16(h).

Putting off an analysis of possible mitigation measures until after a project has been approved, and after adverse environmental impacts have started to occur, runs counter to NEPA's goal of ensuring informed agency decisionmaking. *See Robertson*, 490 U.S. at 353, 109 S.Ct. 1835 (“Without [a reasonably complete] discussion [of mitigation], neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.”).

Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1107 (9th Cir. 2016)(EIS for mine violated NEPA).

In addition, the FEIS contains little, if any, discussion of the effectiveness of any of the mitigation measures, as required by NEPA. NEPA requires USFS to fully analyze all mitigation

measures, their effectiveness, and any impacts that might result from their implementation. NEPA regulations require that an EIS: (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). 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”). A mitigation discussion without a credible 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) (rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS).

Failure to Protect the Pinto Creek Watershed, Fisheries/Wildlife, Water Quality, and Federal Water Rights

(Objectors’ Comment Document S-259, Comments C-012 to C-017)

In addition to the agency’s failures to protect water quality and species habitat noted herein, the FEIS predicts significant impacts due to the groundwater dewatering/pumping and from the contaminated tailings seepage. *See* Appendix E. The pit lake alone is predicted to violate numerous water quality standards. Appendix E, Table 3-11. As noted, the FEIS predicts that contaminated tailings seepage will reach public lands and waters.

The predicted changes in groundwater levels under the proposed action indicate the drawdown area is predicted to continue to expand during the post-mining period from 23.8 square miles at the end of mining (map 3-40 in appendix A) to 37.9 square miles at 100 years post-closure (map 3-41 in appendix A). At the 100-year post-mining timeframe, the proposed action drawdown area is 6 percent larger than under the no-action alternative scenario, and 1 percent larger than under the alternative 1 scenario.

Similar to the no-action alternative and alternative 1, the model also predicts that mounding (an increase in groundwater levels compared to conditions at the end of 2012) would occur beneath Tailings Storage Facility No. 4 and in the Haunted Canyon area at the end of mining (map 3-40 in appendix A). Mounding beneath the tailings storage facilities results from seepage out of the base of the unlined facility; mounding in Haunted Canyon results from Carlota’s mitigation discharges to supplement surface flows. The mounding beneath Tailings Storage Facility No. 4 is predicted to dissipate prior to the 25-years post-mining timeframe (SRK Consulting, Inc. 2019b).

The maximum areal extent of the 5-foot drawdown contour under the proposed action scenario is presented on map 3-35 in appendix A. This map shows the predicted outer limit of the 5-foot drawdown contour as determined by overlaying a series of 5-foot drawdown contours for representative points in time over the 100-year post-mining period (SRK Consulting, Inc. 2019b). The maximum drawdown area under the proposed

action is similar to, but slightly larger (particularly toward the northwest) than, the maximum drawdown areas projected under the no-action alternative and alternative 1.

The groundwater model simulations predict a pit lake on private land would start to develop in 2038 during the first year after Open Pit mining ceases as a result of passive inflow of groundwater. The pit lake is projected to reach 95 percent of full recovery within approximately 220 years after closure (figure 3-19). The projected area of the final pit lake is shown on map 3-37 in appendix A, and the predicted surface area, volume, groundwater inflow, and evaporation rates at full recovery are summarized in table 3-128.

In comparison to the pit lake predicted to develop under the no-action alternative and alternative 1, the proposed action pit lake would be deeper and have a larger surface area and volume and proportionally larger rate of groundwater inflow and net evaporation. At full recovery, the pit lake is predicted to have a groundwater inflow rate of 121 gallons per minute (of total inflow rate of 396 gallons per minute from all sources) and evaporation rate of 392 gallons per minute (table 3-128). The pit lake is expected to behave as a strong hydraulic sink (hydrologic capture zone where there is groundwater inflow that is lost to evaporation but no outflow to the groundwater system) (SRK Consulting, Inc. 2019b).

FEIS at 3-474/75.

Little, if any mitigation is proposed to prevent these impacts to critical resources. This violates the agency's duties to minimize impacts and protect fish and wildlife habitat under the Organic Act and implementing regulations "to maintain and protect fisheries and wildlife which may be affected by the operations." 36 C.F.R. §228.8(e). These impacts also violate USFS's duties to "minimize adverse environmental impacts on National Forest surface resources." 36 C.F.R. §228.8. "The operator also has a separate regulatory obligation to 'take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.' 36 C.F.R. §228.8(e)." Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1164 (D. Montana 2010) (mine approval violated Organic Act and Part 228 regulations by failing to protect water quality and fisheries). "Under the Organic Act the Forest Service must ...require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat." Id. at 1170. Notably, all of these requirements apply even under USFS's view (albeit erroneous as detailed above) that PVMC has a statutory right to conduct all its operations on public land.

Regarding water quality, the FEIS acknowledges that USFS approval of expanded/continued operations will adversely affect water quality, with little, if any, mitigation required to prevent these serious impacts. That would violate the USFS's duties under the Clean Water Act, Organic Act, agency regulations and NEPA (for failing to provide for and analyze mitigation and its effectiveness). Appendix E (Water Resources and Geochemistry Technical Report) confirms that the Pinto Valley Mine exceeded numerous surface and ground water quality standards. This includes significant reductions to surface flows caused by the groundwater pumping, dewatering, and pit lake evaporation.

We expect ongoing and future PVM groundwater extraction from the Peak Well system will adversely affect Pinto Creek cuckoo riparian habitat. Groundwater pumping can reduce the ability of an area to support an abundance of riparian vegetation by lowering groundwater tables and drying riparian areas (USFWS 2002). AGFD and Miller Ecological Consultants' Pinto Creek habitat degradation observations in 2017 and 2018 coincided with Pinto Creek groundwater extraction and modeling results (USFS 2020). Between 2013 and 2018, groundwater modeling estimated there was an 82 percent reduction in Pinto Creek baseflow from PVM operations (USFS 2020). Additional modeling identified in the BA describes future Pinto Creek baseflow will decline a further 10 percent during the period of active mining, for a maximum baseflow reduction of 92 percent from 2012 levels (USFS 2020).. Groundwater and surface water form an interconnected hydrologic system (Megdal et al. 2011). The principal effect groundwater pumping activities have to cuckoo habitat is reduction of water in riverine ecosystems and lowering of associated subsurface water tables, therefore removing or reducing the essential component that creates conditions for abundant cuckoo riparian habitat to persist. Without elevated groundwater tables, native woody riparian vegetation such as willow and cottonwood is unable to germinate, grow, and flourish (Stromberg et al. 1996). As a result, we can anticipate existing, more deep-rooted vegetation persisting, but a reduction in elevated groundwater, adversely affecting riparian tree germination, regeneration, growth and overall vegetation abundance and density through time. The Forest Service (2020) estimated that PVM groundwater pumping would adversely affect approximately 308 acres of cuckoo habitat.

...

[W]e anticipate that ongoing and future PVM groundwater extraction over the operational life of the mine will adversely affect the recovery and establishment of cuckoo breeding habitat.

...

We anticipate the ongoing and future groundwater extraction from the PVM Peak Well Field will reduce the Pinto Creek groundwater table and alter surface flow, riparian habitat quality, and cuckoo prey species, adversely affecting approximately 308 acres of proposed cuckoo critical habitat. We have discussed above how we anticipate the ongoing and future effects of the proposed action will adversely affect cuckoo habitat, which corresponds to the cuckoo proposed critical habitat PBFs. We anticipate groundwater extraction to adversely affect and reduce the Pinto Creek groundwater table and surface water (PBF 3 – hydrologic processes to maintain and regenerate habitat). Groundwater extraction will adversely affect the amount and quality of riparian woodlands (PBF 1 - riparian woodlands). Through the drying of Pinto Creek riparian habitat and simplification and alteration of stream habitat, we anticipate a reduction in the quality, distribution, continuity, and abundance of insect, amphibian, and reptile cuckoo prey (PBF 2 – adequate prey base).

Biological Opinion at 21-22 (FEIS Appendix D). No substantial mitigation is proposed, analyzed, or required to eliminate or minimize these impacts, as required by the NFMA, Organic Act, NFMA, NEPA, and the ESA.

The CWA, Organic Act, and agency regulations preclude USFS from approving any aspect of a

mining operation that would contribute to a violation of federal or state water quality standards, including the attainment of beneficial uses of waters that will be adversely affected and/or eliminated by the groundwater dewatering/evaporation and release of contaminants, such as is currently occurring and predicted to continue at the Mine.

Under the Clean Water Act Section 313, the Forest Service cannot authorize mining operations that do not comply with state and federal water quality regulations, including a state's antidegradation policy. 33 U.S.C. § 1323(a).

Save Our Cabinets v. U.S. Dept. of Agriculture, 254 F.Supp.3d 1241, 1249 (D. Mont. 2017) (USFS approval of mining project violated duties under CWA and Organic Act to ensure compliance with water quality standards). *See also Hells Canyon Presv. Council v. Haines*, 2006WL2252554, *4-5 (D. Or. 2006)(USFS mine approvals violated state CWA standards). The Tonto Forest Plan requirements to protect water quality, fisheries, and habitat would also be violated, which results in a violation of the National Forest Management Act (NFMA).

The Organic Act mandates the same compliance, as the Part 228 regulations “further require that mining operators comply with applicable state and federal water quality standards including the Clean Water Act; [and] take all practicable measures to maintain and protect fisheries and wildlife habitat.” Save Our Cabinets at 1250. The 228 regulations require that the operator submit sufficient information to enable the agency to ensure that the Project will comply with all applicable state and federal requirements to protect water quality and fisheries. *See* 36 C.F.R. §§228.4(c)(3), 228.8(b), 228.8(e).

Regarding the pit lake, the FEIS admits the severe impacts to wildlife:

Although the risk of harmful effects from exposure to pH, total dissolved solids, and sulfate in the pit lake were not quantitatively analyzed, mammals and birds that consume water from the pit lake may also be adversely affected by these constituents. High pit lake acidity in particular has caused mass waterfowl mortality events at other locations. In 2006, 3,000 to 4,000 snow geese (*Chen caerulescens*) perished after landing on the Berkeley pit lake in Montana. The U.S. Fish and Wildlife Service determined that the mortality resulted from exposure to sulfuric acid and heavy metals identified in post-mortem examinations (Dunlap 2017).

In addition, research conducted by Texas Tech University (Hooper et al. 2007) evaluated impacts on mallards in the lab resulting from consumption of synthetic acid metalliferous water designed to simulate the water in mine tailing ponds. Mallards were chosen for the study because previous studies indicated that passerines and waterfowl are the species most at risk to injury from drinking acid mine tailings. The results of the study indicated that ingestion of synthetic acid metalliferous water was highly toxic to dehydrated mallards (simulating migration stress) with a large percentage of birds dying within the first 98 minutes following exposure. Signs of toxicity prior to death included lateral head shaking, nasal discharge, signs of throat irritation, ataxia, signs of central nervous system depression, and increased breathing rate with shallow breaths. Mortality was mainly consistent with extreme copper toxicity. Additional results showed that no mortality occurred in mallards when lime was added to neutralize the acidity of the acid metalliferous water and reduce dissolved metal content; nearly all mallards consuming

typically sublethal doses of synthetic acid metalliferous water were able to survive exposure if allowed access to clean water and food; and synthetic acid metalliferous water diluted 10-fold was still highly toxic to mallards while synthetic acid metalliferous water diluted 100-fold was not lethal to mallards but did cause minor signs of toxicity. See appendix C, “Biological Evaluation,” for a more detailed discussion of this research.

Arizona contains part of the Pacific Flyway for waterfowl with the majority of migration occurring through the Colorado River corridor, with the next major flyway corridor along the Rio Grande River in New Mexico (Birdlife International 2021). Waterfowl such as cormorants will disperse away from these flyways along major rivers, but in much smaller numbers. Water in the pit lake is likely to be unpalatable to waterfowl due to its high mineral content and the lake will be mostly devoid of vegetation and fish; therefore, it will be unsuitable for long-term occupancy by waterfowl. However, small numbers of waterfowl, especially during a highly stressful physiological period such as in-migration, may drink the pit lake water, resulting in mortality or decreased vigor.

FEIS 3-104.

Yet the mitigation planned for the contaminated pit lake is largely a plan to conduct further assessments and modeling. The agency has no plan to protect wildlife that may encounter the polluted pit lake waters, in violation of its duties to protect wildlife under the Organic Act, Arizona law, and its own regulations. *See* ARS §17-236 (Taking any bird unlawful except horticultural/agricultural practices or as authorized by the Arizona Game and Fish Commission); ARS §17-102 (Wildlife as state property); ARS §17-309 (Take wildlife by unlawful method); ARS §17-309 (Take wildlife with deleterious substance is unlawful).

As noted herein, under NEPA, the agency cannot postpone critical analysis until the future, and must subject all relevant issues to public review in a DEIS. This includes the pit lake, and all other issues in the FEIS where the agency did not provide the relevant information and analysis for public review in the DEIS (e.g., baseline conditions for all potentially affected resources, impacts to, and mitigation for, water quality and quantity, wildlife and habitat, cultural/historic resources, air quality, etc.).

NEPA requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in the DEIS, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement.

At some point *after* the public comment period closed, the Bureau attached ground photographs for a few Obscure Routes to the forms; the photographs show details about vegetation and the condition of the routes themselves. Such late analysis, “conducted without any input from the public,” impedes NEPA’s goal of giving the public a role to play in the decisionmaking process and so “cannot cure deficiencies” in an EA. *Id.* at 1104. ... Thus, the Bureau’s failure to make the photographs available during the public comment period “caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation.”

ONDA v. Rose, 921 F.3d 1185, 1192 (9th Cir. 2019)(emphasis in original, citations omitted). *See also*, Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”); Village of False Pass v. Watt, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984).

As the Ninth Circuit recently held:

[A] post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS. Center for Biological Diversity v. U.S. Forest Service, 349 F.3d 1157, 1169 (9th Cir. 2003). The public never had an opportunity to comment on the ‘double-check’ analysis, frustrating NEPA’s goal of allowing the public the opportunity to “play a role in ... the decisionmaking process.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351.”).

Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095, 1104 (9th Cir. 2016).

The FEIS also admits that USFS approval of expanded operations will increase the adverse impact to Pinto Creek and the Forest Service’s in-stream flow right:

The predicted expansion of drawdown resulting from mine-induced drawdown could result in a reduction in baseflow in these stream reaches. A reduction in baseflows would likely affect the perennial stream reach (reduce the length of or eliminate the perennial stream reach affected by drawdown). Model simulations predict that impacts on baseflow occurred as a result of pumping from the Peak Well field during the 2013–2018 period, would continue at slightly greater magnitude under the no-action alternative (2019–2022) and alternative 1 (2019–2027), and would continue at a similar magnitude until pumping ceases under the proposed action (2038) (figure 3-23). Continued pumping from the Peak Well field under the proposed action scenario is predicted to extend the duration of the predicted impacts on baseflow for an additional 19 years compared to the no-action alternative and an additional 12 years compared to alternative 1. The potential impacts on baseflow and on perennial stream flow in Pinto Creek in the affected area would be the same as those described under the no-action alternative in that long-term reduction in baseflow would likely result in a measurable reduction in flow (or elimination of surface flow) that would be particularly noticeable during the low-flow periods. As a consequence, segments of Pinto Creek that were previously characterized as perennial prior to 2013, and that may have been affected by pumping that occurred between 2013–2018 (and no longer sustain perennial flow conditions), would be expected to continue to be affected at a similar magnitude but for a longer duration.

FEIS 3-475.

Under governing public land law, the USFS is prohibited from allowing this increased degradation and loss of protected flows. USFS’s refusal to properly regulate PVMC’s actions,

both on USFS land, and on PVMC's private lands, ignores longstanding Supreme Court precedent recognizing that the federal government may regulate activity on private lands to protect public property. See Camfield v. United States, 167 U.S. 518 (1897); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). "[T]he power granted by the Property Clause is broad enough to reach beyond territorial limits." Kleppe v. New Mexico, 426 U.S. 529, 538 (1976). "It is well established that [the Property Clause] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." U.S. v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979).³

Under the 1897 Organic Act, the agency must act to "secur[e] favorable conditions of water flows."

[N]ational forests ...shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

16 U.S.C. §475. "The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes – 'to conserve the water flows, and to furnish a continuous supply of timber for the people.'" U.S. v. New Mexico, 438 U.S. 696, 707 (1978).⁴ "The objects for which the forest reservations should be made are the ... preservation of forest conditions upon which water conditions and flows are dependent." Id. at 708.

USFS's authorization of PVMC's expanded operations will certainly not "preserve forest conditions upon which water conditions and flows are dependent." Indeed, the opposite will occur, as the dewatering of the aquifer will permanently eliminate and/or severely reduce flows in area waters. New Mexico recognized that the "preservation" of conditions for water flow was aimed primarily at providing water for uses outside the forest boundaries. "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." New Mexico, 438 U.S. at 713. Yet instead of "enhancing" water supplies, the dewatering will eliminate millions of gallons of water *each year* that would otherwise be available to downstream water users, including federal water rights.⁵

³ Further, any purported "rights" under the mining laws do not attach to PVMC's private lands, as those laws only apply to federal public land. 30 U.S.C. §22 (right to valuable minerals only on "lands belonging to the United States").

⁴ New Mexico held that the Organic Act created federal reserved water rights for these, but not other, purposes.

⁵ USFS has recognized its obligations to protect water conditions on its lands to achieve this purpose. In U.S. v. Jesse, the agency successfully argued "that instream flows are required to maintain the natural channels in a state of relative equilibrium in order to deliver water to the ultimate user under favorable conditions." 744 P.2d 491, 498 (Colo. 1987). The Court agreed that surface actions/conditions directly affect groundwater and the purposes of the Act, noting

Here, USFS never considered whether its approval of the dewatering/hydraulic sink is “consistent with” management of the Tonto National Forest and protecting the USFS instream flow right – “enhancing” and “preserving” water conditions/flows for use on/off the forest.

As detailed above, the dewatering/hydraulic sink will eliminate or substantially reduce flows in Pinto Creek and other streams and springs. Yet no mitigation is proposed to maintain these flows or protect these rights. The USFS must ensure that federal water rights are not impaired or used by private interests to the detriment of the purposes for which the rights were acquired or created. Federal water rights are “superior to the rights of future appropriators.” Cappaert, 426 U.S. at 138. “[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.” Id. at 143. “Where reserved rights are properly implied, they arise without regard to equities that may favor competing water uses. *See Cappaert v. U.S.*, 426 U.S. 128, 138-39.” Colville Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985).

The USFS cannot disregard its duty to protect such federal property. “Only Congress, and not an executive branch agency, can authorize the disposition of federal property.” High Country Citizens Alliance v. Norton, 448 F.Supp.2d 1235, 1248 (D. Colo. 2006), *citing Gibson v. Chouteau*, 80 U.S. 92, 99 (1871). The court in High Country found that the Interior Department failed to protect water flows to the detriment of its federal right. Id. at 1253. *See also Lake Berryessa Tenants’ Council v. U.S.*, 588 F.2d 267, 271 (9th Cir. 1978)(federal agency “cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”). Here, USFS illegally failed to prevent impairment of its Pinto Creek water right.

The DROD and FEIS unequivocally shows that the Pinto Valley Mine is in effect appropriating surface water from Pinto Creek, and USFS approval of continuing and expanded operations will only make the situation worse. The Forest Service 1983 instream flow priority right greatly predates any potential competing claim.

In response to why the Forest Service is not more vigorously defending its instream and other water rights in Pinto Creek, the Service only states that it submitted a request for a determination of appropriability to the Department of Water Resources and the Department answered that it would not make a determination at this time (FEIS Vol. 4 Appendix J Response to Comments on DEIS). The Forest Service does not dispute that the PVMC is appropriating public surface water by pumping subflow, and should not defer resolution of this matter to lack of action by another agency.

Further, in April of this year, US Fish and Wildlife issued its final critical habitat designation for the yellow-billed cuckoo. Critical habitat includes most of Pinto Creek with Units 26 and 29 being designated. From the discussions in the Draft and Final EIS, it appears that a considerable stretch of Pinto Creek in Unit 29 is going to be degraded by expansion of the mine. As the

that “evaporation is the worst dissipator of moisture, and the need to “insur[e] springs a greater supply for a longer time.” Id. at 496, n. 5.

Forest Service has not required compensatory or off-site mitigation for this expansion project, it is unclear how expansion can move forward without resolution of critical habitat loss.

The DROD and FEIS do not implement the recommendation from the U.S. Fish and Wildlife Service (FWS) to protect western yellow-billed cuckoo and its critical habitat as required by the NFMA, Organic Act, NEPA, and the Endangered Species Act (ESA). “We recommend implementation of conservation measures to improve Pinto Creek groundwater and surface water to aid in riparian habitat improvement and cuckoo recovery.” August 4, 2020 Biological Opinion at 26 (FEIS Appendix D). At a minimum, these conservation measures are needed to comply with the Forest Service’s duties to minimize all adverse impacts from the Project and to protect fish and wildlife habitat under the Organic Act and implementing regulations “to maintain and protect fisheries and wildlife which may be affected by the operations.” 36 C.F.R. §228.8(e). These impacts also violate USFS’s duties to “minimize adverse environmental impacts on National Forest surface resources.” 36 C.F.R. §228.8. “The operator also has a separate regulatory obligation to ‘take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.’ 36 C.F.R. §228.8(e).” Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1164 (D. Montana 2010) (mine approval violated Organic Act and Part 228 regulations by failing to protect water quality and fisheries). “Under the Organic Act the Forest Service must ...require [the project applicant] to take all practicable measures to maintain and protect fisheries and wildlife habitat.” Id. at 1170.

Reasonable Alternatives Not Considered

(Objectors’ Comment Document S-259, Comments C-018 to C-019)

The FEIS only examines three alternatives: No Action (the mine does not expand onto Forest Service land, ceases mining, and begins closure and reclamation within 6 months.), the proposed action (the mine expands onto about 500 acres of FS land and closes in 2039), and an alternative which allows mining for 7 years. FEIS Vol 1, 2.3. The FEIS improperly fails to consider all reasonable alternatives as required by NEPA, which requires federal agencies to “rigorously explore and objectively evaluate all reasonable alternatives” to a proposed action that has significant environmental impacts. 40 C.F.R. §1502.14(a); *accord* 42 U.S.C. § 4332(2)(C)(iii). Informed and meaningful consideration of alternatives is critical to the NEPA statutory scheme, ensuring that agency decision-makers assess a project’s costs, benefits, and environmental impacts in the correct context. *See Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729-30 (9th Cir. 1995). This requirement also ensures that 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.” Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988) (emphasis in original).

The USFS violated NEPA’s alternatives-review requirement by arbitrarily dismissing the No-Action Alternative and failing to consider reasonable alternatives that would minimize impacts to public lands and waters. Due to its locatable mineral and claim validity assumptions, USFS improperly restricted its NEPA review and regulatory authority based on its unsupported position that PVMC had a statutory right to conduct the Project (as discussed above). Because USFS “misconstrue[d]” its statutory authority, it arbitrarily dismissed the No-Action alternative, and

thereby failed to take “a hard look at all reasonable options before it.” New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 710-711 (10th Cir. 2009).

In addition, as noted herein, the agency’s Purpose and Need and No-Action Alternative ignores the undisputed fact that the site currently violates water quality and other environmental standards due to the various pits, waste/tailings piles, and other pollution sources. The agencies must consider the cleanup/remediation of the site as their first obligation under the Clean Water Act, 1897 Organic Act, the NFMA, NEPA, and other applicable laws/regulations, which the DROD and FEIS fail to do.

For example, the agency cannot assert that the No-Action Alternative would result in the continuation of the current contaminated conditions, as the agency, and PVMC are already under an outstanding obligation to clean-up/remediate the site. By ignoring this, the Forest Service essentially lets the company off-the-hook for the current conditions and responsibilities under federal and state law. At a minimum, the agency must fully review and consider a cleanup/remediation plan that does not involve additional and new mineral extraction and waste dumping.

As result of its erroneous decision that all excavation and related aspects of the Mine would be regulated under the 1872 Mining Law, as discussed above, the USFS arbitrarily dismissed the No-Action Alternative based on its fundamental misconception of its regulatory authority. That was the holding in the Rosemont Mine decision, where the court rejected the same legal position taken by the agency here, where it asserts that it cannot choose the No-Action Alternative for the Project.

The FEIS also did not seriously consider alternatives that might have reduced impacts to Pinto Creek. One alternative could have been to conduct pump tests on individual wells in the Peak Well field to see if certain wells caused more decline than others in Pinto Creek surface flows. Such tests were done for the Carlota Mine and quickly demonstrated a hydrological connection between their ground water pumps and surface water in Haunted Canyon. With the PVM, certain pumps might be retired to help restore flows.

As noted, the DROD and FEIS do not implement the recommendation from the U.S. Fish and Wildlife Service (FWS) to protect western yellow-billed cuckoo and its critical habitat as required by the NFMA, Organic Act, NEPA, and the Endangered Species Act (ESA). “We recommend implementation of conservation measures to improve Pinto Creek groundwater and surface water to aid in riparian habitat improvement and cuckoo recovery.” August 4, 2020 Biological Opinion at 26 (FEIS Appendix D).

Another alternative would be to require mitigation flows similar to what was done in Haunted Canyon. While the effort was controversial and produced questionable results, it nonetheless was at least an attempt to offset some of the most egregious impacts to that riparian area. At a minimum, this alternative would assist the USFS in meeting its obligation to protect public resources and minimize adverse impacts from the project.

Reducing groundwater pumping could be another alternative. The mine might have to scale back production and expectations or find alternate water sources, but certainly continued destruction of Pinto Creek is not an option the FS should tolerate. Under USFS Manual 2500 Chapter 2520, the Policy Objective is to “Give preferential consideration to riparian-dependent resources when conflicts among land use activities occur.” That has not occurred here.

The USFS did not present an alternative that would have required pump and treat wells below #3 and #4 tailings piles. The treated water could have been discharged to Pinto Creek or used as process water which would have reduced dependence on groundwater pumping.

Given the myriad hydrological and other issues with this mine expansion, the FEIS should have given the No Action alternative more serious consideration, and as detailed above, the misinterpretation of federal mining and public land law fatally flaws its NEPA alternatives review. This alternative still allows the mine to continue, albeit for a shorter period of time. As part of this alternative, encroachment issues could be resolved through cleanup or mitigation with no need to expand onto public land. As documented, impacts to Pinto Creek and nearby springs would be less, the final pit size/tailings would be smaller, and less water would report to the pit – all more favorable outcomes the USFS failed to require.

Lastly, as detailed herein, the agency failed to analyze and require alternatives involving adequate mitigation of impacts to water quality and quantity, wildlife, air quality, and other affected resources. As such the agency failed to adequately consider the reasonable alternatives of reducing impacts to these resources.

Special Use Permits and Other Authorizations

(Objectors’ Comment Document S-259, Comment C-020, Also Comments C-044)

Various mine facilities including power lines, pipelines, reservoirs, water storage tanks, and access roads are located on Forest Service land. One well, Peak Well 37, is on USFS land. Water infrastructure alone uses about 71 acres of public land.

These facilities are permitted in various ways including special use permits, public right of ways, letters of agreement, and under 36 C.F.R. 228 Subpart A regulations. In the proposed alternative, additional facilities will be permitted on USFS land to accommodate mine expansion.

As noted herein, the FEIS and DROD erroneously consolidate all permits under the Locatable Minerals FS regulations (36 C.F.R. 228, Subpart A). This consolidation would include all previous construction and disturbances permitted under various authorities and agencies dating back to the 1940’s.

The USFS does not explain why consolidation of permits is a good thing. Special Use Permits, for example, can have conditions attached which help mitigate adverse impacts. The DROD and FEIS failed to describe how, other than simplifying bookkeeping, consolidation of authorizations is a good thing for our public lands.

In addition, special use permits and rights-of-ways (ROWs) across federal land are not issued under the 36 C.F.R. Part 228 Subpart A regulations, but rather under FLPMA. Water pipelines, transmission lines, and other conveyances cannot be authorized by the plan of operations

approval process, which only involve “operations authorized by the United States mining laws.” 36 C.F.R. §228.1. Approval of water and electrical transmission lines is not governed by any right under the Mining Law:

BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited. ...

There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Desert Survivors, 96 IBLA 193, 196 (1987), 1987WL110528, *3 (citations omitted). *See also* Far West Exploration, 100 IBLA 306, 309, n. 4 (1988), 1988WL110726, *3 (“a right-of-way must be obtained prior to transportation of water across Federal lands for mining.”). Although these Interior Department cases dealt with BLM lands, they apply equally to USFS lands, as FLPMA Title V governs both agencies. 43 U.S.C. §1761.

The agency’s decision to consider pipelines, etc. as mineral “operations” that it must approve under Part 228 erroneously eliminates the agency’s duties under FLPMA and creates statutory rights where none exist. USFS thus failed to apply the proper environmental and public interest reviews under FLPMA Title V and its implementing regulations. The application of FLPMA to the use of public lands for utility, water, and other corridors, in contrast to the Part 228 regulations, has on-the-ground ramifications, as FLPMA mandates stringent public and environmental protections that were not considered here. USFS may grant a ROW/SUP only if it “(4) will do no unnecessary damage to the environment.” 43 U.S.C. §1764(a). ROW/SUP’s “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.” §1765(a). The ROW/SUP can only be issued if activities connected with its approval: “(i) protect Federal property and economic interests; ... and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.” §1765(b). FLPMA thus does not limit its protective mandates to only the land within the ROW corridor.

USFS must protect these environmental resources under FLPMA. In County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081, 1085-86 (9th Cir. 2003), the court affirmed USFS’s imposition of mandatory off-site minimum stream flows as a condition of granting a ROW for a water pipeline across USFS land. “FLPMA *requires* all land-use authorizations to contain terms and conditions which will protect resources and the environment.” Trout Unlimited v. U.S. Dept. of Agriculture, 320 F.Supp.2d 1090, 1108 (D. Colo. 2004)(emphasis in original). USFS ROW/SUP regulations require that “An authorized officer shall reject any proposal ...if ...the proposed use would not be in the public interest.” 36 C.F.R. §251.54(e)(5)(ii).

The same was true when the Ninth Circuit upheld BLM’s denial of a ROW for a water delivery pipeline in Nevada, holding that denial of the ROW was proper under FLPMA and did not result in a “taking” of any private property rights;

Washoe County applied for a right-of-way to build a pipeline on federal land. Washoe County and the other Appellants had no right to build on federal land and thus no interest in the land. The government applied internal regulations concerning the federal government's management of public lands to determine whether to grant a right-of-way on property it owns. Thus, the government in no way imposed regulatory restrictions on the use of Appellants' private property, neither the land nor the groundwater rights appurtenant to the land. For example, the government did not limit the Appellants' access to their wells, restrict the amount of groundwater they could pump, or dictate what they could do with the water. Rather, the government was acting as a landowner whose neighbor sought permission to lay a pipeline across its property. However, the government had no obligation as a neighbor to assist Washoe County or the other Appellants in putting their water rights to the most profitable use or to pay just compensation because the State of Nevada granted Washoe County authorization under state law to make a particular use of the water on the Ranch. Because the government did not impose any regulations on Appellants' water rights, it did not effect a regulatory taking.

Washoe County, Nev. V. U.S., 319 F.3d 1320, 1327-28 (9th Cir. 2003).

Accordingly, because USFS never considered regulating these aspects of the Project under proper FLPMA requirements, including the impacts from the facilities served by the access across USFS lands, the proposed approval of the PoO would violate FLPMA and its implementing regulations.

Tailings Piles – Geotechnical Stability/Health and Safety

(Objectors' Comment Document S-259, Comments C-021 to C-026)

The DEIS admits that USFS approval of expanded operations, especially the tailings facilities, will increase the adverse impacts from the tailings, as well as the risk to the public:

Compared to the no-action alternative, the proposed action would add an additional 12 years of active mining, resulting in more tailings being generated over the life of the mine. Extending the footprint and capacity of tailings storage facilities on National Forest System lands under the proposed action would allow more tailings to be stored at Pinto Valley Mine and increase the risk to public health and safety in the event of a tailings storage facility failure.

DEIS at ES-27. Yet the agency never states why this acknowledgment was deleted from the FEIS. As detailed above, the USFS believes that it is required to add to these impacts, and add to the risk to the public, under its mistaken interpretation that PVMC has a statutory right to expand the tailings (and its associated risk to the public) onto public land. Because that position is legally unsupportable, the agency is under no obligation to approve these operations, and indeed, under a proper view of its authority, the agency must deny these increased impacts and risks, as they are not in the public interest.

Sierra Club has led hikes to the eastern Superstitions since the 1970's and its members have always wondered at the growing piles of tailings when they traversed the Pinto Valley Mine on

FS Road 287. Especially disconcerting was the steep heap leach pad just to the right of the road when beginning the drop into Pinto Creek, as well as the #4 tailings they would pass going by the Layton Ranch on the way down to lower Pinto Creek. As the mine was on private property and no NEPA studies had ever been conducted as far as the public knew, little was known about the details of the mine except that it was big. Some Club members saw the spills in 1993 and 1997 from the mine into Pinto Creek and were assured each time that such spills could not happen again (AZ Republic “Magma Copper Clearing its Waste left by Floods,” July 25, 1993). *See also* attached news articles on spills. Most of the attention the past couple of decades has been on the Carlota mine, with its pit located directly in Pinto Creek and its water pumped from the confluence of Pinto and Haunted Canyon.

The FEIS discusses the present and possible future environmental impacts of all this mine waste. First noticed is the sheer size of the tailings piles, particularly #4, which currently is over 700 feet high and by 2039 is projected to be 1,045 feet, almost as tall as the Eiffel Tower. Total storage capacity for #4 is predicted to be 752 million tons. This is a very large tailings pile by any standard (see Bowker Associates – World Mines Tailings Failures). This tailings pile at closure will be one of, if not the, highest in the world using this particular construction method, the upstream method. Tailings #3, while not as large, is formidable at 568 feet high and 113 million tons when the mine finally closes. FEIS Table 3-51, FEIS at 3-239. The mine’s original tailings piles, #1 and 2, are considered closed and apparently will not be receiving any more tailings, but were the tailings that failed in the 90’s and remain of concern.

Unfortunately, both #3 and 4 tailings were built using upstream dams, meaning that new embankments were simply stacked on existing tailings for each successive lift. The Forest Service refers to these tailings facilities, which were originally constructed in the 1970’s as “as built” on private property (FEIS Vol. 4, Appendix J, Response to Comments). Similar to a wedding cake, each layer (in this case about 50 feet) puts more weight on the lower ones. Tables 3-51 and 3-52 show Arizona State standards for Required Factor of Safety and the actual Factors of Safety as determined by computer modeling. For both #3 and 4 tailings, the Factors of Safety decline as more tailings are piled on top of older tailings, until by 2039, they barely meet State criteria. For example, the minimum standard is 1.3; the actual factor at closure is about the same, 1.3. In the event of an earthquake, the result again is basically the same. Note that mining consultants recommend Maximum Credible Earthquake (MCE) design criteria whenever loss of human life could occur (Evaluation of the Maximum Design Earthquake for the Tailings Storage Facilities for the Proposed Resolution Copper Mine, Dr. Steven H. Emerman, March 27, 2019). In truth, these tailings piles have little or no margin of safety. Also, it must be stressed that these are state standards which are not as stringent as federal or other standards. Thus, reliance on old state standards, which have not been updated in light of recent analysis of upstream dams around the world, is not sufficient to meet the USFS’s mandate to fully analyze and protect against risks to the public.

Upstream tailings dam design is the most risky of all tailings dam designs. *See* the reports on the recent catastrophic failures of upstream tailings dams in Brazil and British Columbia as well as analysis/critiques of the upstream design method that were attached to Objectors’ comments and are part of the record for this Objection. Instead of simply citing to outdated Arizona guidelines, the USFS must independently analyze these reports and the associated risks of upstream designs. This is especially true as the Pinto Valley Mine tailings facility #4 will, with USFS approval of

the expansion, become one of the largest upstream tailings dams in the world. Brazil, Chile, and other countries have banned upstream tailings dams. See “The Looming Risk of Tailings Dams” by Moira Warburton, Sam Hart, Julia Ledur, Ernest Scheyder and Ally J. Levine, January 3, 2020). <https://graphics.reuters.com/MINING-TAILINGS1/0100B4S72K1/index.html>.

As described in Appendix F of the FEIS (F-24), liquefaction of tailings piles is a major cause of tailings failures. Liquefaction occurs when water becomes trapped in certain sections of tailings piles and cannot drain. Finer grained tailings are generally less stable than coarser grained. Both #3 and 4 tailings are considered susceptible to liquefaction as they contain very fine tailings, and two different computer modeling programs were run to determine the extent of risk. The first model showed liquefaction occurring in #4 tailings under certain earthquake conditions (0.15 gravitational acceleration). The second model disagreed but appears to have used a slightly weaker earthquake event – 0.137. In any event, when modeled against a maximum probable earthquake, both #3 and 4 tailings are predicted to fail. Both the National Dam Safety Program and the Canadian Dam Association advocate using maximum probable earthquakes when designing tailings piles, especially when people live below the dam site (Appendix F-46). In this case, the communities of Roosevelt Shores and Roosevelt Estates are about 13 miles downstream on Pinto Creek.

The final pages of FEIS Appendix F are entitled “Geotechnical Stability Uncertainty and Risk” and summarize the consequences of #3 and 4 tailings dam failures. Under a major flooding scenario, a dam breach would inundate the full length of Pinto Creek and flow into Roosevelt Lake. The FEIS repeatedly uses the 21-mile figure to determine the length of runout, which apparently means tailings would flow to Roosevelt Dam, as the lake itself appears to be closer to 14 miles from the #4 tailings. The computer models show total runout distances for #4 tailings pile of about 56 miles given a 1% slope from the mine to the lake, and 21 miles for #3 (Appendix F-35). Thus, a major dam breach could threaten not only considerable life and property but also Roosevelt Dam, which holds the main drinking water supply for the Phoenix metropolitan area.

The FEIS points out that the biggest problem is that all types of potential failure modes for the tailings piles have not been analyzed. Besides liquefaction and earthquakes, tailings dams can fail for other reasons, including erosion. FEIS F-48 concludes that “the probabilistic risk of dam failure is unknown, but it is not zero,” and ends by urging development of an emergency action plan which is “an industry standard for most high hazard dams.”

Note that the term “high hazard” and the classification of dams in general refer mostly to population at risk. According to the Canadian Dam Association guidelines, high hazard would mean 10 or fewer people at risk. A major dam breach at the PVM could put far more people at risk, including recreationist in and along Pinto Creek, boaters, campers and fisherman at Roosevelt Lake, traffic on Highway 88, commuters to the Reavis Mountain School, as well as the communities near the lake. AMRC does not agree that it would necessarily take 3 hours for a flood event to take tailings to Roosevelt Lake. Other studies say that minimum velocities for tailings failures seem to be about 20 kilometers/hour. At a distance of about 14 miles (22 kilometers), it appears that tailings could reach Roosevelt Lake in a little over an hour. Using the Canadian Dam Association five step rating system, these tailings would probably be listed as Extreme, with over 100 people at risk.

The FEIS makes no attempt to analyze the impacts of a major tailings spill into Roosevelt Lake. What might be the effect on water quality? Could a spill be cleaned up or would the Lake remain contaminated in perpetuity, similar Idaho's Coeur d' Alene Lake that contains some 75 million tons of sediment from nearby mining operations? What would happen if a major spill occurred with Roosevelt Lake full of water? Could the dam be overtopped or threatened? What could happen to the other Salt River Project dams downstream? How far towards the Phoenix metropolitan area might there be impacts? A revised DEIS should analyze what could happen from a catastrophic spill involving a maximum release of tailings and other waste down Pinto Creek into Roosevelt Lake.

The FEIS lacks sufficient history of the Pinto Valley Mine to give the reader enough information to make an informed decision as to if expansion of the project is merited. Due to repeated spills and violations, the Pinto Valley Mine in 1994 was required to enter into a Consent Decree with multiple regulatory agencies to address roots problems and provide consistent information and reporting on progress on improving practices at the mine. Despite these efforts, a massive tailing spill from tailings #1 and #2 facilities occurred in 1997 that triggered a CERCLA response and cost the mining company \$35 million to clean up. There was great concern that a large storm event could have washed the tailings that had spilled into Pinto Creek downstream before clean-up was completed which would have been a disaster for Roosevelt Lake.

The earliest site characterizations for tailings #3 and #4 that we have heard mention of was done in 1995 as part of ADEQ's Aquifer Protection Permit. The FEIS does not discuss any site characterization studies for any of the tailings facilities prior to their construction to determine geological foundation stability. As the #3 and #4 sites started receiving tailings in the 1970's, construction of the initial dams predated the creation of the ADEQ. It is not clear what regulatory agency, if any, oversaw this important phase of construction of these facilities. In addition, while the FEIS does include fault line mapping for the pit area, the mapping does not extend the fault lines to tailings areas. Likewise, no mapping seems to exist regarding historic springs that might exist under tailings locations, which could be a consideration as the #4 tailings expands into upper Eastwater Canyon. We do note that there was speculation in the 1997 spill that an underground spring may have contributed to the tailings failure.

The FEIS states that, as a result of comments on the Draft EIS, that PVMC has produced an Emergency Action Plan to deal with a significant tailings dam failure. Unfortunately, despite numerous references to the Plan though out all 4 volumes, it is not included in the FEIS. The only actual discussion is two paragraphs in Vol. 1, 3-251, which states that the Plan was developed in accordance with Federal Guidelines for Emergency Action Planning for Dams. This important document should have been part of the NEPA process.

Similarly, the FEIS gives no assurance that the mine will actually close in 2039, opening the possibility that even more tailings and waste could end up along Pinto Creek. In fact, the document states that the mine owners may conduct exploration on national forest lands by filing a plan of operations. Given the already extreme size of the tailings piles and other impacts, the mine needs to be preparing for permanent closure, whether it is 2027 or 2039. The USFS should have analyzed the merits of different closure dates in relation what provides the greatest assurance of a safe and stable reclamation process. If mining until 2039 allows the owners to do a better job of making tailings piles more stable the FEIS should make that argument. If piling

ever more tailings on top of old tailings makes for a more dangerous situation, the EIS process should fully discuss the merits of the no action alternative.

Regarding reclamation/closure, there is a question whether Capstone Mining may be unable to properly fund mitigation and reclamation measures once the mine does close. Its stock has traded well under one dollar in past years. Reportedly, Capstone Mining, parent company of PVMC, is reporting a profit for the first time this year.

<https://www.google.com/search?q=capstone+mining+stock+price&oq=Capstone+Mining+stock+price&aqs=chrome.0.0l4.10634j1j8&sourceid=chrome&ie=UTF-8> (viewed Jan. 25, 2020).

Importantly, the bonding mechanism with the State is self-insured, a type of bonding not allowed by the federal government. All mitigation and reclamation measures should be agreed to and included in the Plan of Operations prior to any approval or permits being issued. The bond should be sufficient to adequately protect surrounding federal land in the event the bond with the State is not realized. This plan and agreement should be included in a revised Draft EIS. The USFS cannot allow self-bonding for the Pinto Valley Mine.

Regarding the pit and pit slope that will be expanded onto USFS land, the DEIS admits that critical geotechnical information/analysis has yet to be obtained.

The pit slope design and supporting geotechnical evaluations for the pit were not available for review for the proposed action. SRK Consulting, Inc. (2018a) prepared a memorandum that provided an overview of the pit design activities completed by other consultants for the pit, **but did not include the actual pit design or pit slope stability reports for review.** *However, there is a potential for pit slope failures in the Open Pit to damage adjacent reclaimed facilities (such as the adjacent Main Dump and adjacent waste rock-covered Leach Piles) during the post-closure period. There also is a potential for post-closure pit slope failures to result in expansion of the pit perimeter toward the east or south into National Forest System land that was not included under the proposed action.*

DEIS at ES-23 (emphasis added). Under NEPA, this critical information and analysis must be contained in the DEIS subject to public review.

Regarding such missing information (as well as all of the other missing information noted herein), NEPA requires that “[i]f 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.” 40 C.F.R. §1502.22(a). Here, data and analysis necessary to determine the critical geotechnical issues related to the pit slope and is clearly essential and related to significant impacts, yet there has been no showing that costs to obtain baseline samples and other critical information are “exorbitant.”

In addition, the FEIS admits that: “There also is a potential for post-closure pit slope failures to result in expansion of the pit perimeter toward the east or south into National Forest System land that was not included under the proposed action,” DEIS at ES-23. Notably, this admission was deleted for the FEIS. Yet the direct, indirect and cumulative impacts from this reasonably foreseeable event has yet to be reviewed or subject to the public comment.

At best, the agency admits that much of this critical information was done “following the draft EIS.” FEIS at J-112. As noted herein, such post-public-comment-period analysis violates NEPA.

Rock Dumps

(Objectors’ Comment Document S-259, Comment C-027)

The FEIS discusses a new West Dump at the base of the heap leach pad in Gold Gulch. This site was apparently chosen for two reasons: the mine needs more rock dump space and the need to buttress the steep face of the heap leach pile. There is no doubt that something needs to be done with the steep slope (the leach pile has for long looked like it was about to slide into Pinto Creek), but locating a rock dump there seems to be inviting a new disaster. The heap leach pad is already close to Pinto Creek, it is hard to imagine a rock dump fitting in that space and not immediately impacting the creek. FS Road 287 would have to be relocated to avoid the new dump. There is no discussion of a new route for FS Road 287 and it is not clear if access to Pinto Creek and the Western Supersitions will continue to be made available from this area. We also note that the dump will bury about 11 acres of Fremont Cottonwood riparian vegetation. The DEIS does not analyze mitigation for this loss, as NEPA requires.

The mine is also continuing to dump waste rock on top of the heap leach pad as the leaching process reportedly will no longer being used. It seems that the mine is either out of space to dump its waste and can only go higher, or to reduce cost the owners refuse to truck the waste to a safer, but further, location. The FEIS failed to discuss the feasibility of this location for the West Dump and the wisdom of putting more waste on top of the leach pad.

We now note that, according to PVM’s most recent statements, it is their intent to resume leaching as a new study has demonstrated positive economics with the existing leach dump and SX-EW plant. It is not clear to us how the leach dump will continue to function as such a dual purpose nor is it clear what this means regarding geotechnical stability of this facility.

We also note that the West Dump, according to numerous maps and figures in Volume 3, no longer seems to abut the leach dump in order to help buttress the facility. The FEIS should have made more clear the situation with continued leaching at the PVM, the exact location and purpose of the West Dump, and what this all means to continued access to the West Supersitions via FR287.

Lastly, as detailed above, because the dump area on PVMC’s unpatented mining claims clearly do not contain the requisite discovery of valuable locatable minerals, the dump must be considered under the Part 251/261 regulations as a proposed special use, which cannot be approved unless it is in the public interest – which the USFS refused to consider in this case.

Air Quality

(Objectors’ Comment Document S-259, Comments C-028 to C-031, Also C-045 to C-055)

The DEIS showed that the Pinto Valley Mine violates the Clean Air Act (CAA) and federal air quality standards. “Air quality modeling indicates that 1-hour concentrations of nitrogen dioxide would exceed the National Ambient Air Quality Standards.” DEIS at ES-17. USFS’s approval of expanded operations is predicted to make this situation worse: “Modeled ambient

concentrations of all air pollutants would be higher than the no-action alternative. However, predicted exceedances of the National Ambient Air Quality standards would be the same as the no-action alternative.” *Id.* See also DEIS at 3-32 (same). “Emissions from mobile sources would increase, mostly due to increases in haul truck activity under the proposed action. Annual emissions of all pollutants would increase, and emissions would be emitted for 12 additional years compared to the no-action alternative.” DEIS at ES-16.

Now, the FEIS states that the Project will comply with all standards. “As described in section 3.2, “Air Quality,” of the final EIS, the updated air quality modeling for the final EIS indicates that there are no modeled exceedances of National Ambient Air Quality Standards that required additional mitigation.” FEIS J-113. Yet none of this “updated air quality modeling” was ever subject to public review under NEPA. The public never had an opportunity to comment on the agency’s new assertions that contradict those in the DEIS. As noted herein, that clearly violates NEPA.⁶

As EPA has determined, a major source of nitrogen dioxide is from combustion emissions from mobile sources and is a harmful air pollutant.

Nitrogen Dioxide (NO₂) is one of a group of highly reactive gases known as oxides of nitrogen or nitrogen oxides (NO_x). Other nitrogen oxides include nitrous acid and nitric acid. NO₂ is used as the indicator for the larger group of nitrogen oxides.

NO₂ primarily gets in the air from the burning of fuel. NO₂ forms from emissions from cars, trucks and buses, power plants, and off-road equipment. ...

Breathing air with a high concentration of NO₂ can irritate airways in the human respiratory system. Such exposures over short periods can aggravate respiratory diseases, particularly asthma, leading to respiratory symptoms (such as coughing, wheezing or difficulty breathing), hospital admissions and visits to emergency rooms. Longer exposures to elevated concentrations of NO₂ may contribute to the development of asthma and potentially increase susceptibility to respiratory infections. People with asthma, as well as children and the elderly are generally at greater risk for the health effects of NO₂.

NO₂ along with other NO_x reacts with other chemicals in the air to form both particulate matter and ozone. Both of these are also harmful when inhaled due to effects on the respiratory system.

⁶ These objections cite/quote some of the air quality analysis in the DEIS, as they were the only information subject to public review during the NEPA process.

U.S. EPA “Basic Information about NO₂”, <https://www.epa.gov/no2-pollution/basic-information-about-no2#What%20is%20NO2> (viewed Jan. 21, 2020). As noted by EPA, even exposure for short periods can be very harmful: “exposures over short periods can aggravate respiratory diseases, particularly asthma, leading to respiratory symptoms (such as coughing, wheezing or difficulty breathing), hospital admissions and visits to emergency rooms.” *Id.*

The DEIS attempted to excuse these violations by saying that the public exposure to these hazardous pollutants “would only occur along National Forest System Road 287 and the general public likely would be exposed to high pollutant levels only while traveling through the area in a vehicle. Consequently, although public exposure at the exceedance locations is conceivable, any exposure would be for much shorter than the 1-hour, 24-hour, and annual durations that correspond to the National Ambient Air Quality Standards averaging periods.” *Id.* The project will also violate the NO₂ standard near the tailings.

The main contributors to the nitrogen dioxide exceedances north of Tailings Storage Facility No. 4 are operations at Tailings Storage Facility No. 4, the Main Dump, and the Open Pit. The area in which these exceedances occur is mountainous and uninhabited. Although public exposure at this exceedance location is conceivable were someone to pass through the area, any exposure likely would be for much less than the 1-hour duration that corresponds to the National Ambient Air Quality Standards averaging period for nitrogen dioxide.

DEIS at 3-32.

The DEIS also admitted that the NAAQS for PM_{2.5} will be exceeded/violated yet also argues that this can be ignored (like for NO₂) because some visitors/users of FS Road 287 will stay less than an hour.

The cumulative PM_{2.5} exceedances occurred along National Forest System Road 287 just east of Tailings Storage Facility No. 3. The highest concentrations are about half due to the background level and non-Pinto Valley Mine sources, with the other half due to concentrate transport, other vehicle movements along the roadway, and operations at the nearby Tailings Storage Facility No. 3. The general public likely would be exposed to high PM_{2.5} levels along National Forest System Road 287 only while traveling through the area in a vehicle. Consequently, although public exposure at this exceedance location is conceivable, any exposure would be for much less than the annual duration that corresponds to the National Ambient Air Quality Standards averaging period for PM_{2.5}.

DEIS at 3-32.

Exposure to PM_{2.5} can lead to serious health effects. According to the EPA:

What are the Harmful Effects of PM?

Particulate matter contains microscopic solids or liquid droplets that are so small that they can be inhaled and cause serious health problems. Some particles less than 10

micrometers in diameter can get deep into your lungs and some may even get into your bloodstream. Of these, particles less than 2.5 micrometers in diameter, also known as fine particles or PM_{2.5}, pose the greatest risk to health.

Fine particles are also the main cause of reduced visibility (haze) in parts of the United States, including many of our treasured national parks and wilderness areas.

U.S. EPA, Particulate Matter (PM) Basics, <https://www.epa.gov/pm-pollution/particulate-matter-pm-basics> (viewed Jan. 24, 2020). As noted by EPA:

The size of particles is directly linked to their potential for causing health problems. Small particles less than 10 micrometers in diameter pose the greatest problems, because they can get deep into your lungs, and some may even get into your bloodstream.

Exposure to such particles can affect both your lungs and your heart. Numerous scientific studies have linked particle pollution exposure to a variety of problems, including:

- premature death in people with heart or lung disease
- nonfatal heart attacks
- irregular heartbeat
- aggravated asthma
- decreased lung function
- increased respiratory symptoms, such as irritation of the airways, coughing or difficulty breathing.

U.S. EPA, Health and Environmental Effects of Particulate Matter (PM), Health Effects, <https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm> (viewed Jan. 24, 2020).

Violation of the NAAQS for SO₂ was also predicted:

The cumulative sulfur dioxide exceedances occurred in a number of areas to the north and east of the Pinto Valley Mine. However, in all cases the 1-hour exceedance is more than 98.5 percent attributable to emissions from the Miami smelter. For all of the hours in the cumulative modeling that the total concentration exceeds the 1-hour sulfur dioxide National Ambient Air Quality Standards, the contribution of the Pinto Valley Mine is less than the U.S. Environmental Protection Agency's interim Prevention of Significant Deterioration significant impact level of 7.8 micrograms per cubic meter (U.S. Environmental Protection Agency 2010). When the increase due to a proposed action is less than the significant impact level, the U.S. Environmental Protection Agency considers the action not to cause or contribute to a modeled exceedance of the National Ambient Air Quality Standards. Consequently, the contribution of the Pinto Valley Mine is less than significant and can be considered not to cause or contribute to the exceedances of the 1-hour sulfur dioxide National Ambient Air Quality Standards.

DEIS at 3-33. The fact that the contribution of the Pinto Valley Mine to the SO₂ violation may be small compared to the other cumulative sources such as the Miami Smelter, does not mean that it can be ignored under NEPA and the CAA.

At a minimum, a complete accounting of all baseline air quality, as well as all direct, indirect and cumulative emissions is needed to accurately ascertain the required mitigation. In other words, the agency cannot adequately prepare a mitigation plan until it knows the full extent of air emissions and conditions. By failing to include all such emissions, the agency violates this NEPA, CAA, and USFS regulatory requirement.

These are not acceptable justifications for allowing the Mine to violate Clean Air Act standards. First, the DEIS provides no factual or legal analysis showing that public exposure to PM, NO₂ and other pollutants in this area would always be less than 1 hour, even if that was an acceptable excuse to violate the standard (which it is not). For example, there is no evidence to support the position that the public would only access the site in a vehicle, as Forest Service roads are open to all uses, including hiking, walking, biking, etc., which of course would be for longer periods than driving a vehicle. Similarly, for the air quality violations on USFS lands near the tailings, no evidence or analysis is provided to support the statement that the public would not “likely” be exposed to these harmful air pollutant levels.

Secondly, the agency’s position ignores the health of workers and other visitors at the site, who undoubtedly will be exposed for much longer than one hour. The DEIS proposes no mitigation for these effects, such as requiring workers/visitors to wear protective masks, respirators, etc.

Thirdly, the CAA and USFS regulations prohibit violation of the NAAQS and other air quality standards, period.

All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements: (a) *Air Quality*. Operator shall comply with applicable Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

36 C.F.R. §228.8.

The USFS must deny any proposal which cannot ensure compliance with all CAA standards, at all times. The CAA, Organic Act, and agency regulations preclude USFS from approving aspects of a mining operation that would violate federal or state environmental standards. Save Our Cabinets v. U.S. Dept. of Agriculture, 254 F.Supp.3d 1241, 1249 (D. Mont. 2017)(USFS approval of mining project violated duties under Organic Act to ensure compliance with water quality standards). *See also Hells Canyon Presv. Council v. Haines*, 2006WL2252554, *4-5 (D. Or. 2006)(USFS mine approvals violated state water standards).

Any violation of any air quality standard violates the Tonto Forest Plan and thus the National Forest Management Act (NFMA). As the DEIS stated, under the Forest Plan: “Management activities will be planned so that air quality will equal to or better than that required by applicable federal, State, and local standards or regulations’ (p. 50).” DEIS at 3-12.

“The desired condition as identified in the Tonto National Forest Plan is that air quality, including air quality–related values, will meet all applicable standards and guidelines.” DEIS at 3-12.

The agency then says that: “To support achieving the desired condition, the Pinto Valley Mine Project would not lead to air pollutant concentrations greater than the National Ambient Air Quality Standards or Arizona Ambient Air Quality Standards, or impacts greater than applicable air quality–related values criteria.” *Id.* Yet that is directly contradicted by the DEIS, when it admits that the nitrogen dioxide standards are currently being violated and that the violation will increase upon the USFS’ approval of expanded operations. Table 3-9 (DEIS at 3-28) shows that the total nitrogen dioxide levels will increase from 194.6 to 204.1 ug/m³ with the USFS approval (compared to the standard of 188).

Table 3-12 shows the results of the cumulative impact modeling. For each pollutant, the maximum ambient impacts are added to the maximum background concentration, and the sum is compared to the National Ambient Air Quality Standards. Table 3-12 shows that under the proposed action, cumulative pollutant concentrations would be greater than the concentrations for direct and indirect impacts only (table 3-9) and would be greater than the concentrations under the no-action alternative. Cumulative 1-hour concentrations of nitrogen dioxide, annual concentrations of PM_{2.5}, and 1-hour concentrations of sulfur dioxide would exceed the National Ambient Air Quality Standards.

DEIS at 3-31/32.

In addition to admitting the predicted violation of various NAAQS, the DEIS fails to adequately analyze and provide mitigation for these impacts. For example for the predicted violation of the PM_{2.5} NAAQS, the agency relies on future analysis and mitigation related to soils:

Prior to release of the final EIS, site-specific soil testing will be conducted in accordance with U.S. Environmental Protection Agency guidance to determine the silt content of unpaved road surfaces in locations that would be subject to continued mine-related vehicle traffic. The representative value(s) for the silt content of unpaved roads at Pinto Valley Mine will be used to refine the air quality modeling and analysis presented in the final EIS to demonstrate compliance with the National Ambient Air Quality Standard for PM_{2.5}.

DEIS at 3-32/33. Yet the agency cannot rely on mitigation measures or analysis that the public will not have an opportunity to comment upon, especially since the FEIS now relies on air quality modeling the public never saw. There is no reason why this analysis, or any of the other analysis postponed to after the publication of the DEIS, could not have been conducted and included in the DEIS in order to allow public review.

“NEPA’s public comment procedures are at the heart of the NEPA review process.” California v. Block, 690 F.2d 753, 770 (9th Cir.1982). “One of the twin aims of NEPA is active public involvement and access to information.” Price Road Neighborhood Ass’n v. U.S. Dept. of Transportation, 113 F.3d 1505, 1511 (9th Cir. 1997). NEPA regulations require that agencies

“shall to the fullest extent possible ... [e]ncourage and facilitate public involvement in the decisions which affect the quality of the human environment.” 40 C.F.R. §1500.2(d). “NEPA procedures must insure that environmental information is available to public officials *and citizens* before decisions are made and before actions are taken ... Accurate scientific analysis, expert agency comments, *and public scrutiny are essential* to implementing NEPA.” 40 C.F.R. §1500.1(b) (emphasis added). The USFS must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. §1506.6(a). The agency “shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by [40 C.F.R. §] 1508.9(a)(1).” 40 C.F.R. §1501.4(b).

For the NO₂ violations, the DEIS merely stated that in the future, NO₂ emissions will be reduced as new vehicles (trucks, loaders, etc.) will replace older vehicles.

Impact: Modeled exceedances of the 1-hour nitrogen dioxide National Ambient Air Quality Standard under the no-action alternative, proposed action, and cumulative modeling scenarios. The locations of this impact are limited to receptors along National Forest System Road 287 near Tailings Storage Facility No. 3.

Mitigation Measure AQ-1: At the end of the lifespan of haul trucks, hydraulic shovels, and track dozers, Pinto Valley Mining Corp. would replace these vehicles or engines with lower-emitting vehicles or engines that meet U.S. Environmental Protection Agency Tier 4 emissions standards or better.

DEIS at 3-30. No analysis is provided to support the determination that simply replacing equipment will result in compliance with all standards at all times, in violation of NEPA, the CAA, and agency regulations. At a minimum, even the purported equipment replacement will only occur in the future, essentially admitting that the project will exceed the NAAQS for an unknown length of time. “An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective.” South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 726 (9th Cir. 2009).

The FEIS also fails to adequately review all the direct, indirect, and cumulative impacts to air quality from all past, present and reasonably foreseeable future actions in the area. In a recent decision finding that an EIS for a mine violated NEPA for failing to fully analyze all cumulative air emissions, the Ninth Circuit held that:

[T]he BLM in this case did not provide sufficiently detailed information in its cumulative air impacts analysis. The BLM made no attempt to quantify the cumulative air impacts of the Project together with the Ruby Hill Mine and vehicle emissions. Nor did the BLM attempt to quantify or discuss in any detail the effects of other activities, such as oil and gas development, that are identified elsewhere in the FEIS as potentially affecting air resources.

...

The cumulative air impacts portion of the FEIS fails to “enumerate the environmental effects of [other] projects” or “consider the interaction of multiple activities.” *Or. Nat.*

Res. Council Fund v. Brong, 492 F.3d 1120, 1133 (9th Cir. 2007). Accordingly, we hold that the cumulative impacts portion of the FEIS does not comply with NEPA.

Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1105-06 (9th Cir. 2016). The court required “quantified or detailed information” on all potential air emissions in the area. *Id.* at 1104.

Although DEIS Table 3-10 lists other nearby cumulative air pollution sources, it admits that the “emissions from the Carlota Mine are not included in the [air quality] analysis.” DEIS at 3-31. This is despite the fact that the Carlota Mine is the closest mine to the Pinto Valley Project, only 2 miles away. The agency’s excuse for this omission is based on the mere fact that Carlota “is expected to be completed before 2024, which is the maximum emission modeling year used in this [Pinto Valley DEIS] analysis.” DEIS at 3-31. Further, there is reason to believe that this might not be true as Carlota has just announced that they will begin mining Eder North, having about finished with Eder South area. Mining of Eder North and possibly Middle Eder, given favorable copper prices, could easily prolong the life of the mine.

Even if that is true, and there is no assurance that that will be the case, this still ignores the current cumulative emissions and those before and after 2024. For example, even if leaching at Carlota ends by 2024, the open waste rock dump(s) and other facilities will emit various NAAQS, such as PM₁₀ and PM_{2.5}. Since PM_{2.5} is already predicted to be exceeded, even without including Carlota’s emissions, (DEIS at 3-32, Table 3-12), these cumulative emissions will only get worse.

Further, the cumulative air emissions analysis, lacking as it is, did not consider other sources, such as vehicle and particulate emissions on local roads (both paved and unpaved), industries, etc., within the cumulative air emissions area. The air quality analysis in the DEIS, and in Appendix B (Air Quality Technical Support Document), only considered (albeit inadequately) the cumulative emissions from the limited set of “Nearby mining and smelter facilities.” Appendix B at B-18, listing only the Freeport-McMoran Smelter, Carlota Mine, Miami Mine, and ASARCO Hayden Smelter (note that even though the Carlota Mine was listed, “emissions from the Carlota Mine are not included in the analysis.”).

For example, the DEIS admitted that the emissions from the ASARCO Hayden smelter, over 29 miles away, must be included in the analysis, but the DEIS lacks analysis of the cumulative impacts/emissions of other sources within that range (e.g. activities in the Miami/Globe/Superior area). “The air quality assessment considered the project-alone and the cumulative near-field (to 50 kilometers [31.1 miles] distance from the Pinto Valley Mine) air quality impacts.” DEIS at 3-25. Overall, the agency cannot pick and choose as to which cumulative air emissions to analyze. It must analyze all emissions from past, present, and reasonably foreseeable activities in the region. Great Basin Resource Watch v. BLM, 844 F.3d 1095, 1105-06 (9th Cir. 2016).

The DEIS also fails to include all potential emissions from the proposed Resolution Project/Mine, only 8.6 miles away. DEIS at 3-31. But just because “the majority of emissions will occur at or near ground level” (*Id.*) is not an excuse to completely ignore these and other impacts from Resolution. For example, there is no analysis of Resolution’s emissions from truck, train, and other vehicle emissions, let alone all other Resolution emissions.

The cumulative air emissions analysis also fails to account for warming temperatures due to climate change. This is despite the DEIS acknowledging this will occur:

Additionally, local air pollution would likely increase through 2027 due to effects driven by increasing temperatures. Specifically, air temperature increases would create hot and arid conditions conducive to dust and ground-level ozone pollution, which would create transient and localized hazards for the analysis area.

DEIS at 3-148. “In addition, warming air temperatures contemporaneous with mining operations may increase localized dust and ground-level ozone pollution until 2039.” DEIS at 3-154.

The DEIS also fails to fully analyze ozone emissions, which already exceed the NAAQS: “From 2016 to 2018, ... concentrations of ozone, PM₁₀, and sulfur dioxide (1-hour average) exceeded the National Ambient Air Quality Standards.” DEIS at 3-278. *See also* DEIS at 3-21 (Table 3-7)(showing worsening levels of ozone NAAQS violations from 2016 to 2018). Although the DEIS says that “the proposed action would not have a significant impact on ozone formation,” DEIS at 3-25, no details are provided. In any event, even if ozone formation caused by the project is not “significant,” that does not mean that the project will not contribute to the ongoing, and worsening, ozone violation in the area.

Regarding other air quality problems, anyone who has been around the Pinto Valley Mine for long knows there is a serious problem with blowing tailings and dust. On a windy day, visible plumes can be seen from around the mine site and from eastern the Superstition Wilderness. Nearby residents frequently report visible plumes. Even under normal conditions, haul trucks and blasting in the pit and general mine construction activity create a lot of dust.

Appendix B in the DEIS discusses air quality but minimizes the impact of the mine’s proposed alternative by essentially saying extending the life of the mine another 12 years won’t make it much worse. It admits that the area is in non-attainment for PM₁₀ and that plumes are visible from the Superstition Wilderness. What is not discussed are the blowing #3 and #4 tailings.

It is not clear in the DEIS how much of the visible plume is caused by blowing tailings, but we note that efforts are made to keep the amount of water on top of #3 and #4 tailings to a minimum. The reason for keeping such a large beach area is not explained. Dryer tailings of course are more susceptible to being wind-blown, and therein could be part of the problem. One rationale for dryer tailings could be to minimize the chance of liquefaction of the various lifts of the tailings piles. The EIS should explain the strategy for a large beach, especially on #4 tailings. We do not agree that extending the life of the mine 12 years is a just a minor contribution to air quality problems in the region compared to the cumulative effects of the decades the mine has been in existence and air quality impacts from other neighboring mines and other sources. There is, after all, no real guarantee that the mine will close in 2039. That closure date for this mine, as well as the Carlota and other mines, is not set in stone.

Failure to Properly Analyze and Protect Historic Properties

(Objectors' Comment Document S-259, Comments C-032 to C-034)

The FEIS says that USFS approval of the PoO will result in severe impacts to at least 27 historic/cultural sites/properties.

45 sites within the area of potential effects have been determined to be eligible for inclusion in the National Register of Historic Places and are therefore considered historic properties. The 45 historic properties in the area of potential effects include prehistoric Native American habitation and resource procurement sites, protohistoric and early historical Native American sites, historical Euroamerican sites, and multicomponent sites (table 3-39). Of the 45 historic properties, further site investigation determined that 18 properties would not be adversely affected by the authorized activities, while 27 of the sites have the potential to be directly affected by the proposed action or are vulnerable to indirect effects due to their proximity to existing roads. In compliance with the National Historic Preservation Act, a historic properties treatment plan was prepared to identify data recovery and protective measures to mitigate effects on the 27 historic properties (WestLand Resources, Inc. 2019a).

FEIS 3-176. It is unclear what this “historic properties treatment plan” is, as it was not included in the DEIS for public review. Under NEPA and the NHPA, this treatment plan and analysis resulting from consultation with Native American Tribes, should have been completed and subject to public review in the DEIS, not later.

In addition, the brief discussion of mitigation for these historic/cultural properties essentially admits that many of these sites/properties will be destroyed by the operations approved by the USFS. As detailed above, however, because the expansion areas are not covered by any “rights” under the Mining Law, the USFS is under no obligation to approve these new operations and their associated destruction of these sites/properties. Under a correct view of the law, the USFS cannot approve these operations (e.g. tailings/pit expansion, dumps, borrow/riprap pits, etc.) unless the USFS has demonstrated that they protect the public interest – which the agency refused to consider here. In addition, various laws, including the Tonto Forest Plan, aimed at protecting Native American cultural/religious resources require protection of the sites/resources.

Pursuant to NEPA, the federal courts have confirmed that “‘preserv[ing] important historic, cultural, and natural aspects of our national heritage’ constitutes an important goal of the statute.” Nat’l Parks Conservation Ass’n v. Semonite, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (quoting 42 U.S.C. § 4331(b)(4)) citing Oglala Sioux Tribe v. United States NRC, 896 F.3d 520, 529 (D.C. Cir. 2018).

NEPA requires that all relevant information necessary for an agency to demonstrate compliance with NEPA be included in an environmental impact statement, and not in additional documents outside of the public comment and review procedures applicable to that environmental impact statement. See, Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) (“[U]nless a document has been publicly circulated and available for public comment, it does not satisfy NEPA’s EIS requirements.”); Village of False Pass v. Watt, 565 F. Supp. 1123, 1141 (D. Alaska 1983), *aff’d sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984) (“The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that

document. Documents not incorporated in the environmental impact statement by reference or contained in a supplemental environmental impact statement cannot be used to bolster an inadequate discussion in the environmental impact statement.”); Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1287 (1st Cir. 1996), *cert. denied sub nom. Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997)(“Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot ‘bring into compliance with NEPA an EIS that by itself is inadequate.’ . . . Because of the importance of NEPA’s procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency’s actual decision was informed and well-reasoned.”); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980) (same).

The NEPA hard look must emerge from an engagement in informed and reasoned decision making, as the agency “obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.” Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999) (*citing* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378–85 (1989)).

“[I]t is not an adequate alternative . . . to merely include scientific information in the administrative record. NEPA requires that the EIS itself ‘make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.’” Sierra Club v. Bosworth, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002). *See also* 40 C.F.R. § 1502.24; Save the Yaak Committee v. Block, 840 F.2d 714, 718-19 (9th Cir. 1988) (biological assessment was not functional equivalent of NEPA analysis and also came too late).

In League of Wilderness Defenders v. Forsgren, the Ninth Circuit noted:

the Forest Service relies upon post-EA submissions and declarations to the court, as well as assurances that its experts were aware of plaintiffs’ concerns and considered them, in arguing that there are no uncertainties or unknown risks surrounding the Hash Rock proposal. This is insufficient under NEPA.

184 F. Supp. 2d 1058, 1069 (D. Or. 2002). *See also*, League of Wilderness Defenders v. Zielinski, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (study relied upon by BLM was not in AR at the time of final NEPA document; “A federal agency’s defense of its positions must be found in its EA”); Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980)(NEPA does not contemplate that documents “contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate”). “[A] post-EIS analysis – conducted without any input from the public – cannot cure deficiencies in an EIS. *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003). The public never had an opportunity to comment on the ‘double-check’ analysis, frustrating NEPA’s goal of allowing the public the opportunity to ‘play a role in . . . the decisionmaking process.’ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351.” Great Basin Resource Watch v. Bureau of Land Management, 844 F.3d 1095, 1104 (9th Cir. 2016).

The federal courts have also addressed the strict mandates of the National Historic Preservation Act:

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 C.F.R. § 800.8(c)(1)(v)(agency must “[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.”)

The Advisory Council on Historic Preservation (“ACHP”), the independent federal agency created by Congress to implement and enforce the NHPA, determines 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 also 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 this 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. 36 C.F.R. § 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).

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 C.F.R. § 800.2(c)(2)(ii).

Apart from requiring that an affected tribe be involved in the identification and evaluation of historic properties, the NHPA requires that “[t]he 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 C.F.R. § 800.1(c) (emphasis added). The ACHP has published guidance specifically on this point, reiterating in multiple places that consultation must begin at the earliest possible time in an agency’s consideration of an undertaking, even framing such early engagement with the Tribe as an issue of respect for tribal sovereignty. ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (November 2008), at 3, 7, 12, and 29.

Regarding respect for tribal sovereignty, the NHPA requires that consultation with Indian tribes “recognize the government-to-government relationship between the Federal Government and Indian tribes.” 36 C.F.R. § 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 federal courts echo this principle in mandating all federal agencies to fully implement the federal government’s trust responsibility. *See Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (“any Federal Government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes”).

Conclusion

As detailed above and in previous comments submitted by the Objectors, the FEIS and Draft ROD fail to fully comply with numerous federal and state laws, regulations, policies, and other requirements. As such, the Regional Office must withdraw the FEIS and DROD and vacate and remand both documents and order the correction of all errors noted herein.

The Forest Service cannot approve any of the action alternatives described in the FEIS and DROD, or any action alternative at all that the applicant may propose, unless and until all laws, etc., noted herein are satisfied. Please direct all communications regarding this Objection to the undersigned attorneys.

Sincerely,

/s/ Roger Flynn

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