

August 30, 2021

Submitted via USFS comment portal:

<https://cara.ecosystem-management.org/Public//CommentInput?Project=60162>

Coronado National Forest
300 W. Congress
Tucson, AZ 85701

Re: Scoping Comments on Small Tracts Act Sale – Arizona Minerals, Inc.

Dear Coronado National Forest:

This letter provides comments on the proposed Small Tracts Act Sale (“Sale” or “Project”) with Arizona Minerals, Inc. (now South32) (“AMI”) per your scoping notice letter dated July 26, 2021. These comments are submitted on behalf of the Patagonia Area Resource Alliance, Defenders of Wildlife, Arizona Mining Reform Coalition, Borderlands Restoration Network, Center for Biological Diversity, Earthworks, Friends of Santa Cruz River, Friends of Sonoita Creek, Save the Scenic Santa Ritas, Sierra Club, Sky Island Alliance, and Tucson Audubon. The documents submitted with these comments are considered part of these comments and must be considered by the agency in its review of the proposed Sale.

Patagonia Area Resource Alliance (“PARA”) is a grassroots organization of volunteer community members committed to protecting and preserving the Patagonia, Arizona area. It is a watchdog organization that monitors the activities of industrial developers such as mining corporations, as well as government agencies, to make sure their actions have long-term, sustainable benefits to our public lands, our watershed, and our regional ecosystem.

Defenders of Wildlife is a national, nonprofit membership organization dedicated to the protection of all native animals and plants in their natural communities. Defenders is committed to protecting wild lands and wildlife in Arizona, and its Southwest office is located in Tucson, Arizona.

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

Borderlands Restoration Network (“BRN”) is a small, Patagonia-based nonprofit that works to grow a local restorative economy by rebuilding healthy ecosystems, restoring habitat for plants and wildlife, and reconnecting our border communities to the land through shared learning. Our work is primarily focused on protecting and restoring wildlife corridors and the surface waters of Sonoita Creek and surrounding watersheds.

The **Center for Biological Diversity** is a non-profit public interest organization with an office located in Tucson, Arizona, representing more than 1.7 million members and supporters nationwide dedicated to the conservation and recovery of threatened and endangered species and their habitats. The Center has long-standing interest in projects of ecological significance undertaken in the National Forests of the Southwest, including mining projects.

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

The **Friends of Santa Cruz River** is a nonprofit organization dedicated to ensuring the continued flow of the Santa Cruz River, the life-sustaining quality of its waters, and the protection of the riparian biological community it supports.

The **Friends of Sonoita Creek** is a nonprofit organization dedicated to protecting and restoring the water and natural habitat of the Sonoita Creek Watershed. We inform residents and visitors about its importance to life forms and relationship to the geography through hands on activities, presentations, hikes and collaboration with kindred organizations.

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

Sierra Club's 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; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

Sky Island Alliance is a regional conservation nonprofit dedicated to protecting and restoring the diversity of life and lands in the Sky Island region of the U.S. and Mexico. Its mission is to ensure the Sky Islands—mountain ranges primarily in Arizona and Sonora that rise out of arid grasslands—are a place where nature thrives, open space and clean water are available to all, and people are connected to the region's innate ability to enrich lives.

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

As shown in more detail below, the proposed approval of the Sale contains numerous legal and factual errors and as such should be revised in order to comply with federal law. In addition, any U.S. Forest Service ("Forest Service" or "USFS") plan to continue its review of the Sale must comply with federal law as detailed herein. At a minimum, if the agency proceeds with its review, an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS")

should be prepared, due to the potential for significant impacts from the Projects alone, and especially when viewed with its cumulative impacts from other and/or related activities as well as connected actions.

1. The Forest Service Cannot Use the Proposed Categorical Exclusion for the Sale

The agency proposes to consider the Sale under a Categorical Exclusion from full National Environmental Policy Act (“NEPA”) review.¹ NEPA requires federal agencies to prepare an EA or an EIS to evaluate the environmental impacts of major federal actions. 42 U.S.C. § 4332(2)(C). Actions that do not **individually or cumulatively** have a significant impact on the environment may be categorically excluded from the requirement to prepare an EA or EIS. 40 C.F.R. § 1508.4. Agencies may establish their own regulations defining which categories of actions may be categorically excluded from NEPA. 40 C.F.R. § 1507.3(b)(2)(ii).

Here, the Forest Service intends to use 36 C.F.R. 220.6(d)(7) as the Categorical Exclusion Category: “Sale or exchange of land or interest in land and resources where resulting land uses remain essentially the same.”

Yet, as explained herein, this Category is inapplicable to the proposed Sale, as the “resulting land uses” will not “remain essentially the same.”

The Scoping Notice states that the three separate parcels requested for purchase (Parcels 1, 2, and 3) have no legal public access. Scoping Notice at 2. This is incorrect. The Scoping Notice states that National Forest System (“NFS”) Roads 5521 and 4687 have been restricted by AMI because the roads cross their patented mining claims; however, the most recent Coronado National Forest road map available to the public suggests that these restrictions are only under consideration. See generally Forest Service Map, Huachuca EMA Map 1, Travel Management Proposed Action and CAT Alternative (Oct. 2012). Despite this, it appears that the mining company has already made changes to parts of 4687 that are not on their private lands. Compare Google Earth Image, NFS Road 4687 and Parcel 3 (2013) and Google Earth Image, NFS Road 4687 and Parcel 3 with South32 Modifications (2019). Further, NFS Road 4687 currently does not appear to cross AMI’s patented mining claims, and there is public access to NFS Road 4687 via an old road, the entrance of which is directly off Harshaw Road and is still usable for recreational purposes. See Photograph, Entrance to Access Road to NFS Road 4687 (Aug. 2021).

¹ Since the White House Council on Environmental Quality (“CEQ”) has stated that it is undergoing review and potential revision of the 2020 NEPA implementing regulations, issued under the previous administration, the Forest Service should abide by the 1978 NEPA implementing regulations, as amended (40 C.F.R. Parts 1500–1508), while CEQ conducts its review and potential reversions or revisions. See generally 86 Fed. Reg. 34154 (June 29, 2021) (citing Executive Order 13990 and the accompanying “List of Agency Actions for Review,” which specifically identifies the 2020 NEPA implementing regulations). Further, under the 2020 NEPA implementing regulations, projects initiated prior to September 14, 2020 have the option of proceeding under the 1978 NEPA implementing regulations. As the application for the Sale was accepted in 2017, this analysis and NEPA documentation should be prepared pursuant to the 1978 NEPA implementing regulations. See Scoping Notice at 1.

Since there is public access to NFS Road 4687 without trespassing on private land, and NFS Road 4687 directly connects to Parcel 3, it is not the case that all of the parcels in question are “only accessible through adjoining private patented mining claim inholdings,” as is stated in the Scoping Notice. Scoping Notice at 2. If the Sale were to be approved, the privatization of Parcel 3 would create a land barrier, cutting off public access to CNF land that people recreate on. Thus, the proposed restrictions should not be allowed as they prevent access to use and enjoyment of NFS land by the general public.

If the parcels are conveyed to AMI, the resulting land uses will not remain essentially the same. As the parcels connect three mining claim areas, the Sale will allow for vastly increased mining operation by South32. Further, by eliminating access to the portion of NFS Road 4687 that is not on private patented land, the public will not be able use the road, and will no longer be able to access Parcel 3 or the land that lies beyond it. The Sale will adjoin and expand the mining operation and eliminate ease of public access from one side to the other as no public roads or land has been reserved for this purpose. Overall, the Sale will be intensely significant as it allows for the extension of South32’s mining operations. The cumulative impacts of the Sale, South32’s mining operations, nearby mining operations, and surrounding mining claims will significantly impact the area, including environmental and cultural resources, water, wildlife, habitat, etc., for years to come.

2. The Forest Service’s Factual Justification for the Sale Is Not Supported by the Facts

The Scoping Notice bases the proposed approval of the Sale on the belief that “Access to and use and enjoyment of NFS lands by the general public will not be unduly impeded or restricted.” Scoping Notice at 3. In addition, the agency states that: Scenic, wildlife, environmental, historical, archaeological or cultural values will not be substantially affected or impaired.” Scoping Notice at 4. That, however, contradicts the facts on the ground.

The Forest Service has provided no evidence to accompany the scoping notice to support its assertions. The information upon which the agency relies must be made available for public review and comment.

As discussed above and below, the Sale of the parcels will adjoin three separate mining claims and vastly expand South32’s mining operations, which will both impede and restrict the use and enjoyment of NFS lands by the general public. The sale of the parcels not only cuts off existing FR road access, creating a land barrier that will inhibit the existing public access to CNF land south of Parcel 3, but will also create a greatly enlarged mining area that will have significant impacts on the environment. Scenic, wildlife, environmental, historical, archaeological, or cultural values will certainly be affected and/or impaired, as also discussed above and below. People’s use and enjoyment of the area will be greatly diminished as the Sale facilitates the Hermosa and other South32 mining and dewatering operations. Scenic value will be diminished and impaired as the use of the parcels will be increased and changed to facilitate mining and Sale of the parcels themselves will create an expanded barrier between people and parts of the NFS lands. Wildlife and habitat, including endangered, threatened, and sensitive species and critical habitat, will be directly affected by South32’s mining and dewatering operations. Further, the Forest Service must consult on the impacts to historical, archaeological, and cultural values,

which are present throughout the area, to effectively determine the degree to which they will be affected.

In addition, the agency states that an appraisal has been completed on the three parcels where the resulting value is below the \$500,000 threshold for sales eligible under the Small Tracts Act (which was raised from \$150,000 in to \$500,000 in 2020).² Scoping Notice at 4. The Forest Service has failed to provide the appraisal or any additional information to support their appraisal findings for public review. In addition, the agency has not provided the public interest determination, discussed below, or supporting documentation for public review. Thus, the agency must re-notice the public of the proposed Sale and include all relevant information regarding the appraisal, public interest determination, and any other relevant information in order to comply with NEPA and the Small Tracts Act.

3. The Forest Service’s Pre-determined “No Extraordinary Circumstances” Finding Is Invalid

The Scoping Notice states that: “there are no extraordinary circumstances to resource conditions.” Notice at 3. Yet, as noted herein, the failure of the agency to fully review the Sale’s impacts, cumulative impacts, baseline conditions, and other NEPA requirements renders the predetermined finding that there are no “extraordinary circumstances” legally invalid. At a minimum, the Sale area and the operations it will facilitate (such as the Hermosa Project) are in the Town of Patagonia’s municipal watershed (sub-watersheds of which have recently been evaluated by the Forest Service as “functioning at risk”), and the area contains affected protected wildlife species, among other “extraordinary circumstances” considerations. See USDA Forest Service, Patagonia Municipal Watershed WCATT Scores (2021).

The Forest Service has also identified “extraordinary circumstances” that make the use of a categorical exclusion inappropriate and which indicate the proposed action warrants an EA or EIS, such as in this case. 36 C.F.R. §§ 220.6(a), (b); Forest Service Handbook (“FSH”) § 1909.15, Ch. 31.2 These extraordinary circumstances include consideration of whether “[f]ederally listed threatened or endangered species or designated critical habitat” are in the project area. 36 C.F.R. § 220.6(b)(1)(i); FSH § 1909.15, Ch. 31.2(1). When a project area contains extraordinary circumstances related to the proposed action, the use of a categorical exclusion may be inappropriate and the Forest Service should consider preparing an EA or EIS instead. See 36 C.F.R. §§ 220.6(a), (b). See Jones v. Gordon, 792 F.2d 821, 827–28 (9th Cir. 1986) (extraordinary circumstances prevent reliance on a categorical exclusion).

4. The Forest Service Must Prepare an Environmental Impact Statement, or an Environmental Assessment (at a minimum)

The Forest Service must fully consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region on, at a minimum, water and air quality including ground and surface water quantity and quality, recreation, cultural/religious, wildlife, transportation/traffic, scenic and visual resources, etc. At a minimum, this requires the agency to

² Note, the application was submitted by AMI in 2017 when the threshold was \$150,000.

fully review, and subject such review to public comment in an EIS, the cumulative impacts from all other mining, grazing, recreation, energy development, roads, etc. in the region.

“[W]here ‘several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS.’” Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1378 (9th Cir. 1998) (quoting City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990)). “[I]f the cumulative impact of a given project and other planned projects is significant, an applicant cannot simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project.” Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1076 (9th Cir. 2002).

“An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The agency must supply a convincing statement of reasons why potential effects are insignificant.” Public Service Co. of Colorado v. Andrus, 825 F. Supp. 1483, 1496 (D. Idaho 1993) citing The Steamboaters v. FERC, 759 F.2d 1383, 1393 (9th Cir. 1985). “[T]o prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are ‘*substantial questions* whether a project may have a significant effect’ on the environment is sufficient.” Anderson v. Evans, 371 F.3d 475, 488 (9th Cir. 2004) (italics in original, citations omitted); see also Western Land Exchange Project v. BLM, 315 F. Supp. 2d 1068, 1087 (D. Nev. 2004) (same).

The agency cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment. See Alaska Ctr. for Env’t v. United States Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999). If an agency, such as the Forest Service, opts not to prepare an EIS, it must put forth a “convincing statement of reasons” that explain why the project will impact the environment no more than insignificantly. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).

In considering the severity of the potential environmental impact, a reviewing agency should consider at least ten factors that help inform the “significance” of a project, such as the unique characteristics of the geographic area, including proximity to an ecologically sensitive area; whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts; the level of uncertainty of the risk and to what degree it involves unique or unknown risks; and whether the action threatens violation of an environmental law. One of these factors may be sufficient to require preparation of an EIS in appropriate circumstances. See Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001); Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 864–65 (9th Cir. 2005) (EA and FONSI inadequate when agency fails to prepare adequate cumulative impacts analysis).

An EIS that is prepared (or at a minimum, a draft EA prepared for public comment) must fully review all reasonable alternatives, provide for mitigation and an analysis of the effectiveness of all mitigation measures, review all direct, indirect, and cumulative impacts, and fully analyze all baseline conditions of the potentially affected environment, among other NEPA requirements.

5. The Forest Service Must Fully Analyze all Direct, Indirect, and Cumulative Impacts

The Forest Service makes no mention of the nearby Hermosa Mining Project, the San Antonio Project (both on the agency's Schedule of Proposed Activities ("SOPA")), as well as other mining (including the abutting Sunnyside Mining Project), grazing, energy, recreation, transportation, and other activities in the area. Indeed, the proposed Sale is directly tied to the Hermosa Project and will facilitate those operations.

NEPA's statutory framework, as well as the Forest Service's own regulatory policies enumerated in the Forest Service Handbook ("FSH"), Section 1909.15 et seq., require the agency to consider potentially significant environmental effects, including cumulative impacts, before deciding to invoke a categorical exclusion and moving forward with a proposed action in the absence of an EA or EIS. If the proposed action may have a significant effect, the Forest Service must prepare an EIS. See 36 C.F.R. § 220.6(c); see also *Sierra Club v. United States*, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) ("In determining whether an action requires an EA or EIS or is categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts." (citing 40 C.F.R. §§ 1508.7, 1508.8)). If, in contrast, the Forest Service is uncertain whether the proposed action may have a significant effect, it must prepare an EA. Id. The Forest Service cannot rely on a NEPA categorical exclusion if the action may have significant impacts individually or cumulatively. According to NEPA regulations, the categorically excluded action must "not *individually or cumulatively* have a significant effect on the human environment." 40 C.F.R. § 1508.4 (emphasis added). The Forest Service's NEPA Handbook similarly provides that if "the proposed action may have a significant environmental effect, prepare an EIS," and not a categorical exclusion.

As stated in the Forest Service Handbook:

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

FSH 1909.15, Ch. 31.3 (emphasis added).

Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded []. Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS. **Scoping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.**

Id. (emphasis added).

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

First and foremost, the text of the CEQ regulations requires cumulative effects analysis. Section 1508.4, which provides guidance on the use of CEs, defines a CE as “a category of actions which do not individually or cumulatively have a significant effect on the human environment” 40 C.F.R. § 1508.4. This section also requires the agency to “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” Id. The key word in this last sentence is “significant.” Under § 1508.27(b)(7), which defines the word “significant” for NEPA purposes, a determination of significance requires the agency to consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” Therefore, in order to provide for extraordinary circumstances under § 1508.4, the agency must consider cumulative impacts.

Hells Canyon, at *7.

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

Hells Canyon, at *6.

That was also the recent ruling from the federal court in Arizona, in a very similar case, where it found that the Forest Service failed to analyze the cumulative impacts related to a mineral exploration project when it relied upon a CE, especially in light of a nearby proposed mining operation whose impacts had not been reviewed by the agency.

In determining whether a proposed action has “significant” environmental effects, an agency should consider whether the action is related to other actions with individually insignificant but cumulatively significant impacts. See 40 C.F.R. § 1508.27(b)(7); Forest Service Handbook § 1909.15, Ch. 31.3 (“Scoping should . . . reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.”); Alliance for the Wild Rockies v. Weber, 979 F. Supp. 2d 1118, 1129 (D. Mont. 2013) (the “extraordinary circumstances analysis includes consideration of whether a normally excluded action may have cumulatively significant

environmental effect”); Sierra Club v. United States, 255 F. Supp. 2d 1177, 1182 (D. Colo. 2002) (“In determining whether an action requires an EA or EIS or is categorically excluded, federal agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts.”). A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. To demonstrate that an agency failed to conduct a sufficient cumulative impact analysis, Plaintiffs need not “show what cumulative impacts would occur” but merely that there is a “potential for cumulative impact.” Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior, 608 F.3d 592, 605 (9th Cir. 2010).

Defenders of Wildlife v. U.S. Forest Service, Order at 13-14, 4:14-cv-02446-RM (D. Ariz., Sept. 15, 2015). Thus, the agency must fully analyze all cumulative impacts from the Hermosa and San Antonio Projects, and other past, present, and reasonably foreseeable future activities in the area.

In its Draft EA for the nearby Sunnyside Exploratory Drilling Project, the Forest Service admits that there are large-scale mineral operations active and proposed in the area (the Hermosa, San Antonio, and Rosemont Copper Mine projects). This includes current exploration activities as well as anticipated mining projects. See generally Coalition Comments on Sunnyside Project Draft EA, at 17–22 (Apr. 3, 2021). The Ninth Circuit has clearly held that proposed mining projects must be fully reviewed in NEPA documents for nearby projects. See Te-Moak Tribe of W. Shoshone, 608 F.3d at 603 (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations). Even projects that have not reached the formal proposal stage (which is not the case here) are considered “reasonably foreseeable” and must be reviewed in an EA or EIS. Northern Plains Resource Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1078–79 (9th Cir. 2011).

An adequate cumulative impacts and baseline analysis has not been conducted for any of the nearby projects. See Sunnyside Draft EA at Table 3-3; Coalition Comments on Sunnyside Project Draft EA, at 19 (“Although Table 3-3 lists a number of projects that will result in cumulative impacts, no details about the actual impacts are provided. The Table merely lists the projects, their locations, and what resources will be affected. Such a listing was expressly found to violate NEPA in Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971–74 (9th Cir. 2006) Yet for each of these resources/impacts, none of the required analysis regarding other existing and proposed activities in the region is provided.”). The Forest Service has acknowledged that the dewatering and water discharges expected from the Hermosa Project (on the regional aquifer and Harshaw Creek) will be substantial. “South 32 [Hermosa] intends to treat the water collected from the declines and discharge it to Harshaw Creek at a rate of up to 4,500 gallons per minute, which represents an approximately 40-fold increase over current stream flow.” Sunnyside Draft EA at 94. Beyond the dewatering plan, thus far, there has not been any public information about the use of water for the life of the mine.

There must be a detailed analysis, as NEPA requires, of the baseline conditions of these affected resources and of these impacts on water quality and quantity, streamflow, erosion, wildlife and

habitat, transportation/traffic, sedimentation, recreation, and other impacted resources. With the additional Sale of the three parcels, there must be additional analysis of the cumulative impacts of all aspects of the Hermosa and other mining and dewatering operations, how the parcels will connect and facilitate those operations, and how those parcels will be impacted as part of the operations.

In sum, a categorical exclusion in any form is inappropriate for the proposed Sale of the parcels because it will allow South32 to join its mining claims together and go into production. The cumulative impacts of this, as discussed above and below will have a substantial impact on both water and the environment that must be analyzed in an EIS.

6. The Forest Service's Pre-Ordained "Public Interest" Determination is Invalid

The Forest Service has already determined that the Sale meets the requirement of the Small Tracts Act, and other federal laws, finding that the Sale is "in the public interest." "As required by the Act a public interest determination was completed by the Coronado National Forest ("CNF") in 2018, wherein it was determined the proposed sale of the tracts under authority of the Act was in the public interest." Scoping Notice at 4. Yet this was done before any public or Tribal review. Such pre-determined decision-making violates the Small Tracts Act, NEPA, and federal public review requirements. As shown herein, the true impacts and ramifications of the Sale, which is to facilitate and allow the huge Hermosa Project to occur without public and Forest Service oversight, is certainly not in the public interest.

7. Additional NEPA Issues and Requirements

In addition, the agency must fully comply with the following NEPA requirements.

a. The EA/EIS Must Fully Analyze All Baseline Conditions In Considering the Sale

The Forest Service is required to "describe the environment of the area(s) to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. The establishment of the baseline conditions of the affected environment is a fundamental requirement of the NEPA process. "NEPA clearly requires that consideration of environmental impacts of proposed projects take place before [a final decision] is made." LaFlamme v. FERC, 842 F.2d 1063, 1071 (9th Cir. 1988) (emphasis in original). Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. Id. Without establishing the baseline conditions which exist in the vicinity . . . before [the project] begins, there is simply no way to determine what effect the proposed [project] will have on the environment and, consequently, no way to comply with NEPA. Half Moon Bay Fisherman's Mark's Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). "In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F. Supp. 2d 1113, 1126 (D. Nev. 2008).

"The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council of Environmental

Quality, Considering Cumulative Effects under the National Environmental Policy Act (May 11, 1999). Such baseline information and analysis must be part of the EA/EIS and be subject to public review and comment under NEPA. The lack of an adequate baseline analysis fatally flaws a NEPA review.

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

“NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur before the proposed action is approved, not afterward.” Northern Plains v. Surf. Transp. Bd., 668 F.3d 1067, 1083 (9th Cir. 2011) (concluding that an agency’s “plans to conduct surveys and studies as part of its post-approval mitigation measures,” in the absence of baseline data, indicate failure to take the requisite “hard look” at environmental impacts).

This requirement applies not only to ground and surface waters, but any potentially affected resource such as air quality, recreation, cultural/religious/historical/archaeological values, soils, and wildlife.

b. The Forest Service Must Include an Adequate Mitigation Plan Under NEPA

Under NEPA, the agency must have an adequate mitigation plan to minimize or eliminate all potential project impacts from the implementation of the Sale. NEPA requires the agency to: (1) “[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives,” 40 C.F.R. § 1502.14(e); and (2) include discussions of “[m]eans to mitigate adverse environmental impacts (if not already covered under § 1502.14(e)).” 40 C.F.R. § 1502.16(a)(9). NEPA regulations define “mitigation” as a way to avoid, minimize, rectify, reduce or eliminate, or compensate for the impact of a potentially harmful action. 40 C.F.R. § 1508.20(a)–(e). “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).

NEPA requires that the agency discuss mitigation measures, with “sufficient detail to ensure that environmental consequences have been fairly evaluated.” Methow Valley, 490 U.S. at 352. An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. Compare Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir. 1998) (disapproving an EIS that lacked such an assessment) with Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where “[e]ach mitigating process was evaluated separately and given an effectiveness rating”). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52 (citing 42 U.S.C. § 4332(C)(ii)).

A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination. South Fork Band Council v. Dep't 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). “The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency’s] reliance on mitigation is supported by substantial evidence in the record.” Wyoming Outdoor Council v. U.S. Army Corps of Eng’rs, 351 F. Supp. 2d 1232, 1251 n. 8 (D. Wyo. 2005).; see also Dine Citizens v. Klein, 747 F. Supp. 2d 1234, 1258–59 (D. Colo. 2010) (finding “lack of detail as the nature of the mitigation measures” precluded “meaningful judicial review”).

c. The EA/EIS Must Fully Review Reasonable Alternatives

NEPA requires the agency to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E); 40 C.F.R. § 1508.9(b). It must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. City of Tenabee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). The alternatives analysis is considered the heart of a NEPA analysis. 40 C.F.R. § 1502.14. The alternatives analysis should present the environmental impacts in comparative form, thus sharply defining important issues and providing the public and the decisionmaker with a clear basis for choice. Id. The lead agency must “evaluate reasonable alternatives to the proposed action.” Id. Even if an EIS leads to a FONSI, it is essential for the agency to consider all reasonable alternatives to the proposed action. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228–29 (9th Cir. 1988) (citations omitted, emphasis in original). “While a federal agency need not consider all possible alternatives for a given action in preparing an EA, it must consider a range of alternatives that covers the full spectrum of possibilities.” Ayers v. Espy, 873 F. Supp. 455, 473 (D. Colo. 1994).

In this case, the Draft EA/EIS must consider, at a minimum, the following reasonable alternatives: (1) the no-action alternative; (2) reduction in the parcels to be sold; (3) restrictions on future uses of any sold parcel to protect public resources, including environmental, water, wildlife and habitat, scenic, cultural, historical, and archaeological resources; and (4) required mitigation measures.

8. The Forest Service Must Fully Analyze and Consult Regarding All Impacted Wildlife Species

NEPA requires that the Forest Service fully disclose the Sale’s impacts on all affected threatened and endangered species and their designated critical habitats. See 40 C.F.R. § 1508.27(b)(9). Impacts to threatened or endangered species short of “jeopardy” or the “destruction or adverse modification of critical habitat” (the standard used under Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2)) may still be significant and must be examined under NEPA. At present, the Forest Service has not yet engaged in the ESA Section 7 consultation process with the U. S. Fish and Wildlife Service (“FWS”).

Finally, it is important to note that the NEPA process provides the public with its only opportunity to review the ESA Section 7 consultation process via public comment because unlike the NEPA process, the ESA Section 7 consultation process itself is “private” between the Forest Service and FWS and will not involve public comment. The public’s only opportunity to “weigh in” on the impacts to threatened and endangered species via public comment occurs during the NEPA process—rendering the Forest Service’s compliance with NEPA that much more critical in this instance as otherwise the public will not be afforded an opportunity to review and comment on FWS’ position as to the Project’s impacts on threatened and endangered species.

We are concerned that AMI’s (South32’s) mining activities, which the proposed Sale will facilitate, are not in compliance with the federal ESA, 16 U.S.C. §§ 1531–1544. There are numerous endangered and threatened (as well as sensitive species) that may occur in the Hermosa Project area—including the Mexican spotted owl (threatened, critical habitat (Protected Activity Centers)), yellow-billed cuckoo (threatened), Gila topminnow (endangered), Chiricahua leopard frog (threatened), Sonora tiger salamander (endangered), Northern Mexican gartersnake (threatened), jaguar (endangered, corridor between critical habitat), ocelot (endangered), Huachuca water umbel (endangered)—which will be directly affected by South32’s mining and dewatering activities.

There is evidence demonstrating that mining activities associated with the Hermosa Project, such as noise and light pollution, ground clearing, road construction, dewatering, etc. significantly disrupt local wildlife and adversely affect habitat, including critical habitat. Birds, such as the yellow-billed cuckoo and Mexican spotted owl are particularly sensitive to noise and light pollution. Activities associated with the Hermosa Project, for example, seemingly disrupt the reproduction of Mexican spotted owls. No offspring/fledglings were documented in the vicinity of the project within Mexican spotted owl critical habitat while drilling and remediation operations were taking place over the course of the last several years. Yet, two fledglings were documented during summer 2020 when the Hermosa Project was largely shut down due to the COVID-19 pandemic.

In addition, South32’s dewatering plan for the Hermosa Project proposes to pump up to 4,500 gallons of treated water per minute for several years into nearby Harshaw Creek. This would be similar to the amount of water the creek takes on during monsoon season. South32 has yet to release additional information analyzing in detail the impacts of the dewatering on local species, habitat, or water resources—however, it is clear that the influx of water will have direct impacts on species that live in and along the riparian habitat of Harshaw Creek, which will become perennial for several years as a result of the planned discharge. See generally PARA et al., Comments to ADEQ on AZPDES for AMI (Apr. 7, 2021). Further, the species will be affected again when mining and dewatering operations cease. See id. at 4. These impacts must be assessed in an EA/EIS.

Our concerns are further compounded by South32’s failure to provide requested information on the status of endangered and threatened species in the project area, which the company has prepared in conjunction with its mining plans. Federal agencies also have been slow to respond to Freedom of Information Act requests for similar information, though we have attached some

FOIA documents that demonstrate the potential impacts South32's mining projects, as well as other mining projects in the area, will have on endangered and threatened species. See USDA Forest Service, FOIA Response, Combined Docs for Review 00122 Deidrich_Redacted (Apr. 30, 2021).

Sale of the three parcels themselves will have a direct impact on local wildlife, as the mining company plans to use these parcels to improve access between its mining sites. As discussed above, this will change the use of these parcels significantly (increased traffic, road improvements, grubbing and clearing, etc.) and prevent the public from use and enjoyment of the parcels and surrounding areas. Furthermore, and also discussed above, the Sale of these parcels cannot only be considered in isolation. The cumulative impacts of the Sale with the adjoining mining projects and other nearby mining projects will significantly affect the environment, including wildlife and habitat. NEPA review and ESA consultation subject to public review must take place for the Sale and associated projects.

9. The Forest Service Must Comply with the National Historic Preservation Act and Other Requirements to Protect Native American Interests and Resources.

The Forest Service must comply with the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101 et seq. (formerly 16 U.S.C. § 470 et seq.), Pub. L. No. 89-665, as amended by Pub. L. No. 96-515, and requirements regarding Native American interests and resources. Due to the likelihood that cultural and religious sites and resources will be adversely affected (especially in light of cumulative impacts of other activities in the area), it would be a violation of the NHPA and other laws (and NEPA as noted above) to approve the Sale without the required review of, and protection of, cultural/historical resources.

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

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

Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the

effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(c), 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer (“SHPO”) and seek the approval of the Advisory Council on Historic Preservation (“Council”).

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 C.F.R. § 800.8(c)(1)(iv) (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 or DEIS”).

The Advisory Council on Historic Preservation (“ACHP”), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA’s requirements. See National Center for Preservation Law v. Landrieu, 496 F. Supp. 716, 742 (D.S.C.), aff’d per curiam, 635 F.2d 324 (4th Cir. 1980). The ACHP’s regulations “govern the implementation of Section 106,” not only for the Council itself, but for all other federal agencies. Id.; see National Trust for Historic Preservation v. U.S. Army Corps of Eng’rs, 552 F. Supp. 784, 790–91 (S.D. Ohio 1982).

NHPA § 306108 (“Section 306108” (formerly “Section 106”)) requires federal agencies, prior to approving any “undertaking,” such as approval of the Projects, to “take into account the effect of the undertaking on any historic property” meaning “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” 54 U.S.C. § 300308 (defining historic property). Section 306108 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 306108 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.” 54 U.S.C. § 300101, Ex. Ord. No. 11593, Section 1.

If an undertaking is the type that “may affect” an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. See 36 C.F.R. § 800.4(d)(2); see also Pueblo of Sandia, 50 F.3d at 859–63 (agency failed to make reasonable and good faith effort to identify historic properties). Consultation “must be ‘initiated early in the undertaking’s planning’, so that a broad range of alternatives may be considered during the planning process for the undertaking.” Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The NHPA also requires that federal agencies consult with any “Indian tribe . . . that attaches religious and cultural significance” to the sites. 54 U.S.C. § 302706(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)(A). “The agency official **shall ensure that the section 106 process is initiated early in the**

undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.1(c) (emphasis added).

The NHPA requires that consultation with Native American 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 Forest Service must also protect archeological and grave resources, Sacred Sites and Native American religious and cultural uses pursuant to the above laws and requirements as well as: (1) the American Indian Religious Freedom Act ("AIFRA"), 42 U.S.C. § 1996 et seq.; (2) the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. §§ 470aa–470mm; and (3) the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 et seq. Due to the archeological significance of the area, an archeological survey should be completed and made publicly available.

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

Conclusion

We appreciate the opportunity to comment on this proposed action. Please include the undersigned groups/contacts as interested parties and direct all future public notices and documents to us at the addresses below. We look forward to the next public NEPA review opportunity.

Sincerely,

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List of Attachments

As stated above, the documents submitted with these comments are considered part of these comments and must be considered by the agency in its review of the proposed Sale. Due to the size of some of these documents, the attachments will be uploaded to the comment portal in multiple batches.

- Arizona Game and Fish Department, Amsonia grandiflora Plant Abstract
- Arizona Game and Fish Department, List of Federally Threatened, Endangered and Sensitive Species in and around the Patagonia Mountains of the Coronado National Forest (July 2013)
- Arizona Minerals, Inc., Map Summary of 2013 Survey for Mexican Spotted Owl (2013)
- Arizona Missing Linkages, Patagonia Santa Rita Linkage Design (2008)
- Borderlands Restoration Network et al., Sonoita Creek Watershed Conservation Plan (June 2020)
- Borderlands Restoration Network, Call for a Sky Island Corridor Initiative White Paper
- Coalition Comments on Sunnyside Project Draft EA (Apr. 3, 2021)
- Defenders of Wildlife, Jaguar Recovery in the U.S. Southwest (2017)
- Defenders of Wildlife, Letter to Santa Cruz County Board of Supervisors (Nov. 9 2020)
- Hermosa Drilling Project, Draft Environmental Assessment (Mar. 2014)
- Hermosa Drilling Project, Plan of Operation (2013)
- Letter from Congressman Raúl M. Grijalva re AZPDES Permit Review (Feb. 19, 2021)
- Letter from Town of Patagonia re Request for Municipal Supply Watershed Groundwater Study (Aug. 12, 2020)
- Map 1, 2ND UPDATE PARCELS-CLAIMS-OWNERS in the Patagonia and Santa Rita Mountains (Aug. 2021)
- Map, Possible Extent of Patagonia Mountains Mining Projects
- PARA et al., Comments to ADEQ on AZPDES for AMI (Apr. 7, 2021)
- Petition to List the Patagonia Eyed Silkmoth (June 17, 2015)
- Proposed Threatened Status for the Western Yellow-billed Cuckoo, 78 Fed. Reg. 61622 (Oct. 3, 2013)
- South32, Hermosa Project Mineral Resource Estimate Update (July 21, 2021)
- Sunnyside Exploration Drilling Project, Draft Environmental Assessment (Mar. 2021)
- Tucson Audubon, Yellow-billed Cuckoo Surveys on the Coronado National Forest within Eight Sky Island Mountain Ranges in Southeast Arizona (2015)
- USDA Forest Service, Climate Emergency Forest Service Higher Duty (2018)
- USDA Forest Service, Coronado National Forest, Sierra Vista Ranger District, Scoping Notice, Small Tracts Act Sale – Arizona Minerals, Inc. (July 26, 2021)
- USDA Forest Service, Coronado National Forest, Sierra Vista Ranger District, Scoping Notice, Small Tracts Act Sale Arizona Minerals, Inc. (July 26, 2021)
- USDA Forest Service, FOIA Response, Combined Docs for Review 00122 Deidrich_Redacted (Apr. 30, 2021)
- USDA Forest Service, Patagonia Municipal Watershed WCATT Scores (2021)
- Watershed Management, Hydrologic Modeling of the Sonoita Creek Basin (Mar. 2014)

NFS Roads and Public Access Documents

- Forest Service Map, Access Road, NFS Roads 5521 and 4687
- Forest Service Map, Huachuca EMA Map 1, Travel Management Proposed Action and CAT Alternative (Oct. 2012)
- Forest Service Scoping Map, Access Road Depiction
- GIS Image, AMI Parcel in Relation to Access Road Depiction
- Google Earth Image, NFS Road 4687 and Parcel 3 (2013)
- Google Earth Image, NFS Road 4687 and Parcel 3 with South32 Modifications (2019)
- Google Earth Image, Road from Harshaw to NFS Road 4687
- Photograph, Entrance to Access Road to NFS Road 4687 (Aug. 2021)
- Photograph, Gate on Road to NFS Road 4687 (Aug. 2021)
- Photograph, Historic Graves on Road to NFS Road 4687 (Aug. 2021)
- Photograph, Road to NFS Road 4687 and Grave (Aug. 2021)
- Photograph, Road to NFS Road 4687.2 (Aug. 2021)
- Photograph, Road to NFS Road 4687.3 (Aug. 2021)