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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
TUCSON DIVISION

SAVE THE SCENIC SANTA RITAS;  
ARIZONA MINING REFORM COALITION;  
CENTER FOR BIOLOGICAL DIVERSITY;  
and GRAND CANYON CHAPTER OF THE  
SIERRA CLUB,

Plaintiffs

vs.

UNITED STATES FOREST SERVICE, an  
agency in the U.S. Department of Agriculture;  
KERWIN S. DEWBERRY, Supervisor of the  
Coronado National Forest; CALVIN JOYNER,  
Objection Deciding Officer and Regional  
Forester; and the UNITED STATES OF  
AMERICA,

Defendants.

Case No.

COMPLAINT FOR  
DECLARATORY  
AND INJUNCTIVE  
RELIEF

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## INTRODUCTION

1. This case challenges the Record of Decision, Rosemont Copper Project and Amendment of the Coronado Land and Resource Management Plan (“ROD”) for the Rosemont Copper Project (“Rosemont Project” or “Mine”) signed by Defendant Kerwin S. Dewberry, Forest Supervisor for the Coronado National Forest, on June 6, 2017, as well as the Final Environmental Impact Statement for the Rosemont Project issued by the Coronado National Forest in December of 2013 (“FEIS”). This case also challenges the June 13, 2014 Response to Objections for the Rosemont Project signed by Defendant Calvin Joyner, Regional Forester for the Southwest Region of the U.S. Forest Service (Forest Service or “USFS”), which responded to the administrative Objections filed by Plaintiffs on or about February 14, 2014.

2. The USFS ROD authorizes Rosemont Copper Company and its parent company, Hudbay Minerals, Inc. (“Hudbay”) to construct and operate the Rosemont Project for its full expected life, covering multiple phases of operations, each with significant environmental impacts.

3. This suit challenges the Forest Service’s failure to comply with mandatory procedural and substantive requirements governing the Forest Service’s approval of mining and other activities for the Rosemont Project. These violations include failure to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”); the Forest Service Organic Administration Act of 1897 (“Organic Act”), 16 U.S.C. §§ 478, 551; the Federal Water Pollution Control Act (“Clean Water Act,” or “CWA”), 33 U.S.C. §§ 1251 *et seq.*; the Federal Land Policy and Management Act of

1976 (FLPMA), 43 U.S.C. § 1701 *et seq.*; the Stock Raising Homestead Act of 1916, 39 Stat. 865, 43 U.S.C. § 300 (historical) (“SRHA”); the President’s Executive Order of April 17, 1926 establishing Public Water Reserve # 107 (“PWR 107”); the Public Trust Doctrine; the Federal Reserved Water Rights Doctrine; the 1872 Mining Law, 30 U.S.C. §§ 21 *et seq.*; the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a; the Las Cienegas National Conservation Area Act of 2000, Public Law 106–538, (Dec. 6, 2000); 16 U.S.C. §§ 460000-0007; the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, and the implementing regulations and policies of these laws.

### **JURISDICTION AND VENUE**

4. Plaintiffs bring this action pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the citizen suit provision of the CWA, 33 U.S.C. § 1365. On August 3, 2017, after issuance of the ROD, Plaintiffs submitted a 60-day notice letter to the USFS and other appropriate agencies pursuant to the citizen suit provision of the CWA, notifying them of Plaintiffs’ intent to sue the USFS under the CWA.

5. This Court has jurisdiction over Plaintiffs’ claims pursuant to 28 U.S.C. § 1331 (federal question) and the CWA, 33 U.S.C. § 1365, and may issue a declaratory judgment and further relief pursuant to the CWA and 28 U.S.C. §§ 2201-2202. There is a present and actual controversy between the parties. Plaintiffs seek a declaratory judgment and injunctive relief to remedy the violations complained of herein.

Plaintiffs also seek an award of costs and expenses, including attorneys’ fees, costs, and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, and the CWA,

33 U.S.C. § 1365.

6. Venue lies in the District of Arizona (Tucson Division) because Plaintiffs reside and have offices in Tucson; the lands at issue in this suit are located approximately 30 miles south of Tucson in Pima County, Arizona; and a substantial part of the events giving rise to Plaintiffs' legal claims occurred in the Tucson Division of the District of Arizona. Defendant Forest Supervisor Kerwin Dewberry's office is in Tucson, Arizona. 28 U.S.C. § 1391(e)(1).

### **PARTIES**

7. Save the Scenic Santa Ritas ("SSSR") is a non-profit corporation based in Tucson, dedicated to the protection of the Santa Rita Mountains and other nearby lands and waters. SSSR has worked since its inception to protect these lands and waters from the adverse impacts from mining and related operations. Its members include conservationists, business owners, ranchers, wildlife enthusiasts, and others committed to ensuring that the Rosemont Mine, and its review and approval by federal, state, and local agencies, complies with all applicable laws. The following photograph of the site of the Rosemont Project in the Santa Rita Mountains was taken by a member of SSSR in October of 2017:



8. The Arizona Mining Reform Coalition (“AMRC”) is a non-profit corporation that 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. Group members of the Coalition include: Apache – Stronghold, Center for Biological Diversity, Concerned Citizens and Retired Miners Coalition, Concerned Climbers of Arizona, Dragoon Conservation Alliance, Earthworks, Environment Arizona, Groundwater Awareness League, Maricopa Audubon Society, Patagonia Area Resource Alliance, Save the Scenic Santa Ritas, Grand Canyon Chapter of the Sierra Club, Sky Island Alliance, Spirit of the

Mountain Runners, Tucson Audubon Society, and the Valley Unitarian Universalist Congregation.

9. Center for Biological Diversity (“the Center”) is a non-profit corporation headquartered in Tucson, Arizona, with offices in a number of states and Mexico. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in endangered species and habitat protection issues nationwide, and has more than 61,000 members throughout the United States and the world.

10. The Sierra Club is one of the nation’s oldest 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 2.7 million members and supporters with 60,000 in Arizona as part of the Grand Canyon (Arizona) Chapter. Its members have long been committed to protecting and enjoying the Coronado National Forest and have a significant interest in the proposed Rosemont Mine and related activities.

11. All Plaintiff groups bring this action on their own behalf, and on behalf of their members who derive scientific, aesthetic, recreational, and spiritual benefits from the natural lands and waters in the Santa Rita Mountains and nearby lands and waters threatened by the Rosemont Mine, including the threatened and endangered species that would be significantly impacted by the proposed Rosemont Mine, such as jaguar, ocelot, northern Mexican gartersnake, Chiricahua leopard frog, Gila chub, Gila topminnow,

southwestern willow flycatcher, and western yellow-billed cuckoo.

12. Plaintiffs and their members, and the children, grandchildren and future descendants of their members, will be significantly and irreparably injured by the construction and operation of the Rosemont Mine. Plaintiffs and their members use the lands in the Santa Rita Mountains ecosystem, along with the nearby lands and waters (such as those in the congressionally-established Las Cienegas National Conservation Area) that will be adversely affected by the Rosemont Project, including the lands and waters at the Mine site, the lands crossed by the approved transmission line, water pipeline, and roads, the travel routes for the Mine's ore concentrate and transportation operations, and the lands and waters that will be adversely affected by the Mine, for recreational, scientific, aesthetic, spiritual, economic, and conservation purposes. Plaintiffs and their members derive recreational, scientific, aesthetic, spiritual and commercial benefits from these lands, waters, and wildlife. Their uses include hiking, camping, backpacking, wading, picnicking, viewing and enjoying wildlife and aquatic life in their natural environment, taking their children and grandchildren to these lands and waters to use and enjoy these resources and values, and enjoying the unspoiled lands and waters of the Santa Rita Mountains and its adjacent public lands and downstream waters that will be adversely affected by the Project. These uses are incompatible with the Rosemont Mine as approved by the USFS and its adverse effects, and would be precluded and/or significantly impaired if the Mine was constructed and operated as approved in the ROD. As they have for many years, members of Plaintiff groups have visited these lands and waters within the last year for these uses, and intend on continuing

their use and enjoyment of these lands and waters in 2017 and in future years.

13. Plaintiffs' past, present, and future enjoyment of these lands and waters has been and will continue to be irreparably harmed by the Forest Service's disregard of its statutory and legal duties and by the unlawful injuries caused by the challenged actions.

14. In addition, Plaintiffs and their members have been and will be irreparably harmed by USFS's failure to conduct a proper NEPA analysis and to fully involve the public, including Plaintiffs and their members, in the required NEPA process.

15. Plaintiffs submitted extensive comments to the Forest Service and other federal and state agencies with regulatory responsibility over the Mine during the environmental review and permitting process for the Project. In February, 2014, Plaintiffs filed an administrative Objection pursuant to 36 C.F.R. Part 218, challenging the USFS's proposed actions in issuing the ROD and FEIS, which was substantially rejected by the U.S. Forest Service, Southwest Region. By filing that Objection, Plaintiffs exhausted all available administrative remedies. In a letter dated May 23, 2017, Plaintiffs SSSR and the Center submitted additional comments and documents to Defendant Forest Supervisor Dewberry, urging the USFS not to approve the ROD.

16. Defendant United States of America is a government entity responsible for the management and protection of federal public land, waters, and resources that will be adversely affected by the Rosemont Project. The United States is the trustee and owner of the federal public lands, waters, and resources that will be adversely affected by the Project, both on federal public lands managed by the U.S. Forest Service and on federal public lands managed by the U.S. Bureau of Land Management.



17. Defendant United States Forest Service is an agency of the United States Department of Agriculture. The Forest Service and its officers are responsible for implementing all laws and regulations relating to the management of the National Forests, including the Coronado National Forest (“CNF”).

18. Defendant Kerwin Dewberry, in his official capacity, is the Supervisor for the CNF and is the USFS official who issued and is responsible for the challenged ROD and FEIS. The Southwest Region’s decision denying Plaintiffs’ Objection was made by Defendant Calvin Joyner, Regional Forester for the Southwest Region of the USFS, is a final agency action under the APA. The decision denying Plaintiffs’ Objection, along with the ROD and FEIS, are the final agency actions challenged in this case.

19. Plaintiffs have suffered and will suffer actual, concrete injuries that are traceable to USFS’s conduct and would be redressed by the requested relief. Plaintiffs have no adequate remedy at law.

### **FACTUAL AND REGULATORY BACKGROUND**

20. The Rosemont Mine would be a large-scale open-pit copper mine on the east side of the Santa Rita Mountains, approximately 30 miles south of Tucson, Arizona. Under the proposed plan of operations submitted by Hudbay/Rosemont, mine activities are proposed on 995 acres of private lands, and 3,653 acres of the Coronado National Forest. The active mining phase is expected to last 20 to 25 years. A “premining” phase will last 18 to 24 months, and “final reclamation and closure” is expected to last another 3 years. In total, the Mine life would last up to 30 years.

21. In the FEIS, the Forest Service identified the “Barrel Alternative” as the preferred

alternative. The Barrel Alternative places all of the tailings (mine waste resulting from the initial processing of the copper ore) and waste rock (rock excavated from the mine pit that never undergoes processing or copper recovery) in upper Barrel Canyon and the lower portion of Wasp Canyon. The ROD approved the Barrel Alternative. For the purposes of this complaint, the mine or project is considered the Barrel Alternative as approved by the ROD.

22. The ROD authorizes Hudbay to excavate a 955-acre open pit (up to 6,500 feet in diameter), with a final depth of up to 3,000 feet deep. The Mine would also include a processing plant and associated facilities, transmission lines, pipelines, waste rock and tailings facilities, and new roads.

23. A total of 661,429,000 tons of ore would be mined from the pit. A total of 1,249,161,000 tons of waste rock would be produced and placed on public lands near the mine pit. The waste rock dump for the approved Barrel Alternative would cover approximately 1,460 acres. The tailings waste facility would cover approximately 987 acres.

24. The Rosemont Mine would be surrounded by a perimeter barbed wire fence within which public access would not be allowed. Within the perimeter fence, a separate security fence would be constructed around the waste rock and tailings facilities. The security fence would not be removed upon closure of the mine, presenting a permanent barrier to wildlife movement.

25. A total of approximately 5,431 acres of land would be directly affected by the Rosemont Mine, including 4,228 acres within the security fence, the primary access road

(226 acres), the utility line corridor (889 acres), new forest roads (39 acres), and rerouted trailheads (19 acres). The total area excluded from public access, within the larger perimeter fence is 6,990 acres.

26. Total fresh water to be used during operations of the mine would be about 4.8 million gallons per day, mostly supplied by groundwater wells in the Santa Cruz Valley. The mine would use between 4,700 and 5,400 acre-feet per year, for a total use over the mine life of approximately 100,000 acre-feet. One acre-foot of water equals 325,851 gallons. Thus, the Mine is projected to use 32.5 billion gallons of water.

27. In addition, the mine pit would be actively pumped or dewatered during the active mining phase and then would act as a hydraulic sink to the regional aquifer in perpetuity.

28. The mine pit lake that would form after pumping ceased would be a dynamic system, gradually filling over a period of approximately 700 years. In that time, the lake elevation would increase by approximately 1,229 feet, rising from approximately 3,050 to 4,279 feet above mean sea level. The final pit volume would be approximately 95,975 acre-feet of water, with a surface area of approximately 213 acres.

29. When equilibrium is reached, the loss of water from the aquifer as a result of the pit is estimated to be up to 230 gallons per minute. This amount represents the maximum amount of water that would enter the mine pit, eventually evaporate, and be lost to the overall aquifer—thereby being unavailable to supply perennial flows, riparian vegetation, or groundwater outflow from the basin—and totals approximately 370 acre-feet per year. 370 acre-feet per year equals approximately 120,564,000 gallons of water lost to the overall aquifer per year.

30. During active mining, the loss of water would be greater. Estimates of the pit dewatering rate range as high as 650 gallons per minute.

31. The groundwater resource commitment associated with the flow into the mine pit is the approximately 17,800 to 18,500 acre-feet of groundwater withdrawn to maintain minable conditions in the pit during the approximately 20-year active mine life. This water would be withdrawn either from the pit sump itself or with the use of dewatering wells or drains. After closure of the mine, a mine pit lake would form. Estimates of the amount of water lost in perpetuity from the aquifer due to evaporation by the mine pit lake ranges from 170 acre-feet per year to 370 acre-feet per year. Loss of this water from the aquifer in the Davidson Canyon/Cienega Basin would continue in perpetuity as a result of the formation of the mine pit lake and is an irreversible impact. 18,500 acre feet equals 6.02 billion gallons of water.

32. The Rosemont Mine is within the Cienega Creek watershed, which provides some of the highest quality stream and wetland ecosystems in Arizona.

33. The Rosemont Mine would impact aquatic and wetland resources within Pima County's "Cienega Creek Natural Preserve," and within the congressionally-designated "Las Cienegas National Conservation Area" ("LCNCA") which is administered by the U.S. Bureau of Land Management ("BLM").

34. The mine pit would create a permanent drawdown of the water table. Groundwater would flow toward the mine pit in perpetuity from the time at which the excavation intersects the water table. At first, during active mining, groundwater would be pumped directly from the mine pit or from dewatering wells next to the mine pit. After

final reclamation and closure, the pit is expected to gradually fill with groundwater, forming a mine pit lake. The mine pit lake would lose water through evaporation, and this water would be perpetually replenished in part by groundwater from the regional aquifer. In this way, the mine pit lake is expected to act as a permanent regional hydraulic sink. Pumping of the mine pit would draw down the level of groundwater in the regional aquifer, forming what is known as a cone of depression. Because the mine pit lake would act to remove groundwater in perpetuity from the system, this cone of depression is expected to persist in perpetuity. The boundaries of the cone of depression would migrate outward for a very long period of time until they eventually reach equilibrium. The various models estimate equilibrium would be reached between 700 and 7,000 years after closure of the mine.

35. The mine pit would permanently convert the hydrologic regime of the proposed site from a water source area to a terminal sink, significantly lowering the surrounding regional aquifer. The consequences of groundwater drawdown from the proposed mine would include the conversion of hundreds of acres of riparian vegetation, including wetlands, and the drying of streams currently characterized by permanent or intermittent flow.

36. The mine would permanently reverse the natural direction of groundwater flow toward and into the mine pit, and away from the sensitive aquatic habitats in the Cienega Creek Natural Preserve, the Las Cienegas National Conservation Area, Davidson Canyon, and other springs and seeps. This would add to a baseline trend of decreasing groundwater, causing a permanent reduction of water in streams and wetlands along

Empire Gulch, Mattie Canyon, Gardner Canyon, and Cienega Creek, with potential adverse impacts to over 30 seasonal and perennial wetlands, and aquatic habitat dependent plants, fish, and wildlife.

37. Empire Gulch, Mattie Canyon, Gardner Canyon, Cienega Creek, and Davidson Canyon are subject to water quality standards set by the Arizona Department of Environmental Quality (“ADEQ”). These standards have been established to protect the designated beneficial uses of these waters for aquatic life, human and animal uses, and recreation.

38. In addition, portions of Davidson Canyon and Cienega Creek are designated as “Outstanding Arizona Waters (“OAW”).” The OAW reach of Cienega Creek is designated as “Cienega Creek, from its confluence with Gardner Canyon to the USGS gaging station (#09484600) (approximately 28.3 river miles).” Arizona Administrative Code (“A.A.C.”), R18-11-112.G.8. The OAW reach of Davison Canyon is designated as “Davidson Canyon, from the unnamed spring at 31°59'00"/110°38'49" to its confluence with Cienega Creek.” R18-11-112.G.21.

39. Under the “Antidegradation” provisions of Arizona water quality standards, discharges are prohibited unless they “will not degrade existing water quality in the downstream OAW.” R18-11-107.01. “Existing water quality shall be maintained and protected in a surface water that is classified as an OAW.” R18-11-107.

40. “State water quality regulations dictate numeric water quality standards both for surface waters and for groundwater. ... State regulations also identify a narrative water quality standard for surface water. ... The narrative water quality standards also state

that a wadeable, perennial stream shall support and maintain organism richness comparable to that of a stream with reference conditions in Arizona.” FEIS at 451.

41. According to state regulations, “A wadeable, perennial stream shall support and maintain a community of organisms having a taxa richness, species composition, tolerance, and functional organization comparable to that of a stream with reference conditions in Arizona.” R18-11-108.E. “The narrative biological criteria in this Section apply to a wadeable, perennial stream with either an aquatic and wildlife (cold water) or an aquatic and wildlife (warm water) designated use.” R-18-11-108.01.A.

42. State regulations define the following designated uses: “‘Aquatic and wildlife (warm water) (A&Ww)’ means the use of a surface water by animals, plants, or other warmwater organisms, generally occurring at an elevation less than 5000 feet, for habitation, growth, or propagation.” R18-11-101.8 (definitions). “‘Full-body contact (FBC)’ means the use of a surface water for swimming or other recreational activity that causes the human body to come into direct contact with the water to the point of complete submergence. The use is such that ingestion of the water is likely and sensitive body organs, such as the eyes, ears, or nose, may be exposed to direct contact with the water.” R18-11-101.21. “‘Fish consumption (FC)’ means the use of a surface water by humans for harvesting aquatic organisms for consumption. Harvestable aquatic organisms include, but are not limited to, fish, clams, turtles, crayfish, and frogs.” R18-11-101.20.

43. Arizona water quality regulations divide Empire Gulch into four sections: (1) “Headwaters to unnamed spring at 31°47'18"/ 110°38'17"”; (2) “From 31°47'18"/110°38'17" to 31°47'03"/110°37'35"”; (3) “From 31°47'18"/110°38'17" to

31°47'03"/110°37'35""); and (4) "From 31°47'05"/110°36'58" to confluence with Cienega Creek." The designated uses of sections 2 and 4 include A&Ww, FBC, and FC.

Appendix B of A.A.C. Title 18, Chapter 11, List of Surface Waters and Designated Uses.

44. Arizona water quality regulations divide Cienega Creek into two sections: (1) "Headwaters to confluence with Gardner Canyon," and (2) "From confluence with Gardner Canyon and Spring Water Canyon to USGS gaging station at 32°02'09"/110°40'34"." Cienega Creek becomes Pantano Wash below the USGS gaging station. The designated uses for both sections of Cienega Creek include A&Ww, FBC, and FC. The section of Cienega Creek below its confluence with Gardner Canyon is designated as an OAW. Appendix B of A.A.C. Title 18, Chapter 11, List of Surface Waters and Designated Uses.

45. Arizona water quality regulations divide Davidson Canyon into four sections: (1) "Headwaters to unnamed spring at 31°59'00"/ 110°38'49""); (2) "From unnamed Spring to confluence with unnamed tributary at 31°59'09"/110°38'44""); (3) "Below confluence with unnamed tributary to unnamed spring at 32°00'40"/110°38'36""); and (4) "From unnamed spring to confluence with Cienega Creek." Sections 2, 3 and 4 are designated as OAWs. The designated uses of sections 2 and 4 include A&Ww, FBC, and FC. Appendix B of A.A.C. Title 18, Chapter 11, List of Surface Waters and Designated Uses.

46. The Arizona wadeable/perennial narrative water quality standard at R18-11-108.E. applies to the perennial reaches of Empire Gulch, Cienega Creek, and Davidson Canyon.

47. The USFS' analysis regarding impacts to streams from the dewatering has been divided into nine key reaches. These key reaches represent critical areas on Cienega



Creek and Empire Gulch that have a persistent water presence that supports an aquatic ecosystem, including threatened and endangered species. One of these “key reaches” is identified as Upper Empire Gulch 1, or EG1.

48. Upper Empire Gulch 1 is defined as “Approximately 0.3 mile in length, located within the Las Cienegas NCA immediately downstream from the Upper Empire Gulch Springs, near the Empire Ranch Headquarters.” Rosemont Copper Project Supplemental Information Report – Rev. June 2015, at 65 (Table 7)(June 2015 SIR).

49. Regarding Upper Empire Gulch, mine drawdown is of such magnitude that negative trends are likely to intensify, regardless of the stresses experienced from climate change. The modeling scenarios are consistent in that a change to ephemeral status would occur at some point in time; however, the results vary on when that transition would occur.

50. For Upper Empire Gulch (EG1), the best-fit modeling scenarios place the shift from perennial to intermittent in key reach EG1 anywhere from 50 to 300 years after mine closure. The worst-case scenarios (i.e., the high end of all model sensitivity analyses) have this shift occurring as early as 20 years after mine closure.

51. The magnitude of mine-related impacts is expected to be greatest in Upper Empire Gulch. Regarding the impacts from the dewatering, the updated aquatic analysis (see “Seeps, Springs, and Riparian Areas” section of the USFS’s June 2015 Supplemental Report) shows that “as a result of mine drawdown ... upper Empire Gulch (EG1) would be the most impacted, potentially losing all or most of its pools and riparian vegetation.” June 2015 SIR at 178.

52. Impacts to Empire Gulch are more certain to occur than those to other perennial streams, and most scenarios indicate that effects would be seen within 50 years of closure of the mine. These effects would gradually increase over time, likely affecting flow at the springs in Empire Gulch, stream flow within the Empire Gulch channel, and the riparian gallery present along the channel.

53. As the U.S. Environmental Protection Agency (“EPA”) stated in its comments on the Administrative Final EIS (“AFEIS”), in August 2013, shortly before the FEIS was issued: “[R]elatively small changes in groundwater levels can and often do result in significant reductions in associated surface water. Because the surface waters in question here contain very little water during the driest times of year, the EPA believes that impacts to Empire Gulch could include not only transition from perennial to intermittent stream flow, but transition from intermittent to ephemeral flow or complete drying of all or portions of stream reaches.” EPA August 2013 comments, at 12.

54. The change from being a perennial stream to an ephemeral or intermittent stream caused by the dewatering (alone and in combination with modeled impacts from climate change), such as is predicted to occur by the USFS for Upper Empire Gulch and other waters, would violate the Arizona wadeable/perennial water quality standard R18-11-108.E; R-18-11-108.01.A.

55. Due to the dewatering, Upper Empire Gulch will not be able to support and maintain organism richness comparable to that of a stream with reference conditions in Arizona.

56. Neither the FEIS nor ROD determined whether the narrative standard at R18-11-

108E and R-18-11-108.01.A would be met for the perennial reaches of Empire Gulch. There is no mention in the FEIS of whether the wadeable/perennial standard would be met for Empire Gulch.

57. No mitigation is analyzed or proposed in the FEIS or ROD to prevent the flow losses in Empire Gulch due to the project's dewatering, to prevent the perennial reaches of Empire Gulch from becoming intermittent or ephemeral due to the dewatering, or to prevent the violation of the wadeable/perennial water quality standard in Empire Gulch caused by the dewatering.

58. For Cienega Creek, the FEIS lists five sections, listed as Cienega Creek 1, 2, 3, 4, and 5. Sections 2, 3, 4, and 5 are OAWs. FEIS at 491 (Table 106). For Cienega Creek 2 "From confluence with Gardner Canyon to the Narrows", the "Description of Flow Regime" shows that there are "perennial reaches" and "contains USGS gage no. 09484550 (titled 'Cienega Creek, near Sonoita'); this gage has been operational since 2001." FEIS Figure 70, FEIS at 531, a graph entitled "Minimum Monthly Flow Values, Period of Record 2001-2010, USFS Streamgage 09484550," depicts the minimum monthly flows at the gage ranging from less than .1 cfs (cubic feet per second) to close to .8 cfs. FEIS Table 82, FEIS at 415, depicts the "Monthly Mean Flow" at Cienega Creek Gage No. 09484550, from 2001 to 2012, with the median, minimum, and maximum flows (in cfs), with all months showing flows. The FEIS, at 414, describes this gage and stretch of Cienega Creek as: "Cienega Creek near Sonoita (gage no. 09484550). This gage is located in a perennial section of Upper Cienega Creek."

59. Under the FEIS section entitled “Ability to Meet Wadeable, Perennial Stream Standards,” the USFS states that: “Upper Cienega Creek currently meets the regulatory definition of a wadeable, perennial stream. As such, regulatory requirements specific to biological integrity (taxa richness, species composition, tolerance, and functional organization comparable to that of a stream with reference conditions in Arizona) and bottom deposits would need to be met.” FEIS at 554-55. Upper Cienega Creek, as discussed at FEIS pp. 554-55, is not located on lands administered by the USFS.

60. For Upper Cienega Creek, “The potential for reductions in stream flow would potentially drive water quality changes as well, as discussed earlier in this section. Results of the models are mixed. ... By 150 years after closure, four out of five modeling scenarios suggest that there would be an increase in the risk of low-flow conditions occurring. By 1,000 years after closure, all modeling scenarios agree that there would some level of increase in the risk of low-flow conditions. These low-flow conditions would increase water temperature, increase nutrient loads, and decrease the assimilative capacity of the stream. Changes in these characteristics would have an effect on the aquatic biota and the characteristics of biological integrity listed above.” FEIS at 555.

61. Due to these acknowledged impacts from the dewatering, the Project is predicted to violate the wadeable/perennial standard for Upper Cienega Creek. No mitigation is proposed or analyzed to prevent these dewatering losses in Upper Cienega Creek, or the violation of the wadeable/perennial standard.

62. The Arizona Game and Fish Department reiterated the connection between the loss of flows in Empire Gulch and the loss of flows and associated habitat downstream in Cienega Creek:

The FEIS does not clearly address additive effects of loss of water in the watershed on Cienega Creek. In addressing the effects of groundwater drawdown on Cienega Creek, this section acknowledges that all models predict drawdown of Empire Gulch, and that loss of water throughout the watershed resulting from the mine pit dewatering “have an additive effect that could impact riparian vegetation or aquatic species” and that “this possibility was disclosed in the DEIS and remains valid (page 34 line 28-31.”)

However, the summary on page 34, line 42 states “there is no reasonable analysis to indicate that the stream flow in Cienega Creek would be impacted by groundwater drawdown caused by mine pit dewatering.” This is contradictory and seems designed to confuse the reader into thinking that Cienega Creek will not be impacted (under “any reasonable analysis”) when in fact the analysis shows that the additive impacts “*have an additive effect.*”

Az. Game and Fish Dept., August 15, 2013 comments on Preliminary Administrative Draft FEIS, at p. 10 of attachment to letter (*italics in original*).

63. Cienega Creek is noted for both scenic beauty and ecological significance. It forms an important connection for wildlife movement between sky islands in southern Arizona. It is one of the few remaining examples of a desert riparian community, exhibiting a high level of plant diversity in a relatively small geographic area. Pima County notes that the habitat along Cienega Creek supports more than 280 native species of mammals, birds, reptiles, amphibians, fish, and insects that either reside in or frequent the preserve and provides habitat for neotropical migratory birds, which seasonally use the area for nesting. The presence of perennial stream flow supports native frog and fish populations, including threatened and endangered species.

64. The ecological, recreation, and cultural importance of Cienega Creek is tied irrevocably to its hydrology. Cienega Creek is valuable because it is a perennial riparian corridor. Changes in the hydrology severe enough to cause dewatering of Cienega Creek are one possible outcome of the mine, and the likelihood of mine effects becoming severe enough to dewater Cienega Creek also increases with climate change and increased groundwater demand within the basin. If these severe effects were to occur, much of the value of Cienega Creek for recreation, wildlife habitat, scenic beauty, and cultural importance would be lost.

65. For Upper Cienega Creek, the potential for reductions in stream flow would potentially drive water quality changes as well. By 150 years after closure, four out of five modeling scenarios suggest that there would be an increase in the risk of low-flow conditions occurring. By 1,000 years after closure, all modeling scenarios agree that there would some level of increase in the risk of low-flow conditions.

66. These low-flow conditions would increase water temperature, increase nutrient loads, and decrease the assimilative capacity of the stream. Changes in these characteristics would have an effect on the aquatic biota and the characteristics of biological integrity.

67. In addition to its failure to protect all existing stream uses and water quality due to the Mine's dewatering/drawdown, direct discharges from mine facilities have the potential to violate water quality standards.

The screening analysis for runoff from waste rock indicates that two constituents may be elevated in mine runoff at levels that suggest they could present antidegradation problems: total and dissolved molybdenum, and total

and dissolved sulfate. The screening analysis for runoff from soil cover suggests that molybdenum and sulfate would not be elevated but that dissolved arsenic, dissolved iron, and dissolved sodium could present antidegradation problems. In addition, dissolved and total mercury is substantially higher.

FEIS at 549.

68. For the soil cover placed on the waste rock, predicted water quality for runoff from soil also exceeds water quality standards in Barrel Canyon for dissolved silver, as well as total lead and dissolved mercury. FEIS Table 105 predicts exceedances of surface water quality standards from the approved soil cover for dissolved silver, as well as total lead and dissolved mercury.

69. The predicted concentration of dissolved silver in stormwater runoff from the waste rock facility is 0.0025 mg/L, compared with the surface water quality standard of 0.00081 mg/L.

70. According to the FEIS: "Runoff from waste rock is predicted to meet Arizona Surface Water Quality Standards for all constituents except dissolved silver; risk of exceedance is mitigated by waste rock segregation techniques and suggests that dissolved silver would likely be below standards as well." FEIS at 447 (Table 97).

71. "It is known for certain that stormwater would contact both soils and waste rock in some manner. The most likely scenario would involve stormwater contacting both soil cover (on the slopes of the waste rock facility) and waste rock (in the conveyance channels of the waste rock facility). The percentage contribution from each source is not possible to easily predict, nor is it possible to predict the beneficial effects of waste rock

segregation. Dissolved silver is the only constituent that would be likely to exceed surface water standards under any waste rock/soil mixing scenario.” FEIS at 473.

72. Because the agency admits that it is not possible to predict the beneficial effects of waste rock segregation, FEIS at 473, the potential mitigation of “waste rock segregation techniques” (quoted above from FEIS 447, Table 97) cannot be relied upon to support the USFS conclusion that the Project will comply with all state water quality standards in Barrel Canyon/Davidson Canyon.

73. In addition, although the FEIS says that the probability of tailings seepage “daylighting” to surface waters “is low,” “Predicted water quality in the event tailings seepage were to appear in Barrel Canyon exceeds applicable surface water quality standards for dissolved silver, dissolved cadmium, total and dissolved lead, dissolved mercury, and total selenium.” FEIS at 473.

74. Because there are no known stormwater samples from anywhere within the Davidson Canyon watershed, except those collected by Rosemont Copper in Barrel Canyon, it is impossible to conduct a full analysis of whether the mine would degrade water quality in the Outstanding Arizona Water segments of Davidson Canyon and Lower Cienega Creek. Not only does this prevent comparison of predicted stormwater quality with existing stormwater quality in these Outstanding Arizona Water reaches, but because Arizona surface water standards change based on water hardness, it also prevents even a comparison of predicted stormwater quality with surface water quality standards in the Outstanding Arizona Water reaches.



75. “Full analysis of antidegradation standards and compliance with surface water standards in the Outstanding Arizona Water reaches of Davidson Canyon and Cienega Creek is under the jurisdiction of ADEQ and has not yet been conducted.” FEIS at 548 (Table 111).

76. The water quality screening analysis suggests that some constituents may be elevated in mine runoff, but because of the lack of stormwater samples in Lower Davidson Canyon or Lower Cienega Creek, this screening analysis is unable to predict water quality changes in these Outstanding Arizona Water reaches.

77. The FEIS thus admits that it was issued without the required analysis of whether the Project will meet all water quality standards, in violation of NEPA as well as the CWA, Organic Act, and the 36 CFR Part 228 regulations.

78. FEIS Table 112 (FEIS at 550-552) shows that the Project will increase the level of several pollutants. For example, in the column labeled “Percent Difference between Pre- and Postmine Watershed Water Quality,” Arsenic (dissolved) will increase by 16%, Iron (dissolved) will increase by 11%, Mercury (dissolved) will increase by 1050%, Mercury (total) will increase by 201%, and Sodium will increase by 21%.

79. No mitigation is proposed to reduce these increases. As such the USFS has failed to minimize the substantial increases in pollutant discharges into Barrel Canyon/Davidson Canyon.

80. The failure to minimize these adverse impacts violates the USFS’ duty under the Organic Act and the 36 CFR Part 228 regulations.

81. Mitigation plans to prevent the potential for exceedances of water quality standards were not contained in the FEIS nor subject to public review under NEPA. This includes the lack of mitigation for the loss of flows due to the dewatering and from the pollutant loadings noted above, but also the required mitigation for the loss of stormwater flows to downstream waters such as the OAW of Davidson Canyon.

82. For example, the FEIS did not contain any mitigation plan to replace the reduction in average annual postclosure runoff volume in Davidson Canyon (predicted to be 17.2%), as a result of the mine activities. FEIS at 429, Table 429 (noting “Change in Average Annual Postclosure Runoff Volume” of 17.2%). This mitigation is required in order to meet the state antidegradation requirements to protect the Outstanding Arizona Water of Davidson Canyon. This critical mitigation plan, along with the necessary analysis of the environmental impacts from implementing such a plan, was not contained in the Draft or Final EIS and was never subject to public review under NEPA.

83. The ROD also authorizes the creation of the mine pit lake that is predicted to be extremely hazardous to wildlife, due to the predicted toxicity and chemical pollution in the pit lake waters.

The results of geochemical modeling for the mine pit lake ... indicate that various contaminant levels that would result from these mining processes may exceed surface water quality standards for wildlife (see the “Groundwater Quality and Geochemistry” resource section of this chapter). For all action alternatives, the mine pit lake water quality could exceed standards for cadmium, lead, copper, mercury, selenium, and zinc, three of which are known to bioaccumulate (i.e., cadmium, mercury, and selenium). Estimates indicate that surface water quality standards for wildlife for ammonia (chronic exposure) also may be exceeded in the mine pit lake as a result of buildup of nitrogen residue from the use of ammonium nitrate explosives (see the “Groundwater Quality and Geochemistry” resource section of chapter 3).

FEIS at 664.

84. As acknowledged by the FEIS:

Wildlife groups that are most likely to be directly impacted by toxins potentially present in the mine pit lake include invertebrates (i.e., insects, etc.) and birds. Wildlife most likely to be indirectly impacted includes any animals that prey on insects or birds that have come in contact with the water in the mine pit lake. Acute exposure by avian species is the most likely scenario to occur, given the depth and isolation of the pit lake and general inaccessibility by wildlife. Chronic exposure is unlikely to occur directly, but chronic exposure could occur indirectly through predation on insects.

Geochemical modeling indicates that some surface water quality standards for acute exposure to warmwater aquatic species and wildlife could be exceeded:

- Copper exceeds the acute surface water standard for two scenarios. Copper has not been observed in background ambient groundwater concentrations at these levels.
- Zinc exceeds the acute surface water standard under all four scenarios. The concentrations modeled for the pit lake (0.745 to 0.959 mg/L) appear to be largely the result of the concentration of zinc naturally occurring in groundwater samples collected from near-pit wells (0.694 mg/L). The background concentration also exceeds the acute surface water standard for zinc. Geochemical modeling also indicates that some surface water quality standards for chronic exposure to warmwater aquatic species and wildlife could be exceeded:
  - Cadmium exceeds the chronic surface water standard under all four scenarios. Cadmium has not been observed in background ambient groundwater concentrations at these levels and therefore is likely elevated due to contact with and reaction to the exposed rock.
  - Copper exceeds the chronic surface water standard under all four scenarios. Copper has not been observed in background ambient groundwater concentrations at these levels and therefore is likely elevated due to contact with and reaction to the exposed rock.

- Lead exceeds the chronic surface water standard for three scenarios. Lead has not been observed in background ambient groundwater concentrations at these levels and therefore is likely elevated due to contact with and reaction to the exposed rock.
- Mercury exceeds the chronic surface water standard for at least two scenarios. Mercury has not been observed in background ambient groundwater concentrations at these levels and therefore is likely elevated due to contact with and reaction to the exposed rock.
- Selenium exceeds the chronic surface water standard under all four scenarios. The concentrations modeled for the pit lake (0.013 to 0.016 mg/L) appear to be partially the result of the concentration of selenium occurring in groundwater samples collected from near-pit wells (0.00212 mg/L), although the modeled concentrations are substantially higher. The background concentration also exceeds the chronic surface water standard for selenium.
- Zinc exceeds the chronic surface water standard under all four scenarios. As noted above, this appears to be largely the result of the concentration of zinc occurring naturally in groundwater samples collected from near-pit wells, which also exceeds the chronic surface water standard for zinc.

FEIS at 389-90. *See also* FEIS at 665 (discussing toxicity impacts to wildlife).

85. This contamination will be toxic and lethal to wildlife:

Cadmium is highly toxic to wildlife, is carcinogenic and teratogenic, and can have sublethal and lethal effects at low environmental concentrations (U.S. Environmental Protection Agency 2011b)[attached to this Objection]. It affects respiratory functions, enzyme levels, muscle contractions, growth reduction, and reproduction, and it is known to bioaccumulate in the food chain. Lead is carcinogenic and adversely affects reproduction, liver and thyroid function, and disease resistance. The main potential ecological impacts result from direct exposure of algae, invertebrates, and freshwater fish and amphibians. It can be bioconcentrated from water but does not bioaccumulate. Copper is highly toxic in aquatic environments and affects fish, invertebrates, and amphibians. A portion of mercury released into the environment is transformed by abiotic and biotic chemical reactions to organic derivatives, such as methylmercury, which bioaccumulates in individual organisms, biomagnifies in aquatic food chains, and is the most toxic form of mercury to which wildlife are exposed (U.S. Environmental Protection Agency 1997).

FEIS at 664-65.

86. Arizona defines “Toxic” as “a pollutant or combination of pollutants, that ... upon exposure, ingestion, inhalation, or assimilation into an organism, either directly from the environment or indirectly by ingestion through food chains, may cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations in the organism or its offspring.” A.A.C. R18-11-101 (44).

87. Despite this, no mitigation is proposed to prevent these direct and indirect effects from the pit lake to wildlife, especially birds, bats, insects, and the related food chain. The FEIS states that mitigation will be required to prevent wildlife access to other contaminated waters at the site (e.g., process water ponds, etc.). “This would avoid or reduce impacts during active mining but does not apply to the pit lake that could develop during the postclosure period.” FEIS at 665.

88. The failure to have any mitigation plan or analysis for the contaminated pit lake violates NEPA.

89. The pit lake contamination also violates the USFS’s duties 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 the USFS’s duties to “minimize adverse environmental impacts on National Forest surface resources,” including water resources, fish and wildlife, and habitat, under 36 C.F.R. § 228.8.

90. These regulations also require that:

[O]perator shall, where practicable, reclaim the surface disturbed in operations by **taking such measures as will prevent or control onsite and off-site damage to the environment and forest surface resources** including:

- (1) Control of erosion and landslides;
- (2) Control of water runoff;
- (3) Isolation, removal or control of toxic materials;**
- (4) Reshaping and revegetation of disturbed areas, where reasonably practicable; and
- (5) Rehabilitation of fisheries and wildlife habitat.**

36 CFR § 228.8(g)(emphasis added). By creating a toxic and contaminated pit lake, the agency has violated these requirements.

91. In addition, the contaminated pit lake will violate Arizona state law mandating protection of birds and wildlife. As stated by the Arizona Game & Fish Department:

ARS 17-236 prohibits the take or injury of any bird ... except as may occur in normal horticultural and agricultural practices and except as authorized by [Game and Fish] Commission order. No exceptions are made for mining. The project must be planned so as to eliminate violation of 17-236 and compliance with the Migratory Bird treaty Act in coordination with the Department and USFWS.

June 30, 2011 Az. Dept. of Game and Fish comments on Preliminary Draft EIS, at 17-18.

92. The USFS has not taken any action “so as to eliminate violation of 17-236.” The USFS failed to meet these concerns, forcing the Game and Fish Department to reiterate these serious concerns in its comments on the Preliminary Administrative Draft FEIS:

The text describes how the water quality in the mine pit lake could exceed standards for cadmium, lead, copper, mercury, selenium, ammonia and zinc at levels toxic to invertebrates and birds. The FEIS section on Groundwater Quality notes that the pit lake may also be acidic.

The FEIS does not describe any mitigation measures for the mine pit lake. CEQ requires a discussion of mitigation measures, even if the mitigation is beyond the authority of the federal agency to implement. An analog site is the Berkeley Pit, an acidic and metalliferous pit lake that formed at former open pit copper mine in Butte, Montana.

August 15, 2013 Comments from Az. Game and Fish Dept., at 6-7.

93. In its formal Objection to the FEIS and Draft ROD submitted to the USFS in 2014, the Arizona Game and Fish Department reiterated its position that the creation of the contaminated pit lake violates both NEPA and state wildlife law. “Pit lake toxicity is described at 664, 665 and 683 [of the FEIS], and multiple other areas as having potential take on bats, birds, and other wildlife, but no alternatives or effective mitigation is offered for migratory birds or other wildlife exposed to the pit lake.” February 14, 2014 Game and Fish Dept. Objection at 30.

94. The Game and Fish Department concluded that the failure to include any substantive mitigation measures for the contaminated pit lake resulted in the following

“Violation of law, regulation or policy:

40 CFR 1502.14(f). An EIS must include appropriate mitigation measures not already included in the proposed action or alternatives.

40 CFR 1502.16(h). An EIS must include means to mitigate adverse environmental impacts.

40 CFR 1502.2(c). An EIS must state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.

16 U.S.C. 703. Taking, killing, or possessing migratory birds.

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.”

Feb. 14, 2014 Game and Fish Dept. Objection at 30-31.

95. The FEIS admits that, for migratory birds: “For all action alternatives, take (manifested as wound or kill, especially for eggs and nestlings) is expected to occur.” FEIS at 697. “Activities resulting from all of the action alternatives that could result in unintentional take include the following (SWCA Environmental Consultants 2013i): ... Pit lake and process ponds.” FEIS at 697. “Unintentional take of migratory birds is expected to occur.” FEIS at 698.

96. Despite the USFS’s requirement that it, and the Project, comply with all applicable laws and regulations, neither the ROD nor FEIS discuss the USFS’s duties to comply with ARS 17-236 and wildlife law as noted by the Arizona Game and Fish Dept., nor analyze how the requirements of the those laws will be met.

97. Regarding direct and indirect effects to “waters of the U.S.,” “Implementation of Alternative 3 [the approved Barrel alternative] will result in the following impacts:

Direct impacts to potential waters of the U.S.:	40.0 acres
Indirect impacts to potential waters of the U.S.:	28.4 acres
Direct impacts to riparian habitat:	587.4 acres
Indirect impacts to riparian habitat:	664.5 acres

CWA Section 404(b)(1) Analysis prepared for Rosemont (Sept. 2013)(FEIS Appendix A, at 38).

98. In a December 28, 2016 letter from the Commander, South Pacific Division, of the U.S. Army Corps of Engineers to Hudbay/Rosemont, Colonel D. Peter Helmlinger notified Hudbay/Rosemont that the Los Angeles District of the Corps was recommending to the South Pacific Division that the agency deny Rosemont’s CWA Section 404 permit.

The key CWA 404(b)(1) factors identified by the District that support a permit denial are determinations that the proposed Rosemont Mine will cause or



contribute to violations of state water quality standards and significant degradation of waters of the United States, including shortfalls in the proposed compensatory mitigation. ... In this case, the District concluded that implementation of the proposed project would cause or contribute to violations of state water quality standards, and that minimization and mitigation measures, along with proposed monitoring were inadequate to ensure that degradation did not occur. The District further concluded that implementation of the proposed project would result in significant degradation of waters of the United States, as a result of a substantial reduction of functions and services and that the project would contribute to the degradation of Outstanding Arizona Waters. The District concluded that implementation of the proposed project would, among other things, adversely affect sediment delivery, hydrological functions, surface water quality, and use by humans and wildlife, including listed species.

The District also concluded that mitigation proposed to offset project impacts would be inadequate. Specifically, while enhancement parcels would be appropriate and sufficient to mitigate indirect impacts to 123.5 acres of waters of the United States, the permanent loss of 40.4 acres of waters would not be mitigated by the proposed re-establishment at Sonoita Creek Ranch, along with proposed mitigation on Davidson Canyon parcels and on proposed mitigation parcels, located outside of the impacted watersheds.

...  
Finally, the District concluded that implementation of the proposed project would be contrary to the public interest. Among the key public interest concerns are adverse effects to cultural resources and traditional cultural properties important to tribes.

99. A similar letter was sent by the Corp's Office of the Commander and District Engineer to Rosemont on May 13, 2014. After noting that the Corps had reviewed Rosemont's "final mitigation plan" submitted in April 2014, "I have determined that the proposed compensatory mitigation would not fully compensate for the unavoidable adverse impacts that would remain after all appropriate and practicable avoidance and minimization measures have been achieved."

100. The U.S. Environmental Protection Agency ("EPA") has similarly noted that the Rosemont Project violates the Clean Water Act and related laws and regulations. "Based

on the information currently available, the permit application does not appear to comply with The [Clean Water Act] Guidelines at 40 CFR 230.10(b), (c) and (d) and should not be permitted as proposed.” Nov. 7, 2013 letter from EPA regional headquarters to U.S. Army Corps District Engineer, with copy to USFS Forest Supervisor.

101. Additional letters from EPA, the Army Corps, and Pima County state that the Project reviewed in the FEIS would not comply with the Clean Water Act. Plaintiffs submitted these documents to the Defendant Forest Supervisor Dewberry on May 23, 2017 for his consideration before issuing the ROD. These documents include:

- (1) December 30, 2013: Letter from Pima County to the Army Corps, Pima County stated that the Rosemont mitigation proposal fails because it cannot produce the necessary mitigation credits due to an unpredictable and insufficient long-term water supply.
- (2) February 28, 2014: Letter from the Army Corps to Rosemont stating that Rosemont failed to provide a mitigation plan that focuses on restoration and enhancement of watersheds to compensate for the destruction of about 70 acres of wetlands that would occur by construction of the mine. The letter gave Rosemont a specific deadline to submit such a plan.
- (3) April 4, 2014: Letter from Pima County to the Arizona Department of Environmental Quality regarding ADEQ’s certification that Rosemont would not violate the Clean Water Act. The County said the certification was based on “faulty information” in the Coronado National Forest’s (CNF) Final Environmental Impact Statement (FEIS) and “unsubstantiated opinions in documents provided by Rosemont Copper Company.”
- (4) April 4, 2014: Letter from the Arizona Game and Fish Department to the Arizona Department of Environmental Quality raising 16 concerns about the mine’s potential impact on Davidson Canyon and Cienega Creek and the current lack of detailed water quality analyses of the waterways in the context of the Section 401 water quality certification for the proposed Rosemont Copper Mine.
- (5) April 7, 2014: Letter from the Army Corps of Engineers to the Arizona Department of Environmental Quality raising significant questions about the adequacy of the agency’s draft Section 401 water quality certification for the proposed Rosemont Copper Mine.
- (6) April 7, 2014: EPA letter to ADEQ regarding the certification issued by the state agency stating that it “believes the draft...certification and supporting information provide an insufficient basis from which to conclude existing water

quality will be maintained”, that ADEQ’s proposal would not “prevent water quality degradation in Davidson Wash and Cienega Creek,” and that “the risk of water quality degradation remains high.”

(7) April 14, 2015: EPA letter to ADEQ highlighting concerns with the state’s 401 water quality certification of the proposed Rosemont Mine.

(8) October 21, 2016: Letter from Pima County to the U.S. Army Corps of Engineers San Francisco regional office urging it to uphold the Corps’ Los Angeles district recommendation to deny Rosemont Copper’s Clean Water Act permit request.

(9) May 5, 2017: Letter from Pima County Administrator Chuck Huckelberry to the Corps of Engineers and EPA Region IX requesting that the federal government not issue Rosemont a 404 permit that is based on a “legally and technically flawed” 401 certification issued by the state of Arizona.

(10) May 9, 2017: Letter from Pima County to CNF Supervisor Kerwin Dewberry stating it was “premature” to issue the Final ROD until after the Army Corps decides on whether to issue the 404 permit and further requesting a review of the impacts by two wildfires that swept through 48,000 acres including portions of the Rosemont project area including the Empire Gulch, Barrel Canyon and Davidson Canyon watersheds.

102. Despite receiving these documents and the significant new information contained within them, and despite reviewing new mitigation and other plans submitted by Hudbay/Rosemont, the USFS did not prepare a Supplemental EIS or provide the public with any additional opportunities to comment as part of the NEPA process after the issuance of the Draft EIS in 2012.

103. Mitigation measures relied on by Rosemont, and the USFS ROD, to support the USFS’s conclusion that the Project complies with the CWA and other laws that were submitted after the FEIS was completed in December, 2013, and after the close of the public comment period on the Draft EIS, were not subject to public review under NEPA.

104. Neither the Plaintiffs, nor the general public, were given an opportunity to comment upon these mitigation measures and other supplemental information during the NEPA public review process, in violation of the public review requirements of NEPA.

105. The Supplemental Information Reports (SIRs) issued by the USFS in 2015 and 2016 contain significant information which could have been obtained by the USFS, and subject to public review under NEPA, prior to the close of public comment on the EIS and issuance of the FEIS.

106. For example, the SIR issued by the USFS in 2015 purports to contain a detailed and quantified analysis of the combined effects of mine dewatering and climate change on Empire Gulch, Cienega Creek, springs and seeps, and other waters predicted to be adversely affected by the dewatering. Climate change was not incorporated quantitatively into the FEIS analysis. The information and analysis contained in the 2015 and 2016 SIRs could have been obtained and analyzed by the USFS prior to the publication of the Draft EIS and Final EIS, yet were never subject to public comment during the NEPA process.

107. The U.S. Environmental Protection Agency (“EPA”) specifically noted that the FEIS did not account for the combined adverse effects from groundwater drawdown when coupled with the effects of climate change. In comments to the Forest Service on the Administrative Final EIS in August of 2013, EPA stated: “The AFEIS does not, however, adequately characterize potential cumulative effects from project-related groundwater drawdown and increasing demand for groundwater as a result of residential and commercial growth within the context of drought and projected climate change.” EPA August, 2103 comments to USFS, at 8. The Final EIS, issued in December of 2013, did not include any quantification of the potential cumulative effects from climate change and area growth noted by EPA.

108. EPA concluded that “the proposed project continues to present serious environmental issues, and EPA has identified significant information gaps that should be resolved prior to publication of the EIS for further public review.” EPA August 2013 comments to USFS, at 1. Despite this, the USFS never subjected the EIS to any further public review.

#### Violations of the Forest Service Organic Act, CWA, and Implementing Regulations

109. The Forest Service’s authority to regulate mining operations is governed in part by the Organic Administration Act of 1897 (“Organic Act”), 16 U.S.C. § 551, which authorizes the agency to promulgate rules for the national forests “to regulate their occupancy and use and to preserve the forests thereon from destruction.”

110. USFS mining regulations implementing the Organic Act are found at 36 C.F.R. Part 228. Under the Organic Act and its regulations, the USFS cannot approve a mining plan unless it can be demonstrated that all feasible measures have been taken to “minimize adverse impacts” on national forest resources, including all measures to protect wildlife and habitat. 36 C.F.R. § 228.8.

111. The mine “operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat.” 36 C.F.R. § 228.8(e).

112. The Part 228 regulations require that the USFS ensure that no activity authorized in a ROD has the potential to violate federal or state water quality standards. The regulations mandate that every “[o]perator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water

Pollution Control Act, as amended (33 U.S.C. 1151 *et seq.*) [Clean Water Act].” 36 C.F.R. § 228.8(b). These include all of Arizona’s ground and surface water standards.

113. The CWA is designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA establishes water quality standards which protect the desired conditions of each waterway. 33 U.S.C. § 1313(c)(2)(A). Standards include one or more designated “uses” such as protection and propagation of fish and wildlife, numeric and narrative “criteria” specifying the water quality conditions such as fish habitat protection that are necessary to protect the designated uses, and an antidegradation policy that ensures uses are protected and that high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B). The federal antidegradation rule requires that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. §131.12.” *Id.*

114. Under CWA Section 313, the USFS cannot authorize mining operations, such as the Rosemont Project, that fail to ensure compliance with all state and federal water quality standards and requirements at all times. “Under the Clean Water Act, all federal agencies must comply with state water quality standards, including a state’s antidegradation policy. 33 U.S.C. § 1323(a).” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998).

115. “A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.” 40 C.F.R. § 131.2 (EPA federal water quality

regulations). “[A] project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 714-15 (1994).

116. The operations and activities authorized by the ROD violate the CWA, Organic Act, and their implementing regulations. The Forest Service lacked the required rational basis, with evidentiary support in the record, to conclude that the Project as authorized in the ROD will comply with these laws and regulations, including all federal and state water quality standards.

117. Despite these requirements, the USFS stated that the FEIS and ROD are based on the USFS’ legal position that: “The Forest Service does not have the responsibility or jurisdiction to determine whether or not the mine would degrade water quality or violate water quality standards.” FEIS at 553. That is a fundamental misunderstanding of federal law and as such, renders the agency’s analysis and conclusions regarding water quality and related issues (such as habitat and wildlife protection and impacts) unsupportable as a matter of law.

118. Further, the Forest Service’s determination that future state and federal permitting decisions will ensure that the Rosemont Project complies with the CWA, Organic Act and Part 228 regulations was arbitrary and capricious because evidence before the Forest Service—including its own NEPA analysis—demonstrates that the Project will violate Arizona state water quality law and regulation, as well as federal antidegradation requirements, as shown above.

Failure to Protect Federal Water Rights

119. As detailed in the FEIS, due primarily to the mine's dewatering and drawdown of ground and surface waters, the Project will result in the elimination or severe reduction of the flows protected by 21 federal water rights. *See, e.g.* FEIS at 431. "These levels of drawdown would almost certainly affect or eliminate flow in Helvetia Spring and possibly Chavez and Zackendorf Springs." *Id.* *See also* FEIS at 421 (Table 87), showing that BLM owns 21 "offsite surface water rights within the area of groundwater drawdown."

120. In addition to these water rights, streams within the Las Cienegas National Conservation Area, such as Empire Gulch and Cienega Creek, as well as the springs that support these streams and other springs predicted to be adversely affected by the dewatering, are protected by express and implied federal reserved water rights. The BLM has raised concerns about their Federal water rights, particularly those associated with Las Cienegas National Conservation Area.

121. "The FEIS documents that impacts to the Las Cienegas National Conservation Area (NCA) are likely to occur which are detrimental to the purposes for which the Las Cienegas NCA has been established if the preferred [Barrel] alternative is implemented." Letter from David Baker, Tucson Field Office Manager, BLM, to Jim Upchurch, Forest Supervisor, Coronado National Forest, Aug. 15, 2013.

122. Of the 21 surface water rights identified for BLM, 3 are associated with springs on the west side of the Santa Rita Mountains (Helvetia, Chavez, and Zackendorf Springs), 4 are associated with ephemeral tributaries to Cienega Creek (North Canyon, Middle



Canyon, and Oak Tree Canyon), and 13 are associated with Empire Gulch. The Empire Gulch water rights cover the entire reach from the confluence with Cienega Creek upstream to the boundary of the Las Cienegas National Conservation Area near SR 83.

123. The federal reserved water rights in the LCNCA were established to fulfill the purposes of the congressional statute establishing the LCNCA, Public Law 106–538, (Dec. 6, 2000); 16 U.S.C. §§ 460000-0007. Las Cienegas National Conservation Area Act, (“LCNCA Act”). Pursuant to Section 4 of the LCNCA Act: “In order to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the unique and nationally important aquatic, wildlife, vegetative, archaeological, paleontological, scientific, cave, cultural, historical, recreational, educational, scenic, rangeland, and riparian resources and values of the public lands described in subsection (b) while allowing livestock grazing and recreation to continue in appropriate areas, there is hereby established the Las Cienegas National Conservation Area in the State of Arizona.” 16 U.S.C. § 460000-3. The USFS’s failure to protect the federal reserved water rights and their waters and associated habitat protected by the LCNCA Act violates that Act.

124. BLM has issued the Las Cienegas NCA Resource Management Plan. That Plan lists a number of goals for management of the Conservation Area. Predicted impacts from the Rosemont Copper Project would be inconsistent with a number of these goals, including goals to maintain and improve watershed health; maintain and improve native wildlife habitats and populations; maintain and restore native plant diversity and abundance; protect water quantity; and maintain the region’s scenic beauty and open

spaces. While the selected action contains a number of mitigation measures to reduce impacts, potential impacts are not expected to be completely offset. Therefore, the conflict between implementation of the Rosemont Copper Project and achieving the goals of the resource management plan cannot be rectified.

125. The federal reserved water rights not located within the LCNCA, such as the 3 BLM springs on the west side of the Santa Rita Mountains (Helvetia, Chavez, and Zackendorf Springs), were established by Public Water Reserve #107 (Executive Order of Apr. 17, 1926)(PWR 107”). Springs within the LCNCA are also subject to PWR 107 and the federal reserved water rights in these springs established by PWR 107.

126. Water flows in springs and waterholes on public land in the West are reserved for public use by PWR 107, which was created by Executive Order by President Calvin Coolidge in 1926. PWR 107 provides:

[I]t is hereby ordered that every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land, be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.

Executive Order of Apr. 17, 1926, previously codified at 43 C.F.R. § 292.1 (1938). *See also* GENERAL LAND OFFICE, DEPARTMENT OF INTERIOR, CIRCULAR 1066, 51 I.D. 457-58 (1926) (“[t]he above order [PWR 107] was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes.”). 1926 I.D. LEXIS 45.

127. The 1926 Executive Order and withdrawal were promulgated under the authority of Section 10 of the Stock-Raising Homestead Act of Dec. 29, 1916, 39 Stat. 862, 865, 43 U.S.C. § 300 (“SRHA”), which provided that withdrawn “lands containing water holes or other bodies of water needed or used by the public for watering purposes ... shall, while so reserved, be kept and held open to the public use for such purposes....” The SRHA referenced the withdrawal authority of the Executive contained in the Pickett Act of June 25, 1910, c. 421, § 1, 36 Stat. 847, as amended by the Act of August 24, 1912, c. 369, 37 Stat. 497, 43 U.S.C. §§ 141, 142.

128. “All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act [Oct. 21, 1976] shall remain in full force and effect until modified under the provisions of this Act or other applicable law.” Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 U.S.C. § 1701, note (c) to Section 701 of Pub. L. 94-579, 90 Stat. 2786.

129. PWR 107, and its withdrawal of lands and reservation of waters, was never eliminated or removed by any Act of Congress or by the President or Executive Branch. Thus, it “remain[s] in full force and effect.”

130. Water rights associated with these three springs (Helvetia, Chavez, and Zackendorf) are likely to be affected by the dewatering.

131. Neither the FEIS nor ROD determined whether, and the extent to which, each of the 21 BLM federal water rights noted in the FEIS, as well as the express and implied federal reserved water rights established with the reservation and creation of the LCNCA

as well as pursuant to PWR 107, will be affected such that they can no longer fulfill the purposes for which they were established.

132. Neither the FEIS nor the ROD imposes mitigation requirements on the Project that will prevent the loss of flows in the 21 BLM water rights and the additional express and implied federal reserved water rights within the LCNCA and under PWR 107. The failure to analyze or require mitigation measures to protect the federal water rights and the federal reserved water rights and the values for which they were established is based on the agency's position that: "Due to the Forest Service's jurisdictional limitation that mitigation measures can be required only on NFS [National Forest Service] surface resources, no mitigation measures are proposed that would directly offset the impacts predicted to occur along Empire Gulch." FEIS at 546. According to the agency: "[T]he Forest Service does not have authority to require mitigations for surface resources beyond the boundaries of the Forest Service, such as those requested by the objectors." USFS Objection Response 0084-144. "The Forest Service authority related to mitigation is limited to protection of surface resources on NFS lands." FEIS at 94.

133. Neither the FEIS nor the ROD imposes mitigation measures on the Project that will prevent the loss of flows in Empire Gulch, whether at Upper Empire Gulch or Lower Empire Gulch, including the loss and/or impairment of federal water rights and federal reserved water rights in the springs and stream reaches in and along Empire Gulch, as predicted by the FEIS and SIRs issued by the USFS in 2015 and 2016. Similarly, no mitigation measures are imposed that will prevent the loss of flows in Upper Cienega

Creek, including the portions of Upper Cienega Creek that are covered by federal water rights and federal reserved waters rights and are OAWs.

134. BLM has expressly stated to the USFS that: “BLM does not relinquish existing BLM surface and groundwater rights.” August 15, 2013 Letter from David Baker, Field Manager, BLM Tucson Field Office to USFS Supervisor Jim Upchurch, “BLM Comments on the Rosemont Copper Project,” Attachment at p. 3 of 9. BLM highlighted the inadequacies of the EIS and NEPA process in connection to the unacceptable adverse impacts to the LCNCA and its water rights.

135. BLM stated numerous times that the USFS’s conclusion regarding the lack of adverse impacts to Cienega Creek is “contradictory.” *Id.* “If there are impacts to Empire Gulch then impacts to Cienega Creek are expected because Empire Gulch is a tributary to Cienega Creek.” *Id.* “If there are impacts ‘because of the downgradient impacts on the surface water and groundwater’ then it follows that if there are impacts to Empire Gulch then there are impacts to Cienega Creek.” *Id.* at 4 of 9. “The FEIS states ‘Upper Cienega Creek also receives surface water flow from Empire Gulch, and the potential for reduction in Empire Gulch stream flow could therefore also result in reductions in Cienega Creek’s stream flow as well.’” *Id.*

136. After the FEIS was issued, BLM reiterated its significant concerns with the impacts from the dewatering on the lands and waters in the Las Cienegas National Conservation Area:

After review by BLM Arizona including the Tucson Field Office, we remain concerned about potential impacts to waterways and associated riparian resources within LCNCA, including impacts described in the FEIS and draft SIR. USFS

analysis demonstrates adverse impacts to Empire Gulch and Cienega Creek that BLM believes are inconsistent with the purposes of LCNCA.

Rosemont Mine Supplemental Information (Draft of March 01, 2015) Report Review Bureau of Land Management Comments, at 1.

137. The United States and the Forest Service have a duty to protect its federal water rights and the federal reserved water rights (both express and implied) from impairment under the Federal Reserved Water Rights Doctrine established in *Winters v. United States*, 207 U.S. 564 (1908). *See also, Cappaert v. United States*, 426 U.S. 128 (1976). In approving the Rosemont Project, the United States and the Forest Service failed to comply with this duty.

138. The United States and the Forest Service have a duty as trustee for the public water resources in these lands and federal reserved water rights to prevent their substantial impairment so that these waters can fulfill the purposes for which they were established, either under PWR 107 or the LCNCA Act. Each of the 21 BLM water rights as well as the federal reserved water rights established by the LCNCA Act and PWR 107 will be substantially impaired, if not eliminated, by the Project's groundwater pumping and dewatering approved by the USFS.

139. The beneficiaries of the public trust resources in these waters are the present and future generations of the American people, especially those people that use and enjoy these waters and the purposes for which the federal reserved water rights were established and which will be substantial impaired or eliminated by the challenged USFS actions in this case. Plaintiffs' members, and their children and grandchildren, use and

enjoy these waters, and the uses protected and fulfilled by the federal reserved water rights. These uses will be substantially impaired or eliminated by the challenged USFS actions in this case.

140. The U.S. government, acting through the USFS, has an obligation, as the trustee of these public waters and lands under the Public Trust Doctrine, to prevent their substantial impairment. The USFS has a duty not to make any decisions which will result in the substantial impairment of these public trust resources when that decision is for the purpose of a private party (such as Rosemont/Hudbay in this case). The USFS failed this duty by approving the Project's dewatering and substantial impairment of the public trust resources protected by the federal reserved water rights.

141. The fact that Rosemont/Hudbay has filed mining claims under the 1872 Mining Law, and the Mining Law itself, does not override the United States' and USFS's duties under the Public Trust Doctrine and the Federal Reserved Water Rights Doctrine.

142. The USFS also has a duty under the Mining and Minerals Policy Act of 1970, 30 U.S.C. §21a to ensure that mining operations it approves will be conducted to "assure satisfaction of ... environmental needs." In the section of the ROD entitled "Findings Required by Laws, Regulations, Policy, and Direction," the agency stated that it complied with the 1970 Act: "The Coronado has ensured that the development and production of this mineral resource will be conducted in an environmentally sensitive manner, ... and that they are compatible with other resources." ROD at 81.

143. The substantial impairment of the waters and associated resources protected by the federal reserved water rights and other federal water rights caused by the Project's

dewatering approved by the USFS does not “assure satisfaction of environmental needs,” and does not meet the requirement that the Project “will be conducted in an environmentally sensitive manner” that is “compatible with other resources.”

144. The ROD’s statement that it complied with these mandates is contradicted by the evidence in the record regarding the federal reserved waters and water rights and is thus arbitrary and capricious and without support in the record.

Illegal Assumption of Statutory Rights to Permanently Occupy and Develop Public Land

145. The ROD and FEIS are based on a mistaken and illegal position that Rosemont/Hudbay has the statutory right, under the 1872 Mining Law, to permanently occupy and develop all of the lands at the mine site, based merely on the fact that the company has filed mining claims on these lands. Due to this position, the agency improperly constrained and restricted its authority over the proposed project and improperly limited its choice of alternatives, mitigation measures, and ability to deny or restrict project activities that are not covered by valid statutory rights.

146. USFS states: “Rosemont Copper is **entitled** to conduct operations that are reasonably incidental to exploration and development of mineral deposits on its mining claims pursuant to applicable U.S. laws and regulations and is asserting its **right** under the General Mining Law to mine and remove the mineral deposit subject to regulatory laws.” FEIS at ix (emphasis added). “Federal law provides the right for a proponent to ... use the surface of its unpatented mining claims for mining and processing operations and reasonably incidental uses.” ROD at 14.



147. USFS further states: “My decision to approve the proposal is guided by Federal law. The primary guidance comes from the General Mining Act of 1872, which grants citizens the right to conduct mining activities on public lands that are open to mineral prospecting, exploration, and development. The Multiple-Use Mining Act of 1955 reaffirms the right to conduct mining activities on public lands, including mine processing facilities and the placement of mining tailings and waste rock.” ROD at 13.

148. The ROD also based its illegal decision to amend the Forest Plan on its self-imposed restraint on its authority over the Project due to these alleged rights under the Mining Law. “A review of the consistency of the proposed MPO determined that certain aspects of implementing the proposed action or any of the action alternatives would result in conditions that are inconsistent with management direction in the 1986 forest plan (see the FEIS, pp. 114–117, for details). The no action alternative is the only alternative among the six considered in the FEIS that is consistent with management direction in the 1986 forest plan. However, I cannot select the no action alternative for implementation because Federal law provides the right for a proponent to develop the mineral resources it owns and to use the surface of its unpatented mining claims for mining and processing operations and reasonably incidental uses.” ROD at 31. “Federal law provides the right for a proponent to ... use the surface of its unpatented mining claims for mining and processing operations and reasonably incidental uses (see 30 U.S.C. 612). Pursuant to Federal law, the Forest Service may reasonably regulate the use of the surface estate to minimize impacts to Forest Service surface resources, but cannot endanger or materially interfere with mining and processing operations and reasonably incidental uses.” ROD at

31. The agency's review and approval of the project was limited by the agency's view that: "The Coronado ... cannot materially interfere with reasonably necessary activities under the General Mining Law." FEIS at 94.

149. In their February 14, 2014 Objections to the FEIS and Draft ROD, Plaintiffs objected to the USFS's position that the agency could not impose environmentally-beneficial mitigation measures that would be "too expensive" to the company to implement. In response, the Regional Forester's Office stated that, based on its interpretation of the Mining Law, the Surface Resources Act of 1955, and USFS regulations: "The Forest Service is not authorized by these Acts and regulations to ... impose ... mitigation measures or operational limitations that would render the project infeasible from an economic standpoint." Response to Objection 0084-74 and 75.

150. Rosemont/Hudbay has filed lode mining claims on all the federal lands in the Project area. This includes the public lands where no mining is proposed (i.e., dumping, processing, and other ancillary uses). A portion of the proposed mine pit is private land owned by Rosemont; the rest is on USFS-managed public land. "[T]he core of the project area consists of 132 patented lode claims [i.e. private land] totaling 1,968 acres." FEIS at 165. The lands proposed for waste and tailings dumping, processing, etc. are on public land comprising "a contiguous group of 850 unpatented lode mining claims totaling approximately 12,000 acres." FEIS at 165.

151. According to the USFS, the mere filing of these lode claims precludes the agencies from choosing the no-action alternative, as well as significantly restricting its approval and review authority over the project – even when most of the ore body is on private land. The

USFS's position is wrong. Such rights, or "entitlement" as stated by the USFS, can only accrue to the company if these claims are valid under the 1872 Mining Law.

152. The ROD authorizes Rosemont/Hudbay to permanently occupy the public lands with the placement of the waste rock and tailings on the company's lode mining claims.

153. The Mining Law limits the permanent use and development of public lands to only those lands that contain a "valuable mineral deposit." "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." 30 U.S.C. §22.

154. Only upon the discovery of a "valuable mineral deposit," within the boundaries of each lode claim does the claimant have rights to permanently use and occupy those public lands. "Thus, although a claimant may explore for mineral deposits before perfecting a mining claim, without a discovery, the claimant has no right to the property against the United States or an intervenor. 30 U.S.C. §23 (mining claim perfected when there is a 'discovery of the vein or lode'); *see also Cole v. Ralph*, 252 U.S. 286, 295–96 (1920)." *Freeman v. Dept. of Interior*, 37 F.Supp.3d 313, 319 (D.D.C. 2014).

155. To satisfy the discovery requirement necessary for a valid mining claim, "the discovered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *U.S. v. Coleman*, 390 U.S. 599, 602 (1968). This economic test for claim validity necessarily includes the consideration of all costs necessary to develop, process, transport, and market the mineral, including costs to

protect public land and the environment. “[I]t must be shown that the mineral can be extracted, removed and marketed at a profit.” *Id.*

156. There is no evidence in the record that the mining claims covering the public lands approved for the tailings and waste rock dumps are valid under the Mining Law. The Forest Service has not inquired into, or determined, whether these claims are valid. The Forest Service stated their intention not to conduct such an inquiry. *See* Feb. 11, 2007 letter from then Forest Supervisor Jeanine Derby to C.H. Huckelberry (Pima County).

157. In addition to the lack of any evidence that the claims to be used for waste rock dumps, tailings waste facilities, and other non-extraction operations are valid under the Mining Law, the evidence in the record shows that the lands covered by these claims do not contain the requisite valuable deposit of a locatable mineral (i.e., those minerals subject to claiming under the 1872 Mining Law). *See, e.g.*, FEIS Figure 29 (FEIS at 157), showing that these facilities would be on lands far from the mineralized zone. *See also* Figure 30 (FEIS at 159). Each of these Figures, as well as the accompanying FEIS text, at 154-64, show that these facilities are clearly on lands (and lode mining claims) that do not contain the requisite valuable mineral deposit.

158. Indeed, based on these figures, it appears that these lands contain common varieties of rock that are not even considered locatable minerals under federal mining law. Thus, it is likely that the lands covering the waste rock, tailings, and other ancillary facilities do not contain the requisite locatable minerals, which is a prerequisite for claim validity. *See* 30 U.S.C. § 22 (only “valuable mineral deposits” are covered by the Mining Law); 30 U.S.C. § 611 (Under the Surface Resources and Multiple Use Act of

1955, “common varieties” of minerals are not locatable under the Mining Law).

159. The USFS has not determined whether the lands to be used for the waste rock dumps, the tailings facility, and other non-extractive operations contain locatable minerals or common variety minerals.

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

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

FSM § 28115.

161. The FEIS shows that the mining claims proposed to be buried by the hundreds of millions of tons of waste and rock in the ancillary facilities do not contain sufficient mineralization to be considered valuable, ore-bearing claims. FEIS at 154-64. These Figures in particular show that the mineralized ore zones are in the area proposed for the mine pit, not the thousands of acres to be buried by the ancillary facilities. Thus, based on

the record, the lands to be covered by the large ancillary waste and processing facilities do not contain the requisite valuable and locatable mineral deposits. At minimum, the record does not support the USFS assumptions of validity for these mining claims and the statutory rights of Rosemont/Hudbay to use these lands for permanent disposal of mine waste and other facilities.

Failure to Require a Right of Way or Special Use Permit for the Water Delivery Pipeline, Electrical Transmission Line, and Associated Road Across Public Land

162. The ROD authorizes Rosemont to construct an electrical transmission line, water supply/delivery pipeline and utility corridor, along with the access/support road associated with these facilities. The water supply line will cross 5,079 feet of public land, the electrical transmission line will cross 2,787 feet, and the utility corridor will utilize 38 acres of public land. FEIS at 41 (Table 1). The “Utility line corridor” is “500 feet wide for transmission with others co-located – water line and utility maintenance road.” ROD at A-23.

163. Similar to the approval/review of the waste dump, tailings facility, and other ancillary facilities located on the company’s mining claims at the site, the ROD approved, and the FEIS reviewed, the access roads, water pipeline, and electrical transmission line that will cross public land under the assumed “rights” under the Mining Law discussed above. The FEIS and ROD fail to apply the proper regulatory structure for the water pipeline(s), transmission line(s) and other conveyance routes, facilities, and activities.

164. The FEIS/ROD illegally fail to require Rosemont to obtain the requisite Right-of-Way (ROW) and/or other Special Use Permits for these facilities. FEIS Table 3, at 56 (listing federal agency permits with no mention of FLPMA ROWs or Special Use Permits). Contrary to the FEIS/ROD, water pipelines, transmission lines, roads, and other conveyances cannot be authorized by the 36 CFR Part 228 plan of operations approval process. Instead, the Forest Service must require the company to submit right-of-way or other special use permit authorizations and require that all mandates of FLPMA, including FLPMA Title V, 43 U.S.C. §§ 1761-1771, and its implementing regulations are adhered to (e.g., no permit can be issued unless it can be shown that the issuance of the permits is in the best interests of the public, payment of fair market value, etc.). *See* 36 CFR Part 251 (USFS special use permit (“SUP”) regulations) implementing the FLPMA ROW/SUP provisions.

165. This is required because the approval of transmission lines, pipelines, etc., is not a right covered by the 1872 Mining Law (i.e., water and waste transportation is not part of the implied right of access to mining claims) – even if the company could show that its claims were valid, which it has not done. Further, even if the USFS could ignore its duties under its multiple use and other FLPMA mandates and assume that the company had a right under the Mining Law to conduct all its operations (which as noted herein is wrong), such rights do not attach to the right-of-ways and other FLPMA approvals needed for the pipelines, transmission lines, etc. Because the USFS failed to review these proposed facilities under the correct permitting regime, its review and approval of the Project cannot stand.

166. Under FLPMA Title V, Section 504, the USFS may grant a ROW/SUP if it “(4) will do no unnecessary damage to the environment.” 43 U.S.C. § 1764(a). Rights of way “shall be granted, issued or renewed ... consistent with ... any other applicable laws.” *Id.* § 1764(c). A Title V ROW/SUP “shall contain terms and conditions which will ... (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” *Id.* § 1765(a). In addition, the ROW/SUP can only be issued if activities resulting from the ROW/SUP:

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

43 U.S.C. § 1765(b).

167. At least three important substantive requirements flow from the FLPMA’s ROW/SUP provisions. First, the USFS has a mandatory duty under Section 505(a) to impose conditions that “will minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” *Id.* §1765(a). The terms of this section do not limit “damage” specifically to the land within the ROW corridor. Rather, the repeated use of the expansive term “the environment” indicates that the overall effects of granting the ROW/SUP on cultural, environmental, scenic and aesthetic values must be evaluated and these resources protected. In addition, the obligation to impose terms



and conditions that “protect Federal property and economic interests” in Section 505(b) shows that the USFS must impose conditions that protect not only the land crossed by the right-of-way, but **all** federal lands and waters affected by the approval of the ROW/SUP.

168. The Rosemont Project could not operate as approved without the use of the water pipeline, electrical transmission line, road, and utility corridor authorized in the ROD.

169. Thus, the FLPMA duty to protect all federal property and resources and protect the environment includes the duty to protect the federal water rights and federal reserved water rights discussed above, as well as the Las Cienegas National Conservation Area, whose waters will be substantially impaired or eliminated by the Project’s dewatering.

170. Second, the discretionary requirements in Section 505(b) require a USFS determination as to what conditions are “necessary” to protect federal property and economic interests, as well as “otherwise protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto.” This means that the agency can only approve the SUP/ROW if it “protects the public interest in lands” not only upon which the pipeline/roads/transmission lines would traverse, but also lands and resources adjacent to and associated with the SUP/ROW. Thus, in this case, the USFS can only approve the ROW/SUPs if the operation of the mine itself “protects the public interest.” As shown herein, that clearly is not the case.

171. Third, the requirement that the right-of-way grant “do no unnecessary damage to the environment” and be “consistent with ... any other applicable laws,” *id.* §§ 1764(a)-(c), means that a grant of a ROW/SUP leading to the mine must satisfy all applicable laws, regulations and policies. Here, because the mine would violate many of these

requirements, the agency cannot issue the ROW/SUP. It should be noted that, even if the USFS can legally assert that it must approve the mine's Plan of Operation due to Rosemont's mining claims covering the proposed open pit, waste and processing dump, etc. (which as shown herein is not legally correct), this subservience to the Mining Law is inapplicable to the ROW/SUPs.

172. In response to the Plaintiffs January 27, 2012 comments on these issues, the USFS stated that FLPMA and the agency's ROW/SUP regulations did not apply to the agency's review and approval of the Project:

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

FEIS at G-19 (emphasis added).

173. Regarding the utility access road associated with the transmission line and water pipeline, the agency admits that a FLPMA Title V authorization is required for roads "except" for "Roads constructed on valid mining claims." Thus, even if the agency's legal position that authorization of roads, pipelines, and transmission lines is considered a right under the Mining Law and approved via the Part 228 regulations was correct – which as shown herein it is not – the agency admits that this is true only for such facilities/uses "on valid mining claims." FEIS at G-19.

174. As shown in the FEIS and herein, there is no evidence in the record that the lands to be crossed by the roads (let alone the pipelines and transmission lines) are covered by

“valid mining claims.” Under the Mining Law, in order to be valid, mining claims must contain the “discovery of a valuable mineral deposit.” 30 U.S.C. § 22.

175. In addition to the lack of any evidence that the claims to be crossed by the roads are valid under the Mining Law, the evidence in the record shows the opposite. *See, e.g.*, FEIS Figure 29 (FEIS at 157), showing routes of the “Utility Maintenance Road” and “Primary Access Road” on lands far from the mineralized zone. *See also* Figure 30 (FEIS at 159). Each of these Figures, as well as the accompanying FEIS text, at 154-64, show that these roads (along with the pipelines and transmission lines) are clearly on lands that do not contain the requisite valuable mineral deposit. Indeed, based on these figures, it appears that these lands contain common varieties of rock that are not even considered locatable minerals under federal mining law.

176. Accordingly, the agency’s decision not to apply FLPMA and the agency’s ROW/SUP regulations violates federal law and is arbitrary and capricious.

Violation of the National Environmental Policy Act (NEPA)

177. NEPA requires federal agencies to prepare an EIS for any proposed major action that may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C).

The CEQ promulgated uniform regulations to implement NEPA, which are binding on all federal agencies. 40 C.F.R. §§ 1500.3, 1507.1.

178. “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b).

179. To comply with NEPA, the Forest Service must analyze all “direct,” “indirect,” and “cumulative” environmental impacts of the proposed action. 40 C.F.R. § 1502.16; 40 C.F.R. § 1508.8; 40 C.F.R. § 1508.25(c).

180. “NEPA establishes ‘action-forcing’ procedures that require agencies to take a ‘hard look’ at environmental consequences.” *Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010).

181. “Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analysis in environmental impact statements. They shall identify any methodologies used and make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.” 40 C.F.R. § 1502.24. NEPA documents such as the FEIS must show that the agency made the necessary environmental analysis before reaching its decision. 40 C.F.R. §§ 1502.1, 1502.24.

182. NEPA requires USFS to “describe the environment of the areas to be affected or created by the alternatives under consideration.” 40 C.F.R. § 1502.15. The establishment of the baseline conditions of the affected environment is thus a fundamental requirement of NEPA.

183. NEPA requires that an EIS: (1) “include appropriate mitigation measures not already included in the proposed action or alternatives,” 40 C.F.R. § 1502.14(f), and (2) “include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f)).” 40 C.F.R. § 1502.16(h). USFS must evaluate any mitigation measures it adopts and relies upon in approving an agency action for their effectiveness.

184. In addition, the USFS is required to “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.” 40 C.F.R. § 1505.2(c). “Any such measures that are adopted must be explained and committed in the ROD.” *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18036 (March 23, 1981).

185. An agency that has prepared an EIS cannot simply rest on the original document. NEPA imposes a continuing duty on agencies to supplement previous environmental documents. An agency must prepare a Supplemental EIS if there are substantial changes to the action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the actions or its impacts. 40 C.F.R. § 1502.9(c). In determining whether new circumstances or information is “significant,” agencies consider the NEPA “significance factors.” *Id.* § 1508.27(b).

186. In preparing and issuing the FEIS, ROD and related review and approval documents for the Rosemont Project, including the agency’s decision not to prepare a Supplemental EIS, the Forest Service violated these NEPA requirements.

187. Many of the analysis and mitigation measures relied upon by the ROD to purportedly comply with federal and state laws, including water quality standards, were only submitted after the close of the public comment period on the Draft EIS. Others were only included in the two Supplemental Information Reports (“SIRs”) issued by the

USFS in 2015 and 2016. These SIRs, and the significant information contained within them, were never subject to public comment, in violation of NEPA. USFS has therefore violated its duty to review all mitigation measures and analyze and disclose the effectiveness of each mitigation measure, and subject such analysis and information to public review under NEPA.

188. As noted above, the USFS specifically refused to consider or analyze mitigation measures to prevent or reduce the loss of flows in Empire Gulch, Upper Cienega Creek, the 21 BLM water rights, and the express and implied federal reserved water rights established by the LCNCA Act and PWR 107, that will be substantially and irreparably impaired, if not eliminated, based on the erroneous legal position that the USFS has no jurisdiction to require or even analyze any such mitigation measure because the adverse impacts will occur beyond the USFS land boundary.

189. Even if the agency is correct as to its jurisdiction/authority position (which it is not as shown above), this violates the agency's duties under NEPA. "All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperation agencies. . ." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18031 (March 23, 1981). The USFS failed to comply with this requirement regarding the mitigation of the adverse effects to wildlife and other resources from the pit lake, as well as the adverse effects from the dewatering.

190. NEPA also requires that: "Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the

requirements of sections 101 and 102(1) of the Act [NEPA] and other environmental laws and policies.” 40 C.F.R. § 1502.2(d).

191. The FEIS fails this duty, as it never determined whether the Project and its alternatives will “achieve ... all relevant environmental laws and policies.” At a minimum, the FEIS never states: (1) whether, and how, the federal water rights and federal reserved water rights will be fully protected as required; (2) whether, and how, the wadeable/perennial water quality standard for Empire Gulch and Cienega Creek will be met as required; (3) whether, and how, the designated uses in all affected waters, including Empire Gulch, Cienega Creek, and Davidson Canyon, will be protected as required; (4) whether, and how, stormwater and other discharges from the waste rock and other facilities into Barrel/Davidson Canyon will achieve all water quality standards, especially when the FEIS states that “Full analysis of antidegradation standards and compliance with surface water standards in the Outstanding Arizona Water reaches of Davidson Canyon and Cienega Creek ... has not yet been conducted.” FEIS at 548; and (5) whether, and how, the agency and Rosemont/Hudbay will comply with substantive state and federal laws that mandate protection of wildlife, such as A.R.S. §17-236 (prohibiting the take or injury of any bird), and the Migratory Bird Treaty Act, in the context of the contaminated pit lake.

192. The USFS also failed to adequately review the direct, indirect, and cumulative impacts, and adequately involve the public in its review, associated with the transportation and smelting/processing of the copper ore concentrate generated by the Project.

193. The ROD authorizes Rosemont to transport the concentrated copper ore for further processing/smelting without knowing where, or how, the ore will be smelted/processed, or where/how the concentrate/cathodes will be transported. “It is not known where or how this material will be transported, although analysis addresses transport by truck to several potential destinations. Likewise, the location of smelting is unknown other than the fact that Rosemont has indicated it will not be in the United States.” FEIS at G-27. “Rosemont Copper has not specified where smelting would occur, other than to state that it would not be in the United States due to capacity limitations.” FEIS at 33.

194. The USFS has yet to determine the route for the transportation of the ore concentrate. The USFS does not know where the smelting of the ore concentrate will occur.

195. In violation of NEPA, the agency failed to analyze the environmental impacts of the smelting of the ore, including the air pollution emissions from the smelting. The USFS failed to analyze the greenhouse gas emissions from the smelting that would contribute to global warming/climate change, as well as the toxic emissions to air, land and water from the smelting. The USFS does not know whether the air pollution and other emissions from the smelting will impact the United States, let alone the impacts to global warming/climate change.

196. The FEIS discusses the greenhouse gas emissions from the Project site and vehicle traffic related to the Project. FEIS at 280. Yet the USFS never analyzed the greenhouse gas emissions from the smelting.



197. Regarding the transportation of the ore concentrate, “Copper concentrate shipments would form the largest number of routine truck shipments for both the Barrel Alternative and MPO [mine plan of operations], with approximately 50 to 56 round trips per day 7 days per week.” FEIS at 51.

198. The transportation plan analyzed in the Draft EIS for the shipment to market for copper cathodes and copper, molybdenum, and silver concentrates for further processing/smelting was solely through Tucson via State Route 83.

199. The Final EIS, however, greatly expanded the scope of the potential transportation routes of the concentrate shipments, and never subjected that new proposal to public review under NEPA.

200. As stated in the FEIS: “In order to address uncertainty about where the mine products may be delivered, the analysis area in the FEIS has been expanded to include possible routes that mine product shipments could take from the mine site to reach the Port of Tucson, other feasible export routes, or smelters in Mexico. The ports of entry of Douglas, Naco, and Nogales are the terminus points for the expanded analysis area.” FEIS at 922.

201. As further stated in the FEIS: “The original analysis area for transportation/access for the proposed mine facilities includes the roads that were analyzed in the DEIS: roads within or cut off by the perimeter fence that would be inaccessible to the public from mine activities, the primary access road and utility maintenance road, and SR 83 from I-10 to its intersection with SR 82. As described above, the Coronado has expanded the analysis area to include possible copper concentrate and cathode haul truck delivery

routes from the mine site to the Port of Tucson at the intersection of Kolb Road and Valencia Road, or copper concentrate haul truck deliveries or to smelters or feasible export locations in Mexico using the ports of entry at Douglas, Naco, and Nogales as the terminus points.” FEIS at 925.

202. The analysis area and routes delineated for the transportation analysis in the FEIS is significantly larger than the analysis area delineated in the DEIS and released for public review and comment. As compared to the DEIS, the FEIS greatly expands the roads that might bear the many truckloads of copper concentrate that would be generated by the proposed mine. The current plan now includes the possibility of concentrate shipments to Nogales, Naco, and Douglas, which significantly changes the analysis of impacts and greatly expands those impacts into new areas and communities who will be directly affected by mine traffic. The FEIS now lists ten (10) “potentially feasible analyzed copper concentrate and cathode delivery routes”:

- I-10, Kolb Road to SR 10B (west end of Benson);
- SR 10B (3) from I-10 to SR 80;
- SR 80, SR 10B (3) to U.S. Route 191B;
- SR 82, SR 19 (Grand Avenue) to SR 90 (Whetstone);
- SR 83, proposed mine entrance to SR 82;
- SR 90, I-10 to SR 80;
- SR 92, SR 90 (Sierra Vista) to Naco Highway;
- U.S. Route 191B, Douglas Port of Entry to SR 80;
- Kolb Road, I-10 to the Port of Tucson (Valencia Road); and
- Naco Highway, SR 92 to Naco Port of Entry.

FEIS at 922-923. The impacts that will be caused by significant increases in truck traffic along these routes will be quite severe, yet these greatly increased direct, indirect, and cumulative impacts are not adequately addressed, if at all, in the FEIS.

203. Although the USFS now says, in the FEIS, that the significant truck traffic associated with the ore concentrate hauling may come through the towns and cities along these new routes, the agency never consulted with, or sought the input from, the people living along these routes, or the Boards of Supervisors of Santa Cruz and Cochise Counties or the City Councils of Patagonia, Nogales, Benson, Tombstone, Sierra Vista, Bisbee or Douglas. This is because, based on the Draft EIS, there was no mention that any Rosemont-related traffic would occur along these new routes or in these towns.

204. The baseline air quality conditions along these new potential routes, as well as the expected cumulative air quality impacts along these routes (from other pollution sources at and near these routes coupled with the Rosemont ore concentrate traffic) was never analyzed.

205. In addition, new information related to significant new events was not analyzed and subject to public review. Prior to the issuance of the ROD, on May 23, 2017, Plaintiffs had informed Defendant Forest Supervisor Dewberry of the significant impacts from large wildfires that swept across much of the project area in the spring of 2017. Two wildfires (Sawmill and Mulberry) caused considerable damage to a portion of the Santa Rita Mountains and the grasslands of the Sonoita Plain to the east. The two fires together burned over 48,000 acres. The burned areas include large portions of the Rosemont Project area analyzed by the FEIS, as well as areas outside the immediate Project site but which will be adversely impacted by Project activities (such as the Las Cienegas National Conservation Area).

206. In addition to destroying hundred-year-old oaks, hackberries, mesquite and hillsides of native grasses, the fires damaged the watersheds of Empire Gulch, Davidson Canyon, and Barrel Canyon. All of these streams feed into Cienega Creek, which is the centerpiece of the Las Cienegas National Conservation Area. A portion of the Conservation Area also burned. These fires have quite likely diminished the quality of the riparian and woodland habitats as well as damaging the water-absorbing capability of the land. Each of these impacts should have been thoroughly analyzed, with full public and agency review and comment, which did not occur. Additional environmental impacts, including within the Las Cienegas National Conservation Area, were caused by related fire-fighting and post-fire activities. As well, due to these new events, the baseline conditions of these areas that were analyzed in the FEIS changed, requiring new analysis/consultation under NEPA.

207. In response, Supervisor Dewberry stated: “with regard to the recent fire activity ... the CNF is reviewing post-fire conditions. A report addressing recent wildfires will be included in the project record and addressed within the Record of Decision.” June 1, 2017 letter from Supervisor Dewberry to Roger Flynn, counsel for Plaintiffs. This “report,” including any analysis of the changed baseline conditions, was never subject to public review in violation of NEPA.

208. Further, the ROD never discussed nor “addressed” the two 2017 wildfires. The only mention of new fires in the ROD regarded a mention of new fires in the SIR issued in 2016, long before the 2017 fires. ROD at 2.

209. “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. §1500.1(b). Thus, the ROD cannot utilize or rely upon information to authorize the Rosemont Project that was not subject to public review during the NEPA process.

210. Further, 40 C.F.R. §1502.22 states that:

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, “reasonably foreseeable” includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

211. The FEIS did not provide evidence that the costs of obtaining the missing information noted herein, such as water quality data, baseline data, mitigation measures, smelting location, and impact analysis were “exorbitant,” and failed to include the incomplete or missing information in the FEIS as required by §1502.22 (a). For the

information that the FEIS admits is incomplete or unavailable, the FEIS failed to provide the supporting rationale and documentation required by §1502.22 (b).

### **CLAIMS FOR RELIEF**

#### **Claim 1: Violation of the Forest Service Organic Act.**

212. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

213. The Forest Service's actions and decisions issuing the Rosemont Project ROD, including its reliance upon the inadequate FEIS, are arbitrary, capricious, an abuse of discretion, contrary to the Organic Act and its implementing regulations (including USFS Mining Regulations at 36 C.F.R. Part 228), not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5 U.S.C. §§ 701-706.

#### **Claim 2: Violation of the Clean Water Act.**

214. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

215. The Forest Service's actions and decisions issuing the Rosemont Project ROD, including its reliance upon the inadequate FEIS, are arbitrary, capricious, an abuse of discretion, contrary to the CWA, including CWA Section 313, and its implementing regulations, not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the CWA and the APA. 5 U.S.C. §§ 701-706;

**Claim 3: Failure to Protect and Prevent Substantial Impairment to Federal Water Rights and Federal Reserved Water Rights and the Waters Embodied in Those Rights in Violation of the Mining and Minerals Policy Act of 1970, the Federal Land Policy and Management Act of 1976, the Organic Act, Public Water Reserve 107, the Stock Raising Homestead Act, the Las Cienegas National Conservation Area Act, the Federal Reserved Water Rights Doctrine, and the Public Trust Doctrine.**

216. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

217. The Forest Service's actions and decisions issuing the Rosemont Project ROD, including its reliance upon the inadequate FEIS, are arbitrary, capricious, an abuse of discretion, and contrary to Public Water Reserve 107, the Stock Raising Homestead Act, the Mining and Minerals Policy Act of 1970, the Federal Land Policy and Management Act of 1976, the Organic Act, and their implementing regulations, the Las Cienegas National Conservation Area Act, the Federal Reserved Water Rights Doctrine, and the Public Trust Doctrine, not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5 U.S.C. §§ 701-706;

**Claim 4: Failure to Properly Review and Regulate the Rosemont Project in Violation of the Federal Land Policy and Management Act, the Organic Act, and the 1872 Mining Law.**

218. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

219. The Forest Service's actions and decisions issuing the Rosemont Project ROD, including its reliance upon the inadequate FEIS, including its improper assumption of "rights" under the 1872 Mining Law, are arbitrary, capricious, an abuse of discretion,

contrary to the Federal Land Policy and Management Act of 1976, the Organic Act, and the 1872 Mining Law, and their implementing regulations, not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5 U.S.C. §§ 701-706;

**Claim 5: Failure to Require a Right-of-Way and/or Special Permit(s) for the Water Pipeline, Electrical Transmission Line, and Corridor and Associated Road(s) in Violation of the Federal Land Policy and Management Act.**

220. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

221. The Forest Service's actions and decisions issuing the Rosemont Project ROD and the inadequate FEIS, including its failure to require and properly regulate under a FLPMA Title V Right-of-Way and/or Special Use Permit(s) the water pipeline, electrical transmission line, utility corridor, and associated road(s) are arbitrary, capricious, an abuse of discretion, contrary to the Federal Land Policy and Management Act of 1976, and its implementing regulations, not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5 U.S.C. §§ 701-706;

**Claim 6: Violation of the National Environmental Policy Act**

222. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

223. The Forest Service's actions and decisions in the preparation, issuance, and reliance upon the inadequate FEIS and ROD, including the failure to take the required



“hard look” at the Rosemont Project and comply with the public and agency review requirements under NEPA, are arbitrary, capricious, an abuse of discretion, contrary to the NEPA and its implementing regulations, not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5 U.S.C. §§ 701-706.

**Claim 7: Violation of the National Environmental Policy Act in Failing to Prepare a Supplemental EIS**

224. Plaintiffs hereby re-allege and incorporate all preceding paragraphs of this Complaint herein by reference.

225. The Forest Service’s failure to prepare a Supplemental EIS subject to the full public review requirements under NEPA is a violation of NEPA, including 40 C.F.R. § 1502.9 (c)(1), and constitutes a failure to act, and agency action unlawfully withheld or unreasonably delayed, within the meaning of the judicial review provisions of the APA. 5 U.S.C. § 706(1).

226. The Forest Service’s actions and decision not to prepare a Supplemental EIS are arbitrary, capricious, an abuse of discretion, contrary to the NEPA and its implementing regulations, not in accordance with the law, and without observance of procedures required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the APA. 5 U.S.C. § 706(2).

**REQUEST FOR RELIEF**

For the foregoing reasons, Plaintiffs respectfully request that this court:

- A. Declare that the United States and its Forest Service have violated the

Organic Act, CWA, FLPMA, the 1872 Mining Law, the Mining and Minerals Policy Act, the Las Cienegas National Conservation Area Act, NEPA, the Federal Reserved Water Rights Doctrine, the Public Trust Doctrine, the APA, and the implementing regulations and policies of these laws;

B. Set aside and vacate the ROD and FEIS;

C. Enjoin the Forest Service from allowing, authorizing, or approving mining or mining related operations in reliance on the ROD and FEIS until the United States and its Forest Service have complied with the Organic Act, CWA, FLPMA, the 1872 Mining Law, the Mining and Minerals Policy Act, the Las Cienegas National Conservation Area Act, NEPA, the Federal Reserved Water Rights Doctrine, the Public Trust Doctrine, the APA, and the implementing regulations and policies of these laws;

D. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees under the Clean Water Act, 33 U.S.C. § 1365, the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable federal law; and

E. Grant such additional relief as this court deems equitable, just, and proper.

Respectfully submitted this 27<sup>th</sup> day of November, 2017.

/s/ Roger Flynn

Roger Flynn, (Colo. Bar # 21078) *Pro Hac Vice Application Pending*  
Jeffrey C. Parsons (Colo. Bar. # 30210), *Pro Hac Vice Application Pending*

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Certificate of Service

I, Roger Flynn, attest that I served the following persons/offices with this Amended Complaint, by mailing it certified first class US Mail postage prepaid this November 27, 2017. Service is conducted in this manner as no appearance by counsel in this case has yet been made by the Federal Defendants.

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*/s/ Roger Flynn*