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VIA ELECTRONIC MAIL and
HAND DELIVERY

June 13, 2013

RE: Roca Honda Mine Draft EIS Comments

Dear Supervisor Kohrman:

Please accept these comments on the Roca Honda Uranium Mine (Mine) Draft Environmental Impact Statement (DEIS) from the Multicultural Alliance for a Safe Environment (MASE). MASE is a non-profit coalition of organizations from uranium impacted communities working to protect their communities from further damage from uranium mining and milling and to ensure clean-up of legacy uranium waste. MASE is comprised of a core group of organizations (and their members) that include: (1) Bluewater Valley Downstream Alliance (BVDA), a citizens group made up largely of residents and property owners directly affected by groundwater pollution and radiation releases from uranium mining and milling in northwest New Mexico; (2) Eastern Navajo Diné Against Uranium Mining (ENDAUM), a grassroots group opposing construction of uranium mines in and near the Eastern Navajo Agency due to the significant threats to human health and environmental resources; (3) Laguna-Acoma Coalition for a Safe Environment (LACSE), a group of residents of Laguna and Acoma Pueblos dedicated to assessing community and environmental health from impacts of past uranium development and protecting sacred cultural sites and areas, including Mt. Taylor, a mountain sacred to Indigenous peoples of New Mexico; (4) Post-71 Uranium Workers Committee (Post '71), a group of former uranium miners, millers, ore haulers, and drillers working to document health conditions among people who worked in the uranium industry and to protect future workers and residents of the region threatened by uranium operations; and (5) Red Water Pond Road Community Association (RWPRCA), an organization of Diné families who have experienced and lived with the impacts of uranium mining and milling in the region since the 1960s. MASE's mission is to restore the land and water contaminated by uranium mining and milling, improve the health of community members, and protect and preserve the natural and cultural environment in which we live.

Because the DEIS suffers from numerous errors and omissions and violates the National Environmental Policy Act (NEPA), MASE urges the United States Forest Service (USFS or Forest Service) to prepare and submit for public review a revised Draft EIS and not simply

proceed to issue a Final EIS. As mandated by the regulations governing environmental impact statements, "The draft statement [EIS] must fulfill and satisfy to the fullest extent possible the requirements established for final statements." 40 C.F.R. § 1502.9(a). A supplemental draft EIS must be circulated for public comment and filed in the same manner as an original draft EIS. 40 C.F.R. § 1502.9(c)(4). Also, as noted below, the proposed Roca Honda uranium mine (Mine) and DEIS, if approved by the USFS, would violate numerous other federal laws, regulations, and agency policies.

Most importantly, the Roca Honda Mine as proposed by Roca Honda Resources/Strathmore Minerals /Sumitomo Corp. (RHR), will irreparably and forever damage and in many ways destroy Mt. Taylor. Mt. Taylor is acknowledged by the Forest Service and all experts as an invaluable Sacred Site and Traditional Cultural Property (TCP) held in reverence by all of the Indian Tribes and Pueblos in the region. Members of these federally-recognized Tribes/Pueblos, many of whom are members of MASE, currently use (as their ancestors have done for centuries) Mt. Taylor and its lands and waters for federally-protected religious worship and other forms of cultural and religious activities. As the DEIS admits, these uses, and Mt. Taylor itself, will be damaged beyond repair – with unconscionable and devastating impacts to Indian peoples throughout the region. As such, the Forest Service is required under federal law to deny the proposed Plan of Operations (PoO), any Right-of-Way (ROW) application, and any other proposed permit or approval submitted by RHR for the Roca Honda Mine.

The Forest Service must fully consider and respond to the following comments in its review of the Mine and revised DEIS and in any eventual Final EIS that may be prepared if the agency decides to issue all necessary approvals, which, as noted herein, such approvals would violate federal law. However, as noted herein, due to the fact that the Mine, and any USFS approval, would violate federal law, the USFS should inform RHR that the agency cannot legally approve the Mine.

I. <u>The USFS Fails to Protect the Mt. Taylor TCP and Sacred Site and Related Native American Resources and Uses</u>.

The DEIS correctly found that the Mine would irreparably damage the integrity of Mt. Taylor as a Sacred Site and TCP as well as preclude the use of the area for religious practices that have been ongoing for centuries. As summarized in the DEIS:

• Both action alternatives would cause adverse impacts to tribal cultural resources and practices related to the sacred character of Mt. Taylor for the Acoma, Laguna, Zuni, Hopi, and Navajo in particular.
• Both action alternatives would adversely affect the Mt. Taylor TCP and cause irreparable harm to surrounding tribes and their traditional cultural practices.
• Both action alternatives would have a perceived impact upon the Spirit Beings associated with the TCP.
• Ground disturbance from construction activities of both action alternatives would result in direct physical impacts to four historic properties.
• Due to less development in Section 10 with less ground disturbance, fewer surface facilities, and less activity and traffic, the totality of the impacts to the Mt. Taylor TCP and related

resources from Alternative 3 would be less than Alternative 2, which proposes development on all three sections of land at issue.
• Impacts of both action alternatives on cultural resources would be significant, and would result in an adverse effect to historic properties.
• Cumulative effects of both action alternatives in combination with other past, present, and reasonably foreseeable future actions would be adverse and significant, exacerbating loss of integrity of [the] Mt. Taylor TCP.

DEIS at x. *See also* DEIS 296-360 (discussing the religious significance of Mt. Taylor and the severe and permanent impacts to Native American Tribes and individual religious uses at the site). The Forest Service acknowledges that:

> Mt. Taylor holds considerable traditional cultural significance for the area tribes, including the Navajo Nation, the Hopi Tribe, the western Pueblos of Acoma, Zuni, and Laguna, the Jicarilla Apache, and many of the Rio Grande Pueblos. It has long standing and ongoing historical, cultural, and religious importance for these tribes. All consider the mountain to be sacred, and some acknowledge and have identified specific sites of cultural and religious significance within the larger boundaries of the mountain. The mountain is used by these tribes for a variety of traditional cultural and religious activities such as hunting, plant and mineral gathering, religious pilgrimages, and ceremonial activities (Benedict and Hudson, 2008).

DEIS at 329.

> Mt. Taylor has an integral relationship with the beliefs and traditional cultural practices of the involved tribes and it is critical to the maintenance of the cultural identity and transmittal of their beliefs. It is this relationship that contributes to the property's significance. The action alternatives would result in the disruption, alteration, and displacement of traditional cultural activities that are critical to the continuity of cultural beliefs and practices of these tribes. In the view of the involved tribes, changes to the traditional practitioners' ability to conduct their traditional cultural activities would lessen the overall effectiveness of their prayers, medicine, and healing ceremonies, thereby impacting the traditional practices and diminishing their value. These impacts and changes would affect the TCP by diminishing the property's integrity of relationship.

Id. at 352.

Despite this, the Forest Service is under the erroneous legal view that, because RHR has filed mining claims under the 1872 Mining Law on Sections 9 and 10, it has no choice but to approve the Mine. DEIS at 355, iii. That is wrong. As such, the USFS violates its duties under the various laws designed to protect Native American Sacred Sites and religious uses and resources on public land.

A. Violation of Executive Order 13007.

The DEIS leaves no question that Mt. Taylor is a "Sacred Site" pursuant to Executive Order 13007 (61 Fed Reg. 26771). DEIS at 355. Pursuant to the Sacred Sites Executive Order

(EO), the USFS must: "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." 61 Fed. Reg. at 26771.

As defined by the EO, the determination of whether a tract of land is a "Sacred Site" is decided by an Indian Tribe, or an appropriate representative of Indian religion – not the federal agency. "Sacred site means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." Id.

In this case, the numerous Tribal/Pueblo government and individual statements in the record attest to the uncontroverted fact that Mt. Taylor, including those portions that will be directly, indirectly, and cumulatively impacted by the Mine, is a Sacred Site protected by the EO. *See* DEIS 296-360. *See also* Declarations of Dr. David Begay, Manuel Pino, Bucky Preston, and Malcolm Bowekaty (attached as Exhibits 1-4); resolution of Azeé Beé Nahaghá of the Diné Nation (attached as Exhibit 5); resolution of the Ramah Navajo Chapter (attached as Exhibit 6).

Native American Sacred Sites such as Mt. Taylor are recognized as critical public land resources protected by federal law. The EO clearly recognizes that the federal government's priority is to protect sacred sites on public land. "Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole." Cholla Ready Mix, Inc. v. Civish,382 F.3d 969, 976 (9th Cir. 2004).[1] As held by the federal courts:

> Executive Order No. 13007 ("EO 13007") [ ] **imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them**. See 61 Fed. Reg. 26771 (May 24, 1996). The district court expressly recognized that BLM was required to comply with the Executive Order. South Fork Band, 2009 WL 24911, at *16 n. 9. [now reported at 643 F.Supp.2d 1192, 1211, n. 9].

South Fork Band Council of Western Shoshone v. Dept. of Interior, 588 F.3d 718, 724 (9th Cir. 2009) (emphasis added).

[1] Any approval of the Mine would fail to meet the agency's obligations under public land law, Indian law, and the EO as well as violating its trust obligations to the Nations/Tribes/Pueblos discussed in the DEIS. The USFS is charged with:

> moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. The trust responsibility restrains governmental action that affects Indians and therefore is an important source of protection for Indian rights.

Seminole Nation v. U.S., 316 U.S. 286, 297 (1942).

The Tenth Circuit has recognized the need to protect sacred sites under the Executive Order as part of the government's public land management authorities:

> Executive Order No. 13007 signed by President Clinton, May 24, 1996, orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.

Wyoming Sawmills, Inc. v. U.S. Forest Service, 383 F.3d 1241, 1245 (10th Cir. 2004).

As the DEIS admits, however, the USFS failed to "accommodate access to and ceremonial use of," and failed to "avoid adversely affecting the physical integrity of" the Mt. Taylor Sacred Site under either of the proposed action alternatives. Indeed, the integrity of the Sacred Site will be largely destroyed.

According to the USFS, this must be allowed due to the fact that RHR has filed mining claims on Mt. Taylor. Yet, as noted in the South Fork Band Council decision, which also involved a large mining project on public land, there is no "Mining Law exemption" from the EO. The only reason the court affirmed BLM's approval of the project (which is currently on appeal), was because the court accepted BLM's view that the subject mine in that case would not be located in the Sacred Site and TCP, nor would it physically damage the Site or preclude access to the Site for religious activities. That is clearly not the case here. The Forest Service admits that the Roca Honda Mine would be located within the Sacred Site and TCP, would result in severe and irreparable physical and spiritual damage to the Site, and preclude access for religious practices.

Thus, due to the undisputed fact that Mt. Taylor (including large portions of the Mine site) is considered a Sacred Site under the EO and due to the adverse impacts to the Mt. Taylor Sacred Site, the agency cannot approve the Plan of Operations. This is also true based on the failure of the agency to comply with other federal laws, regulations, and policies described herein, such as the 1897 Organic Act, NFMA, FLPMA, and RFRA, among others.

B. Violation of the Religious Freedom Restoration Act.

The USFS's approval of the Mine will also clearly violate the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb - 2000bb-4 (as amended by the Religious Land Use and Institutionalized Persons Act of 2000, Pub. Law 106-274, 42 U.S.C. § 2000cc-5). As held by the U.S. Supreme Court:

> [RFRA] prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government "demonstrates that application of the burden to the person" represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b).

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 423 (2006).

RFRA provides that the government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). To establish a prima facie claim under the RFRA, a plaintiff must prove: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion. 42 U.S.C. § 2000bb-1(a); Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir.2001)(citing Werner v. McCotter, 49 F.3d 1476, 1479 n. 1 (10th Cir.), cert. denied 515 U.S. 1166 (1995)). RFRA defines "exercise of religion" as "a religious exercise, as defined in 42 U.S.C. § 2000cc-5." 42 U.S.C. § 2000bb-2(4). Section 2000cc-5 defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

"The exercise of Native American traditional religious practices has been recognized as constituting an 'exercise of religion' for purposes of RFRA. *See, e.g.*, United States v. Friday, 525 F.3d 938, 946-47 (10th Cir.2008); United States v. Hardman, 297 F.3d 1116, 1126-27 (10th Cir.2002)." Comanche Nation v. United States, 2008 WL 4426621, *3 (W.D.Okla. 2008). Courts in the Tenth Circuit (the jurisdiction applicable in New Mexico) have found that the federal government's approval of a project on federal land that would prevent access to, or significantly and adversely affect religious uses of land, violates RFRA.

> RFRA does not define "substantial burden." The Tenth Circuit has defined the term by stating that a governmental action which substantially burdens a religious exercise **is one which must "significantly inhibit or constrain conduct or expression" or "deny reasonable opportunities to engage in" religious activities.** *Thiry v. Carlson,* 78 F.3d 1491, 1495 (10th Cir.1996) (quoting *Werner,* 49 F.3d at 1480).

Comanche Nation v. United States, 2008 WL 4426621, *3 (W.D.Okla. 2008). That is exactly what the Mine will do -- "significantly inhibit or constrain [religious] conduct or expression" and "deny reasonable opportunities to engage in religious activities." In addition to the evidence in the DEIS and record, the attached Declarations of Dr. David Begay, Manuel Pino, Bucky Preston, and Malcolm Bowekaty attest to the destruction and/or significant inhibition or constraint, indeed the elimination of, established and sincere religious uses, conduct and expression currently occurring on Mt. Taylor. *See*, Exhibits 1-4.

The DEIS argues that, despite the fact that the Mine is within the jurisdiction of the Tenth Circuit, a non-binding Ninth Circuit decision, Navajo Nation v. USFS, nevertheless controls. DEIS at 356. In that case, the Ninth Circuit held that such significant impacts to religious uses of public land did not constitute a "substantial burden" under RFRA. The DEIS asserts that this restrictive view of what constitutes "substantial burden" governs this case: "To substantially burden the free exercise of religion, there must be government coercion to act contrary to religious beliefs under the threat of civil or criminal sanction, or a condition on receipt of a government benefit on conduct that would violate religious beliefs." DEIS at 8.

The Comanche Nation decision, however, squarely rejected the reasoning in Navajo Nation and held that the type of direct impacts to religious uses (the type the USFS admits will occur on Mt. Taylor) does constitute a "substantial burden" prohibited by RFRA.

> Defendants [U.S. government] urge the Court to adopt a definition applied by the Ninth Circuit Court of Appeals, which has concluded that a "substantial burden" is imposed

only when individuals are "**forced to choose between following the tenets of their religion and receiving a governmental benefit** ... **or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions**." **Navajo Nation v. United States Forest Service**, **535 F**. **3d 1058**, **1070** (**9th Cir**. **2008**). *The Tenth Circuit has not adopted that definition, and the Court declines to do so in this case. The Tenth Circuit's consideration of RFRA subsequent to the 2000 amendment does not appear to signal a restrictive application of RFRA. See, e.g.,* Grace United Methodist Church, 451 F.3d at 662.

Comanche Nation v. United States, 2008 WL 4426621, *3 (W.D. Okla. 2008) (bold emphasis in original, italics added).

Thus, because courts in the Tenth Circuit have refused to follow the overly-restrictive view of "substantial burden" from the Ninth Circuit – and indeed have refused to adopt that approach, the impacts and burdens on Tribal/Pueblo religious uses constitutes a "substantial burden" on the acknowledged "exercise of religion" on Mt Taylor. Because the USFS has not met its burden to "demonstrate that application of the burden to the person represents the least restrictive means of advancing a compelling interest," the agency's approval of the Mine would violate RFRA. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. at 423. *See also* Comanche Nation, at *17 (enjoining federal approval of project on federal land because: "The practices engaged in by the Comanche people in this land area constitute the sincere exercise of religion as defined under the RFRA. Construction of the TSC warehouse at its current location will impose a substantial burden on the traditional religious practices of the Comanche people in the area of the southern approach to the Bluffs.").

C. Additional Violations of Laws Designed to Protect Native American Resources and Uses.

In addition, due to the likely destruction of archeological and grave resources, the failure to protect the Sacred Site and Native American religious and cultural uses at the Site also violates: (1) the American Indian Religious Freedom Act (AIFRA), 42 U.S.C. 1996 et seq.; (2) the Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470aa-mm ; and (3) the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et seq*.

As just one example, the DEIS acknowledges that, based on information provided by the Pueblo of Laguna, "Permanent impacts include the destruction of archaeological sites, the removal of earth and water beneath Mt. Taylor, disturbance of ancestral human remains, and the disrespect shown to the spirits and beings that make Mt. Taylor of such irreplaceable value to the Laguna people." DEIS at 346. Other Nations/Tribes/Pueblos described similar concerns. *See* DEIS at 296-360.

As noted herein, the DEIS's reliance on a future "programmatic agreement" to resolve and mitigate these impacts and issues fundamentally violates these laws, NEPA and the NHPA, as such mitigation and analysis should have been part of the DEIS, for public and Indian Tribe review (and consultation). The Forest Service has decided to defer consultation and development of the "programmatic agreement to resolve adverse effects to historic properties" until after the public comment process on the DEIS is completed, and the "programmatic

agreement will be incorporated into the final EIS and the Forest Service's record of decision." DEIS at 315. Not only does the DEIS violate NEPA and the NHPA, it ignores the basic fact that no "programmatic agreement" or other mitigation can adequately protect Mt. Taylor and the ongoing religious uses protected by the laws noted herein.

II. The Forest Service Should Deny the Proposed Amendment to the Forest Plan, as the Agency Is Not Required by the Mining Law to Remove Forest Plan Standards Protecting Native American Cultural Resources.

The DEIS admits that the provisions of the Forest Plan for the Cibola National Forest would be violated by approval of either action alternative reviewed in the DEIS:

> The plan lists standards for the treatment of historic properties on lands managed by the Cibola National Forest. These standards only apply to lands and resources managed by the Cibola National Forest. With regard to the proposed project and its potential for impacts on historic properties, it is important to note the following:
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> • Standard No. 4 states that historic properties "will be managed during the conduct of undertakings to achieve a "no effect" finding in consultation with the SHPO and the Advisory Council on Historic Preservation." (USFS, 1985:63)
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> • Standard No. 5 addresses instances where resource management conflicts occur. It gives a list of conditions under which "preservation of cultural resources in place will be the preferred option." These conditions include:
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> ○ Where the cultural values derive primarily from qualities other than research potential, and where those values are fully realized only when the cultural remains exist undisturbed in their original context(s) (e.g., association with significant historical persons or events, special ethnic or religious values, or unique interpretive values). (USFS, 1985:63)
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> Both of the action alternatives for the proposed project would result in adverse effects to historic properties, including to the Mt. Taylor TCP and other sites with cultural values beyond research potential. For example, the Mt. Taylor TCP is eligible for listing on the NRHP in part due to its association with significant events and persons, and Mt. Taylor is significant for its special ethnic and religious values with respect to the role it plays in American Indian religion. Selection by the Forest Service of either of the action alternatives would be in conflict with these two standards of management for historic properties. It is unlikely that complete mitigation can be developed for the Mt. Taylor TCP or other sites with cultural values beyond research potential.

DEIS at 354-55.

Under the National Forest Management Act (NFMA), the agency cannot approve a mining PoO that would violate any provision of the Forest Plan. Once a Forest Plan is adopted, all resource plans, permits, contracts, and other instruments for use of the lands must be consistent with it. 16 U.S.C. § 1604(i). The NFMA requires all site-specific actions authorized by the Forest Service to be consistent with Forest Plan standards and guidelines. "Such projects must be consistent with the applicable forest plan. Utah Envtl. Cong. v. Bosworth (UEC III),

443 F.3d 732, 737 (10th Cir. 2006)(citing the NFMA "consistency clause," 16 U.S.C. § 1604(i))." Forest Guardians v. United States Forest Serv., 641 F.3d 423, 427 (10th Cir. 2011).

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

In addition, and overall, the Forest Service cannot amend the Forest Plan as proposed in order to accommodate the Project. As noted above, the project proposal, if approved, would violate a number of current Plan requirements. The Standards and Guidelines in the Plan were implemented to protect the invaluable cultural/religious resources that will be either destroyed or severely degraded by the Mine and related activities.

In the DEIS, the Forest Service incorrectly assumes the 1872 Mining Law requires it to amend the Plan to allow the proposed project to proceed. That is wrong as a matter of law. Federal courts have required the Forest Service to comply with all Forest Plan Standards and Guidelines in reviewing and approving mining Plans of Operations submitted pursuant to claims filed under the 1872 Mining Law. *See* Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, at *6-10 (D. Oregon 2006) (Forest Service approval of mining PoO violated the National Forest Management Act, NFMA, when approval violated Forest Plan Standards and Guidelines). In that case, the court held that the Forest Service's PoO approvals violated the road density and riparian and fisheries requirements, among other requirements.

Under the NFMA, all activities authorized by the USFS must be consistent with and comply with the Forest Plan. There is no exemption for mining projects under NFMA. Thus, the agencies are under no obligation to amend, eliminate, or otherwise weaken the Plan prescriptions or Standards and Guidelines.

Indeed, the USFS **cannot** weaken or eliminate the standards contained in the Plan since that would, as the DEIS admits, be incompatible with the agency's duties to protect Mt. Taylor and Native American uses of the site. As noted above, these standards were enacted and implemented for a reason – to protect the important public resources covered by the Standards.

Further, although the DEIS argues that the USFS must amend the Forest Plan to accommodate the project, such a weakening of these protections would violate another of the agency's primary statutes governing uses of the National Forests (including mining) – the Organic Act of 1897. Under the Organic Act, and the 36 CFR Part 228 regulations, the agency cannot approve a mining PoO unless it can be demonstrated that all feasible measures have been taken to "minimize adverse impacts" on National Forest resources. *See* Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1170 (D. Montana 2010) (Forest Service PoO approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries).

Changing the Plan standards and other protections that were established to protect these resources would violate these protective standards and the agency's statutory and regulatory duties noted herein, especially the requirements to protect Mt. Taylor's unique values and uses.

In other words, even if the agency had the discretion to eliminate/weaken the Plan's protective requirements, doing so would violate the protective requirements of the Organic Act, 228 regulations, and the laws, regulations, and policies noted herein aimed at protecting Native American cultural and religious uses and sites. As a result, neither of the proposed action alternatives can be approved.

III. The Forest Service Must Deny the Proposed Special Use Permits/Right-of-Ways.

In addition to considering whether to approve the Mine's PoO and whether to amend the Forest Plan to eliminate standards to protect cultural resources, the agency must determine whether to grant Special Use Permits (SUPs) and Right-of-Ways (ROWs) for the discharge pipeline, access roads, and utility infrastructure. "RHR proposes a mine permit area of 1,968 acres, including 48 acres of haul roads, utility corridor and mine dewater discharge pipeline corridor outside of Sections 9, 10, and 16. There are 183 acres of disturbance within Sections 9, 10, and 16, plus 35 acres outside those sections for a total disturbance area of 218 acres." DEIS at 31. The DEIS acknowledges that "Special use permits (rights-of-way (ROWs), etc.)" will be needed in order for the Mine to be approved and to begin construction and then operation. DEIS at xi (Table S-2).

Importantly, none of the required SUPs/ROWs are protected by any asserted "rights" under the 1872 Mining Law. In a recent decision affirming the Forest Service's authority to restrict and deny access routes to mining claims, the Ninth Circuit held that: "[T]he Secretary of Agriculture has long had the authority to restrict motorized access to specified areas of national forests, including to mining claims. *See* Clouser [v. Espy], 42 F.3d 1522, 1530 (9th Cir. 1994)." Public Lands for the People v. U.S. Dept. of Agriculture, 697, F.3d 1192, 1198 (9th Cir. 2012).

The agency's review and approval of SUPs/ROWs is governed by the Federal Land Policy and Management Act (FLPMA) and USFS special use regulations (36 CFR Part 251). As such, it is entirely within the USFS's discretion to deny each of the SUP/ROWs. As shown herein, due to the law governing these SUP/ROWs, and particularly due to the applicant's and the Forest Service's inability to mitigate damage to nationally-recognized cultural/religious uses and resources, the USFS must deny the SUP/ROWs.

Water pipelines, transmission lines, access roads, and other conveyances are not authorized by the 36 CFR Part 228 plan of operations approval process. Instead, the USFS must require the company to submit right-of-way or other special use permit authorizations and require that all mandates of FLPMA Title V 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.). This is required because the approval of transmission lines, pipelines, roads, etc., is not a right covered by the 1872 Mining Law – 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 mandates and assume that the company had a right under the Mining Law (which as noted herein it does not), such rights do not attach to the SUP/ROWs and other FLPMA approvals needed for the pipelines, transmission lines, etc.

The Interior Department has ruled that pipelines and roads, including those across public land related to a mining operation, are not covered by statutory rights under the Mining Law. "[A] right-of-way must be obtained prior to transportation of water across Federal lands for mining." Far West Exploration, Inc., 100 IBLA 306, 308 n. 4 (1988) *citing* Desert Survivors, 96 IBLA 193 (1987). *See also* Alanco Environmental Resources Corp., 145 IBLA 289, 297 (1998) ("construction of a road, was subject not only to authorization under 43 C.F.R. Subpart 3809, but also to issuance of a right-of-way under 43 C.F.R. Part 2800."); Wayne D. Klump, 130 IBLA 98, 100 (1995) ("Regardless of his right of access across the public lands to his mining claims and of his prior water rights, use of the public lands must be in compliance with the requirements of the relevant statutes and regulations [FLPMA Title V and ROW regulations]."). Although these cases dealt with BLM lands, they apply equally to Forest Service lands. As noted in Alanco, ROWs for access roads (as opposed to internal mine roads) are subject to FLPMA's Title V requirements.

The Interior Board of Land Appeals has expressly rejected the argument that rights under the mining laws apply to pipelines and roads:

> Clearly, FLPMA repealed or amended previous acts and Title V now requires that BLM approve a right-of-way application prior to the transportation of water across public land for mining purposes. See 43 U.S.C. § 1761 (1982). As was the case prior to passage of Title V of FLPMA, however, approval of such an application remains a discretionary matter and the Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way grant prior to accepting the application for consideration. Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982). A decision approving a right-of-way application must be made upon a reasoned analysis of the factors involved in the right-of-way, with due regard for the public interest. See East Canyon Irrigation Co., 47 IBLA 155 (1980).
>
> BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited.
>
> The implied right of access to mining claims never embraced the right to convey water from outside the claim for use on the claim. This latter right emanated from an express statutory grant in the 1866 mining act. See 30 U.S.C. § 51 (1970) and 43 U.S.C. § 661 (1970). In enacting FLPMA, Congress repealed the 1866 grant of a right-of-way for the construction of ditches and canals (see § 706(a) of FLPMA, 90 Stat. 2793) and provided, in section 501(a)(1), 43 U.S.C. § 1761(a)(1), for the grant of a right-of-way for the conveyance of water under new procedures. In effect, Congress substituted one statutory procedure for another. There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Desert Survivors, 96 IBLA 193, 196 (1987)(emphasis in original). *See also* Far West Exploration, 100 IBLA 306, 309, n. 4 (1988)("a right-of-way must be obtained prior to transportation of water across Federal lands for mining."). The same analysis applies to water

and power either delivered to, or conveyed from, the mining site. The leading treatise on federal natural resources law confirms this rule: "Rights-of-way must be explicitly applied for and granted; approvals of mining plans or other operational plans do not implicitly confer a right-of-way." Coggins and Glicksman, PUBLIC NATURAL RESOURCES LAW, §15.21.

Thus, the fact that the USFS mining regulations consider roads and pipelines associated with the project are part of the mineral "operations," 36 CFR §228.3, does not override these holdings or create statutory rights where none exist. Operations not conducted on "valid and perfected claims" must comply with all of FLPMA's requirements, including Title V's SUP/ROW requirements. Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 49-51 ("[I]f there is no valid claim and the claimant is doing more than engaging in initial exploration activities on lands open to location, the claimants' activity is not explicitly protected by the Mining Law."). Id. at 50.

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

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

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

FLPMA, § 1765(b).

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

conditions that protect not only the land crossed by the right-of-way, but **all** federal land affected by the approval of the SUP/ROW.

Second, the requirements in Section 505(b) mandate a USFS determination as to what conditions are "necessary" to protect federal property and economic interests, as well as "otherwise **protect[ing] the public interest in the lands traversed by the right-of-way or adjacent thereto**." (emphasis added). This means that the agency can only approve the SUP/ROW if it "protects the public interest in lands" not only upon which the 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 SUP/ROWs if the Mine itself "protects the public interest." As shown herein, that clearly is not the case.

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 SUP/ROW 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 SUP/ROW. It should be noted that, even if the USFS can legally assert that it must approve the Mine's PoO due to RHR's mining claims on Sections 9 and 10 (which as shown herein is not legally correct), this subservience to the Mining Law is inapplicable to the SUP/ROWs.

The federal courts have recently and repeatedly held that the Forest Service not only has the authority to consider the adverse impacts on lands and waters outside the immediate ROW corridor, it has an obligation to protect these resources under FLPMA. In County of Okanogan v. National Marine Fisheries Service, 347 F.3d 1081 (9th Cir. 2003), the court affirmed the Forest Service's imposition of mandatory minimum stream flows as a condition of granting a ROW for a water pipeline across USFS land. This was true even when the condition/requirement restricted or denied vested property rights (in that case, water rights). Id. at 1085-86.

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

Thus, in this case, FLPMA requires the Forest Service to deny the proposed SUPs/ROWs because, as a result of the granting of the permits, the Mine will be allowed to proceed (in addition to the direct adverse impacts from the SUP/ROW facilities) – with devastating damage to the environment (including cultural/religious uses and resources) that cannot be mitigated on Mt. Taylor and its environs.

The Forest Service regulations implementing FLPMA Title V further require the agency to deny the proposed SUP/ROWs in this case. In 1998, the Forest Service revised its special use

authorization rules and set up a two-stage screening process to review land use authorization applications. 36 C.F.R. § 251.54(a). "The purpose of the screening is to eliminate those proposed uses which are obviously unsuitable on National Forest System (NFS) lands." 63 Fed. Reg. 65,954 (Nov. 30, 1998). In the first step of the screening process, the Forest Service ensures that a proposed use meets certain minimum criteria. For those that pass this hurdle, the agency then conducts a full-scale review. 36 C.F.R. § 251.54(e)(5).

The first hurdle, what the agency loosely refers to as the "suitability" test, is a critical one for proposed mining-related uses. Under the suitability test, the agency cannot authorize any use that represents a permanent or exclusive use of federal lands. In the preamble to the revised regulations, the Forest Service stated: "Longstanding Congressional and Executive Branch policy dictates that authorizations to use NFS lands cannot grant a permit holder an exclusive or perpetual right of occupancy in lands owned by the public." 63 Fed. Reg. 65,955 (Nov. 30, 1998); 36 C.F.R. § 251.54(e)(1)(iv).

These rules further require that a proposed use will fail the first hurdle if it "involve[s] disposal of solid waste or disposal of radioactive or other hazardous substances." 36 C.F.R. § 251.54(e)(1)(ix). For the Roca Honda uranium mine, this prohibition is particularly applicable, as it is undisputed that "radioactive or other hazardous substances" will be excavated, dumped – both long and short term – on public lands, and transported over public lands via the access route.

Similar to FLPMA's provisions noted above, for even those operations that pass the "suitability test," the regulations prohibit the agency from approving any SUP/ROW that is not "in the public interest." **"An authorized officer shall reject any proposal … if … (ii) the proposed use would not be in the public interest."** 36 C.F.R. § 251.54(e)(5)(ii).

The Interior Department, interpreting FLPMA Title V and its similar right-of-way regulations, has held that: "A right-of-way application may be denied, however, if the authorized officer determines that the grant of the proposed right-of-way would be inconsistent with the purpose for which the public lands are managed or if the grant of the proposed right-of-way would not be in the public interest or would be inconsistent with applicable laws." Clifford Bryden, 139 IBLA 387, 389-90 (1997) 1997 WL 558400 at *3 (affirming denial of right-of-way for water pipeline, where diversion from spring would be inconsistent with BLM wetland protection standards). Notably, in that case, the agency held that denial of the ROW application was appropriate based on the fact that the project would be inconsistent with a Presidential Executive Order – the same situation here as the Project would violate EO 13007 as discussed above.

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

> [T]he granting of the right-of-way and concomitant reduction of that resource, would, in all likelihood, adversely affect public land values, including grazing, wildlife, and

> riparian vegetation and wildlife habitat. The record is clear that, while construction of the improvements associated with the proposed right-of-way would have minimal immediate physical impact on the public lands, the effect of removal of water from those lands would be environmental degradation. Prevention of that degradation, by itself, justified BLM's rejection of the application.

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

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

Here, it is undisputed that the grant of a SUP/ROW is needed for the Roca Honda Project to proceed and that the Project will result in significant and irreparable harm to (indeed the elimination of) nationally-recognized public land cultural and religious values, uses, and resources. As such, the USFS must deny the proposed SUP/ROWs. It must be stressed that, as noted above under FLPMA, the "public interest" test applies not only to the lands traversed by the SUP/ROW, but also nearby federal lands that may be affected if the proposed SUP/ROW is granted.

IV. The USFS Cannot Consider or Approve RHR's Mine Plan Without the Required Inclusion and Analysis of a Plan to Process/Mill the Ore.

A. Violation of 1897 Organic Act and USFS Regulations and Policies.

Among the many inadequacies of the DEIS is the basic fact that neither the PoO for the Mine nor the DEIS include plans or descriptions of critical operations and activities necessary for the agency to even begin the NEPA and PoO review process. Foremost among these is the lack of any plan whatsoever to process or mill the ore to be obtained from the mining of Mt. Taylor. The DEIS admits that "a mill is not part of RHR's proposed action." DEIS at 176. Indeed, the agency has no idea where, or when, the ore will be processed. "[T]he mill destination or destinations have not been finalized." DEIS at 375. *See also* DEIS at 406 ("The mill site has not yet been selected."). According to the DEIS, milling would occur at some undetermined location within "a 450-mile shipping radius." DEIS at 375.

In other words, the Forest Service is proposing to approve a Mine that has no plan to mill or process the ore. Although it is not the agency's duty to propose a mill, it is the agency's duty to make sure that the PoO is reasonable and can be accomplished, which includes the mandate to require and analyze a plan to mill/process the ore. Deferring the requirement on the company to

submit a complete mine plan, and deferring any analysis of the connected actions and/or cumulative impacts from the mill, not only violates NEPA, it contradicts the USFS' own regulations and policies.

It is well established that the Forest Service may reject an unreasonable PoO. "[T]he Forest Service clearly has the power to reject an unreasonable plan, and to impose conditions on the mining activity." Baker v. United States Department of Agriculture, 928 F. Supp. 1513, 1518 (D. Idaho 1996). "The Forest Service may reject an unreasonable or illegal plan of operations." DEIS at 30. The "reasonableness" of the PoO and the duty of the agency to protect surface resources are expressly linked together. According to the agency's mining regulations, upon receipt of a plan of operations: "[t]he authorized officer shall … analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection." 36 CFR § 228.5. It is impossible for the agency to adequately process the PoO, and to adequately involve the public in that review, when the absolutely critical milling plan is missing.

The fact that a potential mill would be located somewhere off-site does not eliminate the applicant's duty to submit a complete mine plan, nor the agency's duty to ensure that it, and the public, have a complete plan to review in the DEIS (and scoping beforehand).[2]

Here, there is no evidence that this Mine can even be operated, as there is no plan to mill and process the ore. Without such a plan, the ore is of no value. The Forest Service would be violating its duties under the Organic Act and Part 228 regulations if it approved a plan without sufficient evidence that it was economic and therefore reasonable. At a minimum, the agency

[2] Interestingly, although somehow never mentioned in the DEIS, the company's website and submissions to the NRC and U.S. and Canadian securities regulators state that the company does have a mill proposed to process the ore from the Roca Honda Mine. *See* http://www.strathmoreminerals.com/s/RocaHonda.asp (last reviewed June 11, 2013)(attached as Exhibit 7); Strathmore Minerals, "Management Discussion & Analysis for the Year Ended December 31, 2012", at 18: "In November 2006, Strathmore purchased 620 acres of land in the Ambrosia Lake area known as Peña Ranch for a potential conventional mill development. **The planning process for the construction of a mill in New Mexico to support the Roca Honda project began in 2007. Initial site studies for the mill and tailings, as well as mill process design studies were completed**." (emphasis added) (excerpts attached as Exhibit 8). *See also* TECHNICAL REPORT ON THE ROCA HONDA PROJECT, MCKINLEY COUNTY, NEW MEXICO, U.S.A. PREPARED FOR ROCA HONDA RESOURCES, LLC Report for NI 43-101, Including Updated Mineral Resource Estimate and Preliminary Economic Assessment, August, 2012 (excerpts attached as Exhibit 9); Jan. 15, 2013 Memorandum by NRC on Peña Ranch Mill proposed by Strathmore/RHR (attached as Exhibit 10); Jan. 17, 2013 letter from Strathmore to NRC, discussing ongoing NRC process and amendments to previously-submitted Notice of Intent to NRC (attached as Exhibit 11). The recent proposed merger of Strathmore with Energy Fuels, Inc., however, casts doubt on this plan and instead suggests that ore from the Mine would be milled at the White Mesa Mill near Blanding or the proposed Piñon Ridge Mill in Colorado. *See*, attached press release (Exhibit 12), available at http://www.energyfuels.com/investors/press_releases/index.php?&content_id=248.

should not approve the PoO until it is satisfied that the Project is economically and environmentally reasonable.

The current PoO is not "reasonable" because it is clearly incomplete. The applicant has not submitted a detailed mining plan of operation as required by 36 CFR § 228.4(c)(3) & (d), § 228.8, and § 228.12 and as defined by § 228.3(a). Among these requirements is the mandate that the PoO must include:

> Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the period during which the proposed activity will take place, and the measures to be taken to meet the requirements for environmental protection in § 228.8.

36 CFR § 228.4(c)(3). The agency has the authority, and indeed the obligation, to delay or deny consideration of the PoO until it has received all relevant information about necessary aspects of the mine plan, including the mill.

> The [agency] may require information beyond that submitted with an initial MPO [Mining Plan of Operations]. **"[I]nsofar as [the agency] has determined that it lacks adequate information on *any* relevant aspect of a plan of operations, [the agency] not only has the authority to require the filing of supplemental information, it has the obligation to do so."** Great Basin Mine Watch, 146 I.B.L.A. 248, 256 (1998).

Center for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010) (emphasis added). Although that case dealt with mineral operations on BLM lands, the same analysis applies to USFS lands.

At a minimum, the agency should conduct a Surface Use Determination (SUD)/Surface Use Analysis (SUA) to determine whether this Mine is feasible at all, in light of the fact that there is no plan to produce a single marketable pound of processed uranium. Unsupported assertions from the company that it will mill the ore somewhere at some future time are clearly inadequate under NEPA, the Organic Act, and Part 228 regulations. "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. § 1500.1(b). General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." Western Watersheds Project v. Kraayenbrink,632 F.3d 472, 491 (9th Cir. 2011).

The failure of the PoO to describe, let alone detail, the processing of the ore renders the PoO incomplete and any DEIS based on such incomplete information inadequate under NEPA and other laws noted herein, such as the NHPA. The Forest Service should inform RHR that the agency cannot process the PoO until the required information is submitted. The public, through the USFS, should not be required to spend financial resources (via the NEPA process) to gather information the applicant is required to, but failed to, submit.

B. Failure to Provide and Review a Valid Purpose and Need for the Project Violates NEPA.

Although not expressed in the DEIS, the underlying purpose and need of the Roca Honda Project is for RHR to gain access to underground uranium formations for the purpose of extracting ore via the proposed Roca Honda Mine, to be processed into commercially sold yellowcake. *See*, Technical Report on the Roca Honda Project, McKinley County, New Mexico, USA, August 6, 2012.

Despite the fact that the DEIS's failure to consider the milling-related issues violates numerous NEPA and other requirements as described herein, the DEIS's failure to recognize the indispensable role of milling in the Roca Honda Mine proposal fundamentally skews the "purpose and need for the proposed action." 40 C.F.R. § 1502.13 ("The [EIS] shall briefly specify the underlying purpose and need"). Under NEPA, "an agency cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals,'[…] requiring instead that agencies have 'the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project.'" Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. Ill. 1997). "One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." Id. at 666, quoted by Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002). An unlawfully stated purpose and need is a NEPA violation independent of the other violations that may flow from a contrived purpose. Id.

According to the DEIS, the USFS is merely responding to the applicant's request for PoO approval for the Roca Honda Mine and presumes it can adhere to the limited scope of analysis conducted by the third-party NEPA contractor. DEIS at iii. Yet, as detailed herein, federal agencies cannot operate with such blinders on, and must instead exercise skepticism regarding statements of the project proponent, particularly where a third-party contractor prepares the NEPA document. Here, even a cursory review of published documents reveal that RHR/Strathmore's true purpose and need is to gain federal approval of a mine/mill complex known as the Roca Honda Project. Technical Report on the Roca Honda Project, McKinley County, New Mexico, USA, August 6, 2012. Strathmore's announced purpose is to use Roca Honda Project to produce salable yellowcake for the commercial market. As such, extracting federal minerals for yellowcake production and sale in the global marketplace is the underlying "purpose and need" for this privately promoted project.

In the ongoing Nuclear Regulatory Commission review of the proposed Peña Ranch Mill segment of the Roca Honda Project, Strathmore has confirmed that the purpose of the Roca Honda Mine is to provide a source of ore to feed into the proposed Peña Ranch Mill. Alternatively, in the recent announcement of the proposed merger of Strathmore Minerals with Energy Fuels, Inc., Strathmore/Energy Fuels indicated that milling ore from Roca Honda may be more economically feasible at the White Mesa Mill near Blanding. *See* attached press release, available at http://www.energyfuels.com/investors/press_releases/index.php?&content_id=248 (last viewed on June 3, 2013); *see also*, attached article from San Miguel County Basin Forum (Exhibit 13) (Energy Fuels spokesperson indicates that Roca Honda ore would be milled at White Mesa or secondarily at the proposed Piñon Ridge Mill).

Irrespective of where ore from the Roca Honda mine may be milled, none of the published RHR/Strathmore documents attempt to explain the feasibility of operating the Roca Honda mine independent of any mill, or vice versa. Moreover, the DEIS does not scrutinize the absurd notion that ore can be feasibly shipped hundreds of miles without increasing production costs (and related impacts) beyond those supported by modern price levels. Transportation cost calculations are important to the analysis of any project, Strathmore has estimated that material "Hauling from Mine to Mill" would cost approximately $0.66 for every pound of anticipated yellowcake production. Technical Report at 21-9. Indeed, Strathmore's documents reveal no plans for long-distance shipment: "Once the mineralized material is hoisted to the surface, it will be transferred into highway trucks, which will deliver the material to the Peña Ranch mill." Technical Report at 16-7

Further, the DEIS does not identify any realistic need for yellowcake production from conventional uranium mines in the foreseeable future. Indeed, current prices are below production costs, in part because the Department of Energy is managing an enormous stockpile of already mined uranium (AMU) and has stated it will manage the AMU stockpile in a manner where prices may only support existing yellowcake production. United States Department of Energy, Quantification of the Potential Impact on Commercial Markets of Introduction of DOE Excess Uranium Inventory in Various Forms and Quantities During Calendar Years 2012 through 2033, Report ER-2142.12-1201 at 47 (April 23, 2012), attached as Exhibit 14. In its report, DOE also confirmed that its price support policies are not likely to support new projects. Id. at 47, 50. Where yellowcake production is properly recognized as the purpose of the project, the alternatives available to the federal government includes the release of these AMU stockpiles. In addition to protection of the National Forest and cultural values in the area, a Government Accountability Office Report confirms that benefits of the sale of DOE stockpiles include reduced maintenance costs for already mined uranium stockpiles, protection of the National Forest, and an income stream to the federal government. United States Government Accountability Office, Excess Uranium Inventories: Clarifying DOE's Disposition Options Could Help Avoid Further Legal Violations, GAO 11-846, at 8-10 (Sept. 2011), attached as Exhibit 15. In light of the AMU stockpiles, there is no legitimate purpose or need for a mine/mill project.

The AMU stockpiles notwithstanding, a cursory review of uranium market projections reveal that current uranium production in the United States is a fraction of licensed production capacity. In its Domestic Uranium Production Report, the United States Energy Information Administration (EIA) reports that in the fourth quarter of 2012, uranium production was 961,062 pounds U_3O_8. U.S. Energy Information Administration, Domestic Uranium Production Report, 4th Quarter, 2012 (Feb. 2013) at 1. That Report is attached as Exhibit 16. However, the EIA also reports that there is currently 27,100,00 pounds U_3O_8 of licensed in situ leach capacity in the United States. Id. at 6. Therefore, not including conventional uranium mining capacity, domestic uranium production is less than 29% of capacity. The DEIS clearly fails to demonstrate why, when actual uranium production is not even a third of uranium production capacity, there is a need for the applicant's mine.

Because an accurate statement of the project proponent's true purpose and need for the Roca Honda Mine - yellowcake production and sale via the Roca Honda Project - is a critical

component of the scope and structure of any NEPA document, the DEIS must be withdrawn and reissued in accordance with this key NEPA requirement.

V. The DEIS Does Not Provide an Adequate Cumulative Effects Analysis and Fails to Consider Connected Actions.

A. The DEIS Fails to Evaluate Connected Actions.

At the outset, the DEIS's failure to analyze the processing and milling of the ore violates the agency's duties under NEPA to review connected actions, or if milling is not considered a connected action (which it is), the cumulative effects/impacts from the milling and related activities. At most, the DEIS has a generalized review of potential transportation of the ore to an unknown mill within a "450-mile shipping radius." DEIS at 375. While the DEIS was prepared without any consideration of a mill (see above discussions regarding how that renders the process to date illegal), based on the company's submissions to the Nuclear Regulatory Commission (NRC), and as noted in the attached documents, the applicant proposes to process ore from Roca Honda at a mill. As such, the mill is either a connected action that must be fully reviewed under NEPA, or at a minimum, the revised DEIS must fully review the operation, transportation, and all aspects of the company's proposed mill and activities to bring the ore to market.

The company and the agency cannot have it both ways. The DEIS cannot ignore the milling process (and all of its related impacts) because RHR did not formally include it in the PoO for the Mine, yet at the same time the company has stated to potential investors, the SEC and Canadian securities regulators, and the NRC, that a mill is proposed in the same region as the Mine or that ore from the Roca Honda mine will be transported hundreds of miles to another mill.

Without a mill, the Mine cannot operate. Thus, the mill and the Mine are clearly "connected actions" under NEPA and must be analyzed as such in the revised DEIS. Under NEPA, 42 U.S.C.S. § 4321 *et seq*., a single NEPA review document is required for actions or projects when the projects are connected, cumulative or similar. 40 C.F.R. § 1508.25. Council on Environmental Quality (CEQ) regulations provide that actions are "connected" if they … "(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously," or "(iii) Are interdependent parts of a large action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). Even if the Mine could conceivably occur without the previous or simultaneous occurrence of the mill, which is not the case here, if it could not occur without such actions the mill is a connected action and must be considered within the same NEPA document as the Mine. "[E]ven though an action could conceivably occur without the previous or simultaneous occurrence of another action, if it would not occur without such action it is a 'connected action' and must be considered within the same NEPA document as the underlying action." Dine Citizens Against Ruining Our Env't v. Klein, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010). Thus, because the Mine is dependent on the mill to operate, they are connected actions.

B. The DEIS Fails to Fully Evaluate Cumulative Impacts.

1. The DEIS Fails to Evaluate Cumulative Impacts Associated with Ore Milling.

At a minimum, even if the USFS erroneously concludes that the mill and the Mine are not "connected actions" (a view not supported by NEPA or the facts), the agency must fully review the impacts from all "past, present, and reasonably foreseeable future actions." These are the "cumulative effects/impacts" under NEPA.

To comply with NEPA, the USFS must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR § 1502.16; 40 CFR § 1508.8; 40 CFR § 1508.25(c). "Direct effects" are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). "Indirect effects" are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). All types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. "Cumulative effects" are defined as:

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

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

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

Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting NEPA review for mineral operation that had failed to include detailed analysis of impacts from nearby proposed mining operations).

"The CEQ regulations require agencies to discuss the cumulative impacts of a project as part of the environmental analysis. 40 C.F.R. § 1508.7." Davis v. Mineta, 302 F.3d 1104, 1125 (10th Cir. 2002). "Of course, effects must be considered cumulatively, and impacts that are insignificant standing alone continue to require analysis if they are significant when combined with other impacts. 40 C.F.R. §1508.25(a)(2)." New Mexico ex rel Richardson v. BLM, 565 F.3d 683, 713, n. 36 (10th Cir. 2009). *See also* Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1243 (D. Wyo. 2005) (failure to adequately review all cumulative impacts is arbitrary and capricious and violates NEPA).

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

The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. Blue Mountains, 161 F.3d at 1214-15; Kern v. BLM, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring "mine-specific … cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region). The cumulative impacts analysis must include "reasonably foreseeable future actions," which is a lower threshold than is used to determine whether an agency violates NEPA's segmentation prohibition. [3] Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1229 (10th Cir. 2008) quoting O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 236 (5th Cir. 2007) (citing 40 C.F.R. § 1508.23)("While a cumulative impact analysis requires the [reviewing agency] to include 'reasonably foreseeable' future actions in its review, improper segmentation is usually concerned with projects that have reached the proposal stage.").

Thus, in this case, the USFS must consider the cumulative impacts from all past, present, and reasonably foreseeable future projects in the region on, at a minimum, water and air quality including ground and surface water quantity and quality, recreation, cultural/religious, wildlife, transportation/traffic, scenic and visual resources, etc. In addition, without any analysis of milling, the USFS cannot ensure that there will not be any additional impacts to threatened, endangered, sensitive, or indicator species in the region (a likely violation of the Endangered Species Act and the NFMA), environmental and cultural/religious resources, etc., that may exist at/near a mill location, or along transportation routes.

As held by the court decisions noted herein, this means that the impacts from other projects – not just the current Mine under review – must be fully reviewed. This includes, at a minimum, the impacts from the transportation of ore to a mill, as well as the environmental impacts from the mill itself.

This extends to the mill and other mines on both public and private lands. Cumulative impacts must be reviewed "regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 CFR § 1508.7. For example, in considering a challenge to federal approval of mineral leasing and mining, a court required an agency to look at the impacts from the proposed mill that would process ore from mines/leases, despite the fact that the proposed mill would be on private lands and despite the fact that the mill was not directly

[3]As argued above, the mill component of the Roca Honda Project has been proposed and is under review by the NRC.

associated with the mines/leases being proposed and was not included in the lease/mining proposals. The court held:

> [The agency's] other two arguments—that the effects of the mill need not be evaluated because (1) it is being built by a company on private land, and (2) approval of the mill is controlled by other governmental entities—lack merit. Regardless of whether an EA or EIS is being prepared, the agency conducting the analysis must consider the "cumulative impacts" of the proposed action. …
>
> Nothing in this regulation suggests that ''cumulative impacts'' are limited to those occurring on [public] land, or that [the agency] need not consider the impacts from related activities that another federal agency is in charge of approving or disapproving.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1212 (D. Colo. 2011). *See also* Sierra Club v. U.S. Dept. of Energy, 255 F.Supp.2d 1177, 1185 (D.Colo. 2002) (agency must review impacts from "reasonably foreseeable" mine on private land when preparing NEPA document for federal land easement related to the future mine. "The fact that a private company will undertake the mining is irrelevant under NEPA regulations. *See* 40 C.F.R. § 1508.7 ('regardless of what agency or person undertakes such other actions')").

Yet the DEIS's cumulative effects analyses consists of little more than a generalized discussion of potential transportation impacts related to milling. That is unacceptable, as the revised DEIS must provide the detailed quantitative analysis of all of the "past, present, and reasonably foreseeable actions" in the region, along with the ore hauling route, mines feeding the mill, etc.

In addition, the company's public statements/reports mention "toll milling," which would involve transporting ore from mines other than the Roca Honda Mine and milling that ore at the mill that would be used to process the Roca Honda ore. *See* Exhibit 7, http://www.strathmoreminerals.com/s/RocaHonda.asp (discussing the economics of the "Toll Milling Option" associated with the Roca Honda Mine and related mill). Despite this, the DEIS is completely silent regarding this reasonably foreseeable aspect of the company's mining and milling proposals.

This review of the impacts must also include an analysis of the baseline conditions at the other mines in the region that may feed the mill (as well as for the mill itself), as well as the site characteristics and impacts of the mining such as the geochemical aspects of the mineral deposits, waste rock, etc., at the various mine sites. At a minimum, the DEIS should evaluate the current groundwater characteristics in both quality and quantity, at the mill and mine sites as well as the potential for the potential mill(s) to generate environmental impacts.

As with any project that may have significant impacts to the environment, the revised DEIS must identify and analyze all potential impacts from mine and mill operations and transportation (as well as non-mining/milling projects in the region) including, but not limited to, impacts to air quality, noise, water resources, water quality, plants and wildlife, recreation, and religious and cultural resources. The USFS must address all listed, rare or other special status

species that may be affected by the operations or transportation associated with the mines and the mill(s) under NEPA, the NFMA, as well as the Endangered Species Act.

Deferring analysis until after the Draft EIS is submitted for public review violates NEPA, as the law "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 CFR § 1500.1(b).

For example, the revised DEIS's connected actions, or at a minimum cumulative impacts, analysis must include a full review of the impacts from delivering the ore to the mill, as well as mill operations. The Ninth Circuit recently rejected the federal agency's attempt to avoid looking at the off-site transportation and other impacts when reviewing a Plan of Operations for a mining/milling project. South Fork Band Council v. Department of the Interior, 588 F.3d 718, 725-726 (9th Cir. 2009). This includes impacts to air quality, traffic, safety, recreation and cultural resources.

Regarding off-site impacts from the milling and transportation, federal courts have rejected the argument that reliance on state-issued permits or analysis satisfied the agency's independent duty under NEPA.

> BLM argues that the off-site impacts need not be evaluated because the Goldstrike [mill] facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document -- let alone one prepared and adopted by a state government -- cannot satisfy a federal agency's obligations under NEPA. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council, 588 F.3d at 726.

Further, the DEIS fails to fully analyze other operating or proposed uranium operations in the region – including the actual mining as well as the transportation to any mill. Attached is a list of uranium mining and/or milling operations from the NRC. Taken from: http://www.nrc.gov/materials/uranium-recovery/license-apps/ur-projects-list-public.pdf (reviewed March 27, 2013)(attached as Exhibit 17). Note that this NRC list includes the Peña Ranch mill proposed by Strathmore/RHR. At a minimum, the cumulative impacts from the mining, transportation and milling of ore from the New Mexico projects must be thoroughly analyzed. This includes a complete analysis of the cumulative impacts from all reasonably potential milling sites/operations and related facilities.

Regarding the White Mesa mill, the DEIS must fully review all the impacts from that mill and related operations. For example, as uranium ore continues to be mined and processed, it will be necessary for that mill to construct as many as 4 additional 40-acre tailings impoundments. The construction of new tailings impoundments will result in the destruction of unique and significant cultural resources on White Mesa. *See* http://uraniumwatch.org/denisonmill.ut/whitemesa_archeologicalsites_report.040630.pdf (adopted and incorporated into the administrative record for this case, last viewed June 4, 2013).

Original mill construction and the recent construction of Cell 4-B also resulted in the destruction of pit houses and other cultural resources that have been found eligible for inclusion in the National Register of Historic Places. *See* http://www.radiationcontrol.utah.gov/Uranium_Mills/IUC/cell4b/cultural_resources4b.htm (adopted and incorporated into the administrative record for this case, last viewed June 4, 2013).

The revised DEIS must also fully review (and mitigate against) the air and water pollution issues at the White Mesa Mill. For example, the mill currently has a groundwater contamination issue that must be fully reviewed. *See* http://www.radiationcontrol.utah.gov/Uranium_Mills/IUC/nitrate/nitrateCAP.htm (adopted and incorporated into the administrative record for this case, last viewed June 4, 2013). All of the documents on these Utah government webpages must be reviewed as part of the USFS's review of the cumulative impacts from the Roca Honda project.

The NEPA review must also specify which mines may feed the mill, and the USFS cannot simply assert that this information is too speculative. Further, regarding transportation, the Forest Service must evaluate the cumulative impacts related to the movement of ore shipments through the towns on the route(s) to any mill, including from the La Jara Mesa mine and other mines. The Forest Service should also evaluate other transportation and other issues/impacts that may occur on these route(s), particularly since any transportation route, whether from the Mine to the Peña Ranch Mill, the White Mesa Mill or the Piñon Ridge Mill, will go through numerous environmental justice communities

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

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

2. Failure to Fully Review Other Cumulative Impacts.

In addition to the lack of cumulative impacts analysis related to milling, the DEIS fails to provide the NEPA-required level of analysis for other past, present, or reasonably foreseeable future activities in the region. The DEIS's analysis of impacts from other mines in the area, as well as other activities such as grazing, energy exploration and development, logging, off-road recreation, etc., is minimal at best and fails to provide the "sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010). The DEIS fails to provide the project specific "cumulative data," a "quantified assessment of their [other projects'] combined environmental impacts," and

"objective quantification of the impacts" from other existing and proposed activities in the region. Great Basin Mine Watch v. Hankins, 456 F.3d at 971-974.

As the DEIS admits, the region including Mt. Taylor and its environs, including the lands and waters used and valued by Native Americans traveling to and from Mt. Taylor, have been, and are, subject to various activities that may impact the cultural, religious, environmental, and other resources of the area. *See* Chapter 3 ("cumulative impacts" noted as part of the various "resource" subchapters). Simply mentioning, or at best only briefly discussing, these other activities, without any quantified data or analysis of their impacts, violates NEPA's strict "cumulative impacts" analysis requirements.

In addition to the other activities noted above whose quantitative cumulative impacts have not been fully analyzed, the DEIS ignores the impacts from the nearby Mt. Taylor Mine, which has recently been proposed for resumption. In a recent Public Notice issued by the State of New Mexico's Mining and Minerals Division of the Energy, Minerals, and Natural Resources Department: "This public notice is made by Rio Grande Resources Corporation (RGR) as required by 19.10.9.903 NMAC. On April 15, 2013 RGR submitted to the New Mexico Mining and Minerals Division an application for revision of its existing Mine Permit No. C1002RE for the Mt. Taylor Mine from standby to active status and for revision of the Closeout/Closure Plan for this mine." (attached as Exhibit 18). According to the Public Notice: "The proposed revision to active status will enable Rio Grande Resources to place the Mt. Taylor Mine back into operation." For the full file on this application (and mine), *see* http://www.emnrd.state.nm.us/mmd/MARP/CI002RERev13-2.html (adopted and incorporated into the record for this case). Thus, the revised DEIS must include a full analysis of the current site conditions at/near the Mt. Taylor Mine, as well as all potential impacts from the current facility and any proposed resumption of that Mine and related operations (e.g., mining, milling, transportation, etc.).

Finally, the DEIS fails to evaluate the cumulative impacts of past uranium mining and milling. Incredibly, while the DEIS acknowledges there have been significant environmental and public health impacts from past uranium mining and processing, it concludes that "there is little or no connection between the legacy health issues or uranium mining and processing in the past, and anticipated health and safety effects from the proposed Roca Honda Mine." DEIS at 442. This position, however, disregards NEPA's explicit mandate to evaluate all past, present and reasonably foreseeable future impacts. Blue Mountains, 161 F.3d at 1214-15; Kern v. BLM, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006).

VI. Additional NEPA Violations.

In addition to the above noted inadequacies, the agency has further failed to undertake the required "hard look" at all the direct and indirect impacts from the project. The DEIS is therefore inadequate under NEPA. NEPA ensures that before approving a project, federal agencies (1) consider and evaluate all environmental impacts of their decisions, and (2) disclose

and provide an opportunity for the public to comment on such environmental impacts. 40 C.F.R. §§ 1501.2, 1502.5; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

> The centerpiece of environmental regulation in the United States, NEPA requires federal agencies to pause before committing resources to a project and consider the likely environmental impacts of the preferred course of action as well as reasonable alternatives. *See* 42 U.S.C. § 4331(b) (congressional declaration of national environmental policy). By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions. Balt. Gas & Elec. Co. v. Natural Res. Defense Council, 462 U.S. 87, 97 (1983) (identifying the facilitation of informed agency decisionmaking and public involvement as the "twin aims" of NEPA). The requirements of the statute have been augmented by longstanding regulations issued by the Council of Environmental Quality ("CEQ"), to which we owe substantial deference.

New Mexico ex rel. Richardson v. BLM, 565 F.3d at 683, 703 (10th Cir. 2009). "NEPA mandates that federal agencies take into consideration the impacts of their actions on the environment in the hopes that such consideration will lead to environmentally sound decisions that balance the needs of humans and the environment in which they live." Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1239-40 (D. Wyo. 2005).

> NEPA does mandate that an agency "take a 'hard look' at the impacts of a proposed action." Citizens' Comm. to Save Our Canyons, 513 F.3d at 1179 (10th Cir. 2008) (quoting Friends of the Bow v. Thompson, 124 F.3d 1210, 1213 (10th Cir. 1997)). . . . This examination "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made."; *see also* 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."); Id. § 1502.5.

Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1263-64 (10th Cir. 2011). NEPA ensures that an "agency will not act on incomplete information only to regret its decision after it is too late to correct." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1990).

A. The DEIS Fails to Take a Hard Look at Surface Water Impacts.

The DEIS admits that, for surface water impacts: "At this stage in EIS preparation, details on the proposed discharge of treated wastewater have not been provided, but the indication is that it will be well outside the permit area. When details on the discharge are provided, information on the hydrogeology of the impacted area will be added to this section." DEIS at 146. "Details of the discharge plan are not now available to the USFS." DEIS at 175. "Details on discharge of treated wastewater to private land for use in a ranching enterprise are not available." DEIS at 178.

Further, the DEIS admits that significant pollution may occur from stormwater contacting and related to mine operations. "Table 9 shows the potential contaminants that could affect storm water quality at the site during the construction and operation phases of the mine. Table 10

shows excavated materials that would be stockpiled for some length of time at the mine surface that could potentially pollute surface water or groundwater (through infiltration), if not properly controlled and managed." DEIS at 148.

Yet, the agency defers the submittal of any plan to "control and manage" this pollution until the future state permitting process, long after the public review process for the DEIS is completed. "RHR would be required to submit a notice of intent to comply with the Construction Activities Storm Water General Permit. As part of the permit requirements, a storm water pollution prevention plan (SWPPP) would be developed for the Roca Honda Mine permit area. The purpose of the SWPPP is to describe the mechanisms (BMPs) to control storm water runon and runoff from the disturbed areas during construction." DEIS at 149. As noted above, the agency cannot defer review of relevant information until after the DEIS is submitted for public review.

The fact that New Mexico may issue permits for these activities does not eliminate the USFS's independent duties under NEPA. "A non-NEPA document – let alone one prepared and adopted by a state government-cannot satisfy a federal agency's obligations under NEPA. *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998 (9th Cir.2004)." South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 726 (9th Cir. 2009). The same NEPA violation was found in Klamath-Siskiyou, 387 F.3d at 998, where the Ninth Circuit rejected as "without merit" identical arguments that an agency may excuse itself from its NEPA hard look duty where a "facility operates pursuant to a state permit under the Clean Air Act."

B. The DEIS Fails to Take a Hard Look at Groundwater Impacts.

The Forest Service also failed to take a hard look at groundwater impacts. For the dewatering, the Forest Service again admits that critical information has yet to be obtained, but nevertheless issued the DEIS. "RHR estimates that dewatering of the proposed Roca Honda Mine during construction would be approximately 600 gpm to 2,000 gpm for Section 16. Section 10 discharges would be substantially less than Section 16 during construction. The actual amount cannot be accurately assessed until such time as there is sufficient drawdown data available from the depressurizing activity from Section 16." DEIS at 151.

Similar problems exist with the DEIS's failure to review the impacts from and mitigation of backfilling the mine, as well as the deterioration of water in Mt. Taylor caused by the operations.

> **Details on the chemistry of the material and of potential reactions are not known at this time** and, thus, it will be important for RHR to perform testing and to mix the materials with cement prior to placement. EPA (1975, p. 2) reports that from other mines in the area, conventional underground mining has caused deterioration of post-mine groundwater quality, most dramatically from increased dissolved radium and uranium. **Increased concentrations of dissolved metals would also be expected, including arsenic, molybdenum, selenium, and vanadium.** For EIS purposes, the oversight of backfill by NMED—a State regulatory requirement—is expected to ensure that there is no backfill using materials capable of having an adverse effect on groundwater quality.

DEIS at 177 (emphasis added). Yet, the Forest Service cannot defer such important analysis until RHR submits the needed information in the future and then to the future state permitting that is not subject to NEPA. As noted above, federal courts have rejected the argument that reliance on state-issued permits or analysis satisfied the agency's independent duty under NEPA.

> BLM argues that the off-site impacts need not be evaluated because the Goldstrike facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document -- let alone one prepared and adopted by a state government -- cannot satisfy a federal agency's obligations under NEPA. Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 998 (9th Cir.2004).

South Fork Band Council, 588 F.3d at 726.

The agency also admits that the DEIS lacks a monitoring and mitigation plan for these impacts – again improperly deferring to the future state process. "The Forest Service anticipates that the final monitoring plans for groundwater impacts at RHR will be determined by NMOSE for water levels and NMED for water quality." DEIS at 179. For these "large water level impacts" the USFS either improperly defers to the state non-NEPA process, or illegally circumscribes its own authority to regulate the impacts from the Mine:

> NMOSE can require mitigation in the form of requiring that replacement water be provided to users of groundwater, and surface impacts be offset such that there is no net effect on streamflows. While reasonable onsite mitigation can be required by the Forest Service, mitigation involving any such replacement of water to non-Federal uses is subject to requirements of the regulating State agency. NMED will specify measures required to prevent adverse water quality impacts from occurring.

DEIS at 180.

The USFS offers no legal support for its determination that it does not have any authority over the off-site impacts from the Mine, as they are related to the agency's duties to manage and protect public land under the Property Clause and the Organic Act, among other authorities. This is true both for the review and approval of the PoO as well as the ROW for the water discharge pipeline, and other SUPs/ROWs. "Congress may regulate conduct occurring on or off federal land which affects federal land. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir.1981)." Duncan Energy Co. v. U.S. Forest Service, 50 F.3d 584, 589 (8th Cir. 1995) (upholding Forest Service authority over private property interests). "It is well established that [the Property Clause of the U.S. Constitution] grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." U.S. v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979).

The Supreme Court has recognized for over a century that Congress may regulate activity on private lands as a means of protecting public property. *See* Camfield v. United States, 167 U.S. 518 (1897); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."). "[T]he power granted by the Property Clause is broad enough to reach beyond territorial limits." Kleppe

v. New Mexico, 426 U.S. 529, 538 (1976). The agency's cramped view of its authority in this case undermines its review of the Mine and fatally flaws the DEIS.

Further, as demonstrated in the attached declaration of hydrologist George Rice which is incorporated by reference herein, the DEIS significantly and unreasonably underestimates the impacts of mine dewatering on groundwater and nearby springs. For example, while the DEIS states that the nearby Mt. Taylor Mine will pump up to 4,500 gallons per minute (gpm), which is equal to approximately 7,258 acre feet per year (afy), concurrently with the proposed Mine's dewatering operations, in calculating the cumulative groundwater impacts, the groundwater model upon which the DEIS is based assumes that the Mt. Taylor mine will only pump groundwater at a rate of 640 acre feet per year (afy). Declaration of George Rice, Comment 4, pp. 11-12, attached as Exhibit 19. The actual dewatering rate at the Mt. Taylor Mine, as stated in the DEIS, is therefore over 10 times the dewatering rate that the Forest Service uses to assess cumulative groundwater impacts. Id. This significant flaw grossly underestimates the actual cumulative impacts that the Roca Honda Mine will have combined with other foreseeable uranium mining operations.

Further, the model also underestimates the duration of dewatering. While the Mine is expected to operate for 18-19 years (DEIS at 34), the model only simulates dewatering for 12 years. Rice Declaration at Comment 3, pp. 10-11. This simulation not only contradicts the stated life of the mine, it also fails to take into account any extensions of the mine life due to periods of idleness or discovery of additional ore bodies. Id.

The model used to determine dewatering impacts likewise overestimates the recharge into San Mateo Creek and therefore underestimates the impacts of dewatering. Id., Comment 1, pp. 7-8. As Mr. Rice explains, while the DEIS indicates that San Mateo Creek runs at an average of around 0.5 cubic feet per second (cfs), or approximately 224 gallons per minute (gpm) (DEIS at 102, Fig. 37), the model used to calculate impacts of dewatering assumes a recharge rate of 327 to 824 gpm, significantly higher than established flow rates.

The model also fails to evaluate the Mine's effect on other important water sources. The DEIS at 165 concedes that Grants and Milan get their drinking water from an aquifer underlying the aquifer that will be dewatered for mining operations. However, the DEIS fails to evaluate the Mine's impacts on this aquifer because it is allegedly not hydraulically connected to the Westwater. Rice Declaration, Comment 5, pp. 13-14. This position ignores the well established faults and fractures in the Westwater that may hydraulically connect the San Andreas and Westwater aquifers. Id. Moreover, the model ignores entirely the hundreds of boreholes in the area that could likewise act as preferential pathways for water and contaminants. Id., Comment 7, p. 14.

The DEIS further ignores dewatering impacts on 605 Spring. Id., Comment 6, p. 14. This omission is particularly troubling in light of the fact that 605 Spring is in very close proximity to Bridge Spring, which was evaluated for impacts from dewatering. Id. Moreover, the DEIS's failure to include dewatering impacts on 605 Spring is aggravated by the incorrect representation that the drawdown of Bridge Spring due to dewatering will be 0.7 feet. DEIS at 174. INTERA's outputs show dewatering will actually draw Bridge Spring down by 1.19 feet. Rice Declaration, Comment 13, p. 18. The DEIS also failed to analyze the potential cumulative

impacts of past, present, and reasonably foreseeable energy drilling and production on surface and groundwater quality and quantity in the region.

Finally, the modeling results are inherently unreliable because it was not verified. As Mr. Rice explains, a groundwater model must not only be calibrated (which was done in this case), but also verified. Id., Comment 8, p. 15. Verifying a groundwater model involves comparing model results to a data set that was not also used to calibrate the model. Id. In this case, that was not done and the model results are therefore unreliable.

C. The DEIS fails to take a hard look at public health impacts.

1. Physical Impacts.

The DEIS fails to take the required hard look at public health impacts. In his Declaration, attached as Exhibit 20 and incorporated in its entirety by reference herein, Dr. Doug Brugge concludes that the DEIS is deficient in several respects in its evaluation of public health impacts. First, Dr. Brugge suggests that because radon dose estimates have inherent error rates and that the estimated dose to the nearest person is very close to the regulatory limits, further investigation is warranted. Brugge Declaration at ¶ 1, p. 1. A revised and re-issued DEIS should therefore require that additional radon exposure estimates be required.

Second, Dr. Brugge notes that the occupational radon exposure limits that are required by regulation and that the DEIS touts as protecting worker safety (DEIS at 190) are, in fact, not adequate. Id. at¶ 2, p.1. A 1987 National Institute of Occupational Safety report recommended that occupational radon exposures be lowered to 1 working level month. Id. The DEIS should have disclosed this fact and analyzed the potential impacts on mine worker health.

Dr. Brugge also notes that much of the public health data and studies upon which the DEIS relies is insufficient. For example, Dr. Brugge notes that the DEIS fails to incorporate and analyze the most recent studies on uranium health effects. Id. at ¶ 7, p. 2 and Attachment B. Moreover, the data presented in the DEIS is not useful for meaningfully assessing uranium health effects. Id. at ¶¶ 4, 9, pp. 1-2.

Finally, Dr. Brugge notes that some of the health related information in the DEIS is arguably incorrect. For example, Dr. Brugge disagrees with the DEIS's interpretation of the literature relating to the susceptibility of Navajos to radon exposure. Id. at ¶ 5, p. 1. Dr. Brugge also notes that the DEIS is incorrect about radon attaching to dust or other particles. Id. at ¶ 8, p. 2.

2. Psychological Impacts.

The DEIS likewise fails to take a hard look at the proposed Project's psychological impacts. As demonstrated in the attached Declaration of Dr. Michael Edelstein, incorporated by reference herein, the DEIS is deficient in several regards. Dr. Edelstein's Declaration is attached as Exhibit 21.

First, the DEIS fails to disclose and evaluate baseline epidemiological conditions and the resulting baseline psychological conditions of the affected community. Edelstein Declaration,

No. 23, pp. 11-15. In other words without first knowing and evaluating the baseline health conditions in the communities that have already been substantially impacted by uranium mining and milling, the Forest Service cannot meaningfully disclose and evaluate the psychological impacts the proposed Project may have.

Likewise, the DEIS fails to disclose the cumulative psychological impacts of the proposed Project with psychological trauma inflicted from past uranium mining and milling. Id., Nos. 24-27, pp. 15-35. As Dr. Edelstein explains, community members living in neighborhoods and areas contaminated with waste from past uranium mining and milling face a number of psychological impacts, including depression, anxiety and post-traumatic stress disorder (PTSD). Id. While the DEIS acknowledges the proposed Project will have psychological impacts on the affected community, it fails to meaningfully analyze those impacts when combined with the impacts from existing contamination and the threat of other future uranium mining projects.

The DEIS also fails to take the required hard look at the psychological impacts of the proposed project on local indigenous communities. Id., No. 28, pp. 35-41. While the DEIS acknowledges and discloses that the Roca Honda mine will have cultural impacts on local tribal members, it fails to analyze what the psycho-social consequences of those impacts will be. Id. at 35-36. As Dr. Edelstein explains, for indigenous people in the region, the proposed Mine will not only inflict the psychological trauma of having another uranium mining operation in the community when the health and environmental effects of past mining and milling have not been addressed, it will also inflict a particular kind of psychological trauma related to desecrating Mt. Taylor. Id. at 35-37. Indigenous people conceive of Mt. Taylor as an integral part of their everyday existence. Id. When the proposed Mine threatens to destroy parts of the sacred mountain, the psychological trauma affects tribal people not only on an individual level, but also on a collective level. Id. However, the DEIS failed to explore these particular impacts.

Finally, the DEIS fails to disclose and analyze the psychological impacts that will be the result of a divided community. Id., No. 29, pp. 41-46. The DEIS acknowledges that the Roca Honda mine may result in some temporary economic benefits to the community. DEIS at 288. As a result, some community members are proponents of the Mine. Edelstein Declaration at No. 29, pp. 41-42. However, the perceived economic benefits also result in many community members becoming marginalized for their opposition to the Mine. Id. This community divisiveness results in psychological trauma impacts that the DEIS does not disclose or analyze.

D. The DEIS Fails to Fully Evaluate Mitigation Measures and Their Effectiveness.

Regarding mitigation, the DEIS's analysis of the Mine, mill, and other activities in the region, and related transportation, must also fully review mitigation of the impacts from these activities, including a full analysis of the effectiveness of each mitigation measure. NEPA requires the USFS to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 CFR § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 CFR § 1502.16(h). NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 C.F.R. §§1508.20(a)-(e). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other

interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson, 490 U.S. at 353.

The need for a detailed analysis of mitigation and its effectiveness is required under NEPA.

> [T]he Court holds that the Corps' reliance on mitigation measures that were unsupported by any evidence in the record cannot be given deference under NEPA. The Court remands to the Corps for further findings on cumulative impacts, impacts to ranchlands, **and the efficacy of mitigation measures.**

Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1238 (D. Wyo. 2005) (emphasis added).

> [NEPA] does require that an EIS discuss mitigation measures, with "sufficient detail to ensure that environmental consequences have been fairly evaluated." Methow Valley, 490 U.S. at 352, 109 S.Ct. 1835.
>
> An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare* Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with* Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. Methow Valley, 490 U.S. at 351–52, 109 S.Ct. 1835(citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.

South Fork Band Council v. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009)(rejecting EIS for failure to conduct adequate review of mitigation and mitigation effectiveness in mine EIS). "The comments submitted by [plaintiff] also call into question the efficacy of the mitigation measures and rely on several scientific studies. In the face of such concerns, it is difficult for this Court to see how the [agency's] reliance on mitigation is supported by substantial evidence in the record." Wyoming Outdoor Council, 351 F. Supp. 2d at 1251, n. 8.

Thus, the DEIS's brief listings or discussions of mitigation measures is not acceptable – the revised DEIS must fully analyze the impacts to each resource, fully analyze each mitigation measure, and fully analyze the effectiveness of each proposed mitigation measure for all potentially affected resources (e.g., surface and ground water, air, land, wildlife, recreation, religious/cultural, etc.).

As just one example of the DEIS's failure to adequately evaluate mitigation measures, the DEIS admits that the "Forest Service would develop a programmatic agreement in consultation with the ACHP [Advisory Council on Historic Preservation] and the consulting parties. This programmatic agreement would define measures to be implemented to avoid, minimize, and mitigate adverse effects to historic properties, and to address impacts to other cultural resources

and practices." DEIS at 358. The Forest Service concedes that the programmatic agreement is "to be developed between the draft EIS and final EIS" and thus only then will the public and Indian governments see the "measures to avoid, minimize, and mitigate impacts to cultural resources." DEIS at 57. This admits that such required analysis of mitigation has not yet been done – despite NEPA's requirement that all mitigation analysis, including analysis of the effectiveness of each mitigation measure, must be included in the Draft EIS. As such, this analysis must be included in the revised DEIS.

> An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2).

40 CFR § 1502.5. As held by the federal courts:

> [R]egulations mandate that an environmental impact statement be commenced "as close as possible to the time the agency is developing or is presented with a proposal." 40 C.F.R. § 1502.5 (2005). "The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." *Id.; see also* 40 C.F.R. § 1502.2(g) (2005) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made").

Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 785 (9th Cir. 2006).

Further, although the DEIS admits that there will be measurable adverse impacts to local streams, groundwater, and springs from the Mine's dewatering and operations, no mitigation is proposed or analyzed. "The Intera model simulates the Westwater Canyon Member of the Morrison Formation to be in direct contact with the Rio San José near and above Seama on Laguna Pueblo. In that location, the simulated depletion effect of the mine is 3.4 cubic feet per day as of 100 years. Although perennial streams other than the Rio San José (i.e. San Juan River, Rio Puerco) are distant from the mine, the model does provide a hydraulic connection to the Westwater Canyon Member of the Morrison Formation and should predict effects from mine dewatering." DEIS at 175.

The DEIS also admits that there may be adverse impacts to the ground waters in and around Mt. Taylor due to the mobilization of pollutants such as "radium, selenium, nitrate and, to a lesser extent, uranium" [and that] … water remaining underground after mining would likely be affected." DEIS at 176. No mitigation is proposed to reduce or minimize these impacts or to protect this invaluable and increasingly scarce public resource. The failure to analyze mitigation measures violates NEPA's procedural requirements is compounded where substantive provisions of other laws, regulations, and policies are designed to protect the recognized Native American spiritual and religious values inherent in protecting the integrity of these waters. In other words,

the Forest Service's NEPA analysis must disclose impacts and the measures available to address RHR's proposal to worsen the quality of ground and surface waters on/in Mt. Taylor, including the denial of the RHR proposal. At a minimum, the agency must (as explained in more detail below) "minimize" all of these impacts under its Organic Act and Part 228 mandates.

Finally, while the DEIS lists potential measures to mitigate psychological impacts, it fails to provide any meaningful details. Thus, it is impossible for decision makers or the public to meaningfully analyze those potential measures. Edelstein Declaration at No. 32, pp. 52-53.

E. The DEIS Fails to Review Reasonable Alternatives.

The Forest Service also failed to fully review reasonable alternatives to the activities at the Mine, and related milling and transportation activities. NEPA requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b). It must "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). Indeed, NEPA's implementing regulations recognize that the consideration of alternatives is "the heart of the environmental impact statement." 40 CFR 1502.14, quoted in Alaska Wilderness Recreation and Tourism Ass'n v. Morrison, 67 F.3d 723, 729 (9th Cir. 1995).

"The obligation to consider alternatives to the proposed action is at the heart of the NEPA process, and is 'operative even if the agency finds no significant environmental impact.' Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1277 (10th Cir.2004)." Dine Citizens Against Ruining Our Env't v. Klein, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010). "The agency may not, however, 'define the project so narrowly that it foreclose[s] a reasonable consideration of alternatives [sic].' Utah Envtl. Cong. v. Bosworth, 439 F.3d 1184, 1195 (10th Cir.2006) (quoting Davis, 302 F.3d at 1119)." Dine Citizens, 747 F. Supp. 2d at 1255.

> An agency must meaningfully consider and discuss alternatives in the process of reaching a decision. *C.f.* 40 C.F.R. § 1502.14 (describing the discussion of alternatives in an EIS and noting that it "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public").

Id. at 1256.

Here, the DEIS fails to fully consider a number of reasonable alternatives. These include: (1) denying operations on mining claims that are not supported by the discovery of a valuable mineral deposit on each claim; (2) denying operations that do not comply with the Forest Plan standards under the National Forest Management Act (NFMA) (i.e., the alternative of not amending the Forest Plan as proposed in the DEIS); (3) denying the Mine PoO until a milling plan is included in the PoO; (4) alternative milling locations and processes; (5) mitigation measures or denial due to water impacts, including re-injecting or otherwise keeping pumped groundwater on/in Mt. Taylor to reduce adverse environmental impacts and the loss of spiritual/religious values in ground and surface waters on Mt. Taylor; (6) alternative project

operations that protect, minimize, and mitigate against adverse impacts as noted herein; (7) reducing cumulative impacts by required mitigation of contamination left from prior mining operations on area public lands; (8) alternatives to economic development that will not destroy the TCP and degrade the environment and human health. *See also,* Edelstein Declaration at No. 22, pp. 9-11.

F. Failure to Fully Ascertain All Baseline Conditions.

The DEIS also fails to contain the required detailed analysis of all baseline conditions. Under NEPA, an agency must "describe the environment of the areas to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15. "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988). "In analyzing the affected environment, NEPA requires the agency to set forth the baseline conditions." Western Watersheds Project v. BLM, 552 F. Supp. 2d 1113, 1126 (D. Nev. 2008). The lack of an adequate baseline analysis fatally flaws an EIS. "[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project's effect becomes simply impossible." Northern Plains v. Surf. Transp. Brd., 668 F.3d 1067, 1083 (9th Cir. 2011). "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency fail[s] to consider an important aspect of the problem, resulting in an arbitrary and capricious decision." Id. at 1085. Failure to properly establish baseline in the past is one of the primary reasons why remediating legacy uranium mine and mill waste has proven so difficult in the Grants Mineral Belt.

In Idaho Conservation League, 2012 WL 3758161 (D. Idaho 2012), the Idaho district court concluded that the Forest Service acted arbitrarily and capriciously by authorizing exploratory hardrock mineral drilling without adequately analyzing the baseline groundwater and hydrology. Id. at *17. Such analysis should include "a baseline hydrogeologic study to examine the existing density and extent of bedrock fractures, the hydraulic conductivity of the local geologic formations, and [measures of] the local groundwater levels to estimate groundwater flow directions." Idaho Conservation League, 2012 WL 3758161, at *16. The court in Shoshone-Bannock Tribes of Fort Hall Reservation v. U.S. Dept. of Interior, 2011 WL 1743656, at *10 (D. Idaho 2011), reached a similar conclusion. There, the impact of a new mine waste dump was "highly uncertain" because BLM permitted it without studying groundwater "flows and potential contamination," even though there was evidence indicating the possibility of groundwater impacts. Id.

"NEPA requires that the agency provide the data on which it bases its environmental analysis. Such analyses must occur *before the proposed action is approved*, not afterward." Northern Plains, 668 F.3d at 1083 (emphasis added) (internal citations omitted) (concluding that an agency's "plans to conduct surveys and studies as part of its post-approval mitigation measures," in the absence of baseline data, indicate failure to take the requisite "hard look" at environmental impacts).

In this case, for example, the DEIS admits that the Forest Service would approve "mine development activities," which "would include the gathering of baseline characterization data."

DEIS at vi. The DEIS also acknowledges that RHR had submitted plans to "drill water monitoring wells, the purpose being to establish a groundwater quality baseline." DEIS at 311. Yet those plans were withdrawn without acquiring the needed information. Id.

Further, "RHR has submitted a proposed detailed groundwater monitoring plan and a work plan to establish baseline groundwater quality in response to an NMED request pursuant to RHR's discharge plan application. The data provided in the Roca Honda Baseline Data Report (2011) will be used in conjunction with data generated in future monitoring by RHR to further refine its understanding of existing water quality." DEIS at 130. This essentially admits that more work needs to be done to adequately "understand existing water quality." Under NEPA, such analysis must be in the revised DEIS and subject to public review. Also, as noted above, the DEIS lacks the required full review of current/baseline air, water and other conditions at the Mt. Taylor Mine and other facilities in the affected region.

G. The DEIS Fails to Take a Hard Look at Socio-Economic Impacts.

The DEIS also fails to take the requisite hard look at socio-economic impacts. "NEPA requires an EIS to disclose the significant health, socioeconomic, and cumulative consequences of the environmental impact of a proposed action." Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 106-107 (1983) citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Kleppe v. Sierra Club, 427 U.S., at 410; 40 CFR §§ 1508.7, 1508.8 (1982). The DEIS specifically concedes that no quantitative analysis of public costs to Grants or other nearby communities was conducted because no significant costs to local governments were anticipated.

However, this view ignores the well-documented social impacts of increased crime, drug abuse, prostitution, infectious diseases, including sexually transmitted diseases, and domestic violence associated with boom and bust extractive economies. *See, e.g.*, Kuyek, Joan and Coumans, Catherine, No Rock Unturned: Revitalizing the Economies of Mining Dependent Communities (2003), adopted and included in the administrative record for this case at: http://www.miningwatch.ca/sites/miningwatch.ca/files/No_Rock_Unturned.pdf (last viewed June 4, 2013).

Indeed, the DEIS itself acknowledges that the proposed action alternatives would cause these impacts. DEIS at 391 (increase in infectious diseases likely); 392, 420 (mining will likely result in increased incidence of sexually transmitted diseases); 396 (increase in social pathologies commonly experienced in extractive industry economies); 419 (increase in drug use and violence in extractive industry communities). These impacts would certainly impose increased costs on local law enforcement, jails, court systems and medical care facilities. Nevertheless, the Forest Service ignored those costs and failed to analyze them in the DEIS.

Further, the DEIS fails to analyze the costs to state infrastructure and resources. In the DEIS's transportation section, the Forest Service projects that two 20 ton truckloads per hour would travel over area roadways 24 hours a day. DEIS at 374. However, the DEIS fails to analyze the costs of road, bridge and other infrastructure maintenance and repair associated with this increase in truck traffic. Nor does the DEIS analyze the costs associated with the truck traffic from the Roca Honda Mine when combined with traffic from other proposed mines, such as the La Jara, Mt. Taylor, and Marquez Canyon Mine.

Finally, the DEIS fails to analyze the costs associated with the destruction of water resources. The Mine alone will result in at least 80,000 acre feet of water being removed from local aquifers. DEIS at 164. In an arid state where water is likely to become even scarcer due to the effects of global climate change, the economic value of water will increase, both in terms of its value as a commodity and its value as an economic driver. The DEIS fails entirely to quantify and analyze the costs associated with the Mine's water use and therefore fails to take the requisite hard look at the Mine's socio-economic impacts.

H. The DEIS Fails to Take a Hard Look at Transportation Impacts.

Notwithstanding the problems with the DEIS's failure to analyze impacts associated with RHR/Strathmore's proposed plan to mill ore from the Roca Honda Mine, as described elsewhere in these Comments, the DEIS fails to identify a mill site as part of its transportation analysis. As a result, the transportation impacts analysis fails to take a hard look at transportation impacts as NEPA requires.

The DEIS's failure to identify a mill location where ore from the Mine would be processed, stating only that ore would be shipped to "either an existing mill or a new mill." DEIS at 43. The arbitrary omission of the existing mill near Blanding, Utah and Strathmore's proposed Peña Ranch Mill makes the analysis of alternate transportation routes, and the proper risk assessment,[4] entirely speculative. Moreover, the Forest Service's and Applicant's failure to identify a mill site results in a complete inability to determine whether ore transport routes would have cumulative impacts and the extent of those impacts. The DEIS's hypothetical risk analysis prevents the public from meaningfully commenting on the Forest Service's analysis.

Further, the DEIS concludes that ore transportation would not result in any cumulative impacts. DEIS at 377. Although it is impossible to meaningfully analyze cumulative impacts without identifying a mill where ore will be processed, the conclusion that there will be **no** cumulative impacts ignores the fact that there are several other existing and proposed uranium mines in the Mine's immediate area which will also be transporting ore. The DEIS's conclusion also ignores the cumulative transportation impacts associated with other industrial extraction activities in the region such as coal mining, oil and gas extraction, and possible timber operations.

[4] The risk assessment itself is based on outdated publications from the Nuclear Regulatory Commission. DEIS at 376. Instead of relying exclusively on outdated risk assessments of limited utility, the Forest Service should examine actual impacts and risks posed by historic mining in the area. For example, the Old Church Rock Mine, operated by United Nuclear Corporation, left significant waste, attributed primarily to ore transportation, along roadsides and adjacent properties, resulting in long-term radiation exposure to residents at levels far exceeding regulatory levels. In the Matter of Hydro Resources, Inc., 63 NRC 41, 52-53 (2006). Likewise, ore transportation at the abandoned Mariano Lake Mine resulted in high levels of radiation along roads and nearby residences with the attendant high levels of exposure and risk of disease. Arcadis Consulting, Mariano Lake Mine Site, Interim Removal Action, Phase 1 Preliminary Draft Report at 11 (Sept. 2011), attached as Exhibit 22.

Finally, the DEIS fails entirely to analyze the environmental impacts associated with waste disposal from the Mine. According to the PoO, the Mine will have a water treatment plant designed to treat mine water for discharge. PoO at 37. Water treatment will generate a waste stream containing highly concentrated levels of uranium, radium, and other radioactive and hazardous wastes. There is no clarification of the regulatory regime for handling and shipping wastes where, among other possibilities, these wastes may qualify as source materials, 11(e)(2) byproduct materials under 42 U.S.C. §2014(e)(2), or low level radioactive waste. Although details are limited, it appears that the water treatment wastes would concentrate radioactive and hazardous wastes in a manner requiring transportation to appropriately licensed facilities.

The DEIS does not provide any analysis of the impacts associated with solid, semi-solid, or liquid waste transportation (and any additional processing and disposal) and therefore the Forest Service has failed to take a hard look at those impacts.

I. The DEIS Does Not Fully Analyze Radioactive Air Pollution Emissions.

Despite the unique health and environmental impacts caused by radionuclide emissions from active and inactive uranium mines, the DEIS ignores these impacts by assuming future compliance with the Clean Air Act, which requires special regulation of uranium mines due to the hazardous air pollutants, including radon. DEIS at 189. Instead of explaining these impacts, the DEIS minimizes the impact of radon and other radionuclide emissions by focusing on the role tobacco plays in radon inhalation. DEIS at 435, 436. As written, the DEIS blames the victims for smoking and diverts attention from the public health dangers to nearby residents, recreational and cultural users of public lands, and distant persons who may breathe dust laced with radon and other decay chain materials. The DEIS limits its analysis to a radon model prepared by SENES which is based on "receptors", i.e., people, located only a few miles from the mines. DEIS at 191. The impacts on other "receptors" - the population living within 50 miles of the proposed Roca Honda Project - are simply ignored.

The DEIS simply accepts the SENES conclusions and fails to independently analyze or recognize the abundant literature that confirms radon and materials in its decay chain attached to other particles, including fine dust particles and can stay in the air for many miles and days before releasing alpha radiation and other dangerous radiation. Without explanation, the DEIS reaches the unsupported and vague conclusion that "radiation from uranium and its decay products does not travel far." DEIS at 234.

The unsupported SENES assertions regarding radionuclide and radiation dispersal are contradicted by a published U.S. EPA conclusion that the health of populations living at a distance greater than 80 km (50 miles) from a tailings pile can be affected by radiation from radon that is emitted, especially when radium, radon, and progeny attaches to dust particles. Final Environmental Impact Statement for Standards for the Control of Byproduct Materials from Uranium Ore Processing Volume I, EPA 520/1-83-008-1 Washington, DC: U.S. EPA, 1983, adopted and incorporated into the administrative record for this case at:

http://nepis.epa.gov/Exe/ZyNET.exe/2000XSR7.txt?ZyActionD=ZyDocument&Client=EPA&Index=1981%20Thru%201985&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField

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The radionuclide transport mechanisms from mines and mills are quite similar. Instead of relying on SENES, the Forest Service should base a new radon transport analysis on reliable sources such as the BEIR reports of the National Research Council's Committee on Health Risks of Exposure to Radon. "BEIR" stands for "Biological Effects of Ionizing Radiation," and it's the acronym given to a long-standing National Academy of Science committee that has conducted periodic reviews of the world's literature on ionizing radiation.

The most recent BEIR report is BEIR VII (2006), which updated risk assessments based on radiation exposures at levels seen in various reactor and nuclear materials accidents and on health status of people exposed occupationally and environmentally. It addresses, among other things, why the committee continues to accept the no-threshold linear response theory of radiation effects instead of a theory that purports to document a threshold at which radiation does not cause biological damage. To the extent that existing, relevant studies may not be adequate to model the releases at the Roca Honda project, adequate studies should be provided with significant EPA and NRC input and oversight and released for public comment in a new DEIS.

The inadequate analysis of direct impacts of radionuclide emissions and radionuclide dispersal and transport from the Roca Honda project is compounded by the failure to analyze the cumulative impacts of radionuclide emissions from past, present mines and mills ("legacy wastes") that may have an overlapping area of impacts due to the 50 mile area of potential health effects. DEIS at 195. Instead of providing analysis of the likely impacts of these legacy wastes, the cumulative impacts section summarily concludes that EPA regulation would mitigate the impacts, while other portions of the DEIS rely on SENES conclusions that there will not be any impacts. DEIS at 195. The DEIS wrongly asserts that the location of other mines, which are only 8 miles from the Roca Honda Mine, would prevent exposures and "results in public doses significantly different from background radiation doses from radon." DEIS at 195. These unreliable SENES conclusions ignore the established EPA determination that radon does have health impacts at distances of 50 miles from each of the legacy waste sites, as well as the proposed mine and mill project.

Last, the DEIS lacks an independent analysis and disclosure of the information that will be part of the EPA permitting under the Clean Air Act provisions addressing National Emissions of Hazardous Air Pollutants. This data and analysis should be included in the DEIS to inform the public and ultimate government decisionmakers on the impacts within EPA jurisdiction and control. Instead, the DEIS describes a series of criteria and model inputs used by a private contractor that will be presented, at some undefined date, to EPA to determine whether or not this proposed mine can comply with the Clean Air Act's special hazardous air pollution requirements addressing radon from uranium mines. DEIS at 192. However, assertions of future potential regulatory compliance with other laws are not sufficient to meet NEPA requirements that the Forest Service must inform the public and its decisionmakers by providing an

understandable analysis of the impacts of anticipated radionuclide emissions within the NEPA document.

J. The DEIS Fails to Take a Hard Look at Environmental Justice Impacts.

The DEIS correctly indicates that the communities impacted by the proposed Mine are environmental justice communities both by virtue of containing significant minority populations and low-income populations. DEIS at 265-268. The DEIS also correctly notes that properly evaluating the Mine's anticipated impacts in an environmental justice context requires an analysis of whether the Mine will have disproportional impacts on the environmental justice community. DEIS at 270; *see also,* Council on Environmental Quality, Environmental Justice: Guidance Under the National Environmental Policy Act at 14-15 (1997). Despite these accurate observations, the Forest Service nevertheless fails to take a hard look at the environmental justice impacts of the proposed Mine.

The most glaring deficiency in the DEIS with respect to Environmental Justice impacts is the Forest Service's failure to analyze whether impacts from legacy waste, combined with the impacts of the proposed Mine and other proposed uranium mining projects, impact the local community disproportionally. Indeed, the DEIS entirely dismisses the importance of legacy waste impacts in the environmental justice context, stating, "the actions and their consequences associated with … legacy issues are not part of the proposed action and would not occur at the proposed Roca Honda mine." DEIS at 272; *see also* Id. at 442.

Rather than ignoring the impacts of legacy waste, the Forest Service should have examined whether the legacy impacts, combined with the impacts of the proposed Mine and other reasonably foreseeable uranium projects, will disproportionally impact the affected communities. In other words, the Forest Service should have evaluated whether concentrating radiologically polluting industries in communities that already carry the burden of past contamination represents environmental injustice. Moreover, as Dr. Edelstein notes in his Declaration, the psychological impacts alone of proposing a new uranium mining operation in and near communities that continue to suffer the health and environmental impacts from past uranium operations is significant. Edelstein Declaration at Nos. 24-27, pp. 15-35; No. 30, pp. 46-47.

The DEIS also fails to disclose and analyze whether transporting the Mine's ore to a mill will have disproportionate environmental impacts on environmental justice communities. If the ore from the Mine will be transported to the proposed Peña Ranch Mill, the DEIS should have disclosed and analyzed the impacts on low income and minority communities along the likely transportation routes. If ore will be transported to the White Mesa Mill or proposed Piñon Ridge Mill, the DEIS should have disclosed and analyzed the impacts on low income and minority communities along on those likely transportation routes. Moreover, if the ore will be transported to the White Mesa Mill or proposed Piñon Ridge Mill, the Forest Service has an obligation to consult with any tribes and communities who might be on or near the likely transportation routes.

Finally, the DEIS fails to disclose and analyze whether the loss of water resources will disproportionally affect nearby communities. In an environment of diminishing water supplies due to global climate change, the Forest Service should have taken a hard look at the long term

impacts of taking significant amounts of groundwater – a public resource – and giving it to a private rancher at the expense of nearby environmental justice communities. Further, the Forest Service failed to examine whether the massive dewatering project that it concedes will dry up springs will have a disproportionate impact on environmental justice communities.

VII. Failure to Comply with the National Historic Preservation Act.

Related to the numerous violations of NEPA detailed above, the USFS violated the consultation and other duties of the NHPA.

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

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

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). *See also* 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA.").

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

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of the Roca Honda Mine, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. *See* Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2). *See also* Pueblo of Sandia, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties). Consultation "must be 'initiated early in the undertaking's planning,' so that a broad range of alternatives may be considered during the planning process for the undertaking." Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR § 800.2(c)(2)(ii). "The agency official **shall ensure that the section 106 process is initiated early in the undertaking's planning**, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added).

The NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). *See also* Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771.

Here, as detailed above, consideration of numerous aspects of the Mine, from the milling/processing and transportation to impacts analysis and mitigation, are either entirely missing or deferred until sometime in the future. Such omissions and delays violate the NHPA requirements to review the impacts from the undertaking (i.e., review and approval of the PoO and SUP/ROW) and consult with the Native American governments about the operations/impacts at the earliest possible time. In addition, deferring USFS review to the state of New Mexico regarding the critical water and other issues makes these failures worse, as New Mexico is under no NHPA obligations.

VIII. The DEIS Is Based on Incorrect and Unsupportable Assumptions and Positions Regarding the Alleged "Entitlement" to Have the Project Approved Under the Mining Law.

The DEIS states that: "The applicant has the right to exercise their rights under U.S. Mining Laws to develop and remove the mineral resources as set forth by the General Mining Law of 1872 as amended. These laws provide that the public has a statutory right to conduct prospecting, exploration, development, and production activities (1872 Mining Law and 1897 Organic Act), provided they are reasonably incident (1955 Multiple Use Mining Act and case law) to mining and comply with other Federal laws." DEIS at iii. The DEIS was similarly based on the USFS's belief that, due to RHR's filing of mining claims, the USFS cannot categorically prohibit mining or deny reasonable and legal mineral operations under the mining laws. DEIS at 30. Thus, according to the DEIS, Roca Honda Resources has a statutory right to conduct its operations based solely on the fact that the company has blanketed the project lands with mining claims.

According to the USFS, the 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. 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. Here, there is no evidence in the record that these claims are valid.

Accordingly, in addition to making an arbitrary and capricious decision without evidentiary support, the USFS violated the Federal Land Policy and Management Act and the 1872 Mining Law (as amended) by not requiring the company to pay Fair Market Value (FMV) for the use of public lands not covered by valid mining claims, based on the lack of any evidence that the mining claims at the Project site contain locatable minerals and the requisite discovery of a valuable mineral deposit. Similarly, the agencies' position also violates provisions of FLPMA and the Multiple Use Sustained Yield Act, National Forest Management Act, 1897 Organic Act, and other laws mandating that the agencies manage, or at least consider managing, these lands for non-mineral uses – something which the Forest Service has failed entirely to do or consider in this case.

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

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

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

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

292 F.Supp.2d at 47. Although the "UUD standard" was at issue in that case (BLM's duty to "prevent unnecessary or undue degradation" under FLPMA), the holding that development "rights" under the mining laws only apply to lands covered by valid claims applies equally to the USFS in this case. The court was clear as to what was required to "perfect" a mining claim:

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

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

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

Id. at 48. In its review of the proposed Roca Honda Mine, the USFS erroneously believed that it did not have – and never even considered – this "wide discretion" to "approve or disapprove" any part of the Plan of Operations.

As stated in the USFS Minerals Manual, "In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the Forest Service. These require a claimant to: … 2. Discover a valuable mineral deposit. … (and) 7. Be prepared to show evidence of mineral discovery." FSM 2813.2.

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. According to the USFS Minerals Manual: "A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands." FSM §2811.5.

> The term "valid claim" often is used in a loose and incorrect sense to indicate only that the ritualistic requirements of posting of notice, monumentation, discovery work, recording, annual assessment work, payment of taxes, and so forth, have been met. This

> overlooks the basic requirement that the claimant must discover a valuable mineral deposit. Generally, a valid claim is a claim that may be patented.

FSM §2811.5.

According to the company's own review, its projections for operating a sufficiently profitable mine (even if they were verified by the USFS, which has not occurred) is based on a price per pound of U_3O_8 of $75 – which is far above the current price of 42.50/lb[5] – and not supported by any objective price projects for the next few years. *See* Technical Report on the Roca Honda Project, McKinley County, New Mexico, USA, August 6, 2012, at 1-8. Moreover, recent project abandonments and divestment in uranium projects suggest that an increased demand for uranium in the foreseeable future is unlikely. *See, e.g.*, Green and Sweeney, Yellowcake Fever: Exposing the Uranium Industry's Economic Myths at 3-4 (April 2013) (noting that transnational mining giant BHP Billiton cancelled its Olympic Dam uranium project in Australia and dissolved its Uranium Division; also noting that uranium mining company Cameco took a $162 million write down on its Australian Kintyre project due to a depressed uranium market), adopted and incorporated into the administrative record for this case at: http://www.acfonline.org.au/sites/default/files/resources/ACF_Yellowcake_Fever.pdf (last viewed June 4, 2013).

Thus, there is no evidence in the record proving the discovery of a valuable mineral deposit. Indeed, the evidence shows that the Project is uneconomical at current, or reasonably anticipated, market prices.

In this case, USFS's assumptions of "rights" or an "entitlement" under the Mining Law are erroneous. At a minimum, the agency's assumptions of these rights/entitlements should have been investigated and supported by detailed factual evidence – evidence lacking in this case.

IX. Failure to Comply with Organic Act and Part 228 Regulations' Duty to Minimize All Adverse Environmental Impacts.

Even if the filing of the mining claims, without any evidence that all the claims are valid, limits the USFS's authority (which as shown herein is not legally correct), the agency must still comply with federal laws such as the 1897 Organic Act and its implementing 36 CFR Part 228 regulations. As noted herein, however, the DEIS fails to show that the USFS met its duties to "minimize adverse environmental impacts on National Forest surface resources," including water resources, fish and wildlife, and habitat, cultural/religious, and other resources under 36 CFR Part 228. This includes analyzing and choosing the least destructive alternative for each project facility as well as the overall Project itself. This includes all Project activities such as ground water pumping, mining, ore and other dumps/storage, milling, transportation, etc.

[5] Uranium prices have remained relatively flat over the last 18 years, with the exception of two speculative bubbles in the last six years., adopted and incorporated into the administrative record in this case at: http://www.infomine.com/investment/metal-prices/uranium-oxide/all/ (last viewed June 6, 2013).

Under the Organic Act, the agency "can reject an unreasonable plan and prohibit mining activity until it has evaluated the plan and imposed mitigation measures. …The Forest Service can regulate conduct that is reasonably incident to mining. The Forest Service can prohibit the initiation or continuation of mining operations for failure to abide by applicable environmental requirements." Siskiyou Regional Education Project v. Rose, 87 F. Supp. 2d 1074 (D. Or. 1999). The Forest Service has a judicially enforceable duty to prevent destruction of National Forest System lands and to minimize adverse environmental impacts to National Forest surface resources.

The Organic Act requires that the agency "*must* . . . ensure that its approval of a plan or project does not result in the 'destruction' and 'degradation' of the public forests." Clouser v. Madigan, 1992 WL 694368, at *4 (D. Or. 1992)(emphasis in original), *aff'd sub nom.* Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994). *See also* Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1170 (D. Montana 2010) (Forest Service PoO approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries).

The DEIS fails to show how the agency will minimize adverse impacts to all affected resources. At best, the listed mitigation measures may somewhat reduce some impacts. However, in addition to failing to analyze the effectiveness of these measures (see NEPA discussion), such reduction of impacts does not "minimize" the adverse impacts. *See* Trout Unlimited v. U.S. Department of Agriculture, 320 F.Supp.2d 1090, 1108-10 (D. Colo. 2004)(rejecting Forest Service argument that reduction in adverse impacts satisfies duty to minimize adverse impacts).

In addition to failure to truly minimize all adverse impacts to each resource, and although MASE stresses that Alternative 3 would be illegal under a number of laws discussed herein, compared to Alternative 2 (RHR's proposed plan), Alternative 3 will result in fewer adverse impacts and thus Alternative 2 cannot be approved. In other words, Alternative 2 does not "minimize adverse impacts" and thus would violate the agency's duties under the Organic Act and 228 regulations.

Additionally, and as noted herein, the DEIS lacks information on the water discharge and other critical aspects of the Mine. Without such information, the agency cannot have "minimized" adverse impacts from impacts it has failed to fully analyze. For other impacts, such as dewatering, there is no assurance that impacts to "fisheries and wildlife" have been truly minimized. As noted herein, the dewatering will eliminate or significantly reduce flows in area streams. Yet no mitigation is proposed to minimize the loss of water that will directly and indirectly impair or eliminate fish habitat. The beneficial use/designated use protection is not limited to streams which support fish; a water body composed of solely plants and invertebrates is also protected. Bragg v. Robertson, 72 F. Supp.2d 642, 662 n.38 (S.D. W. Va. 1999) (citing EPA, Water Quality Standards Handbook § 4.4) *reversed on other grounds* 248 F.3d 275 (4th Cir. 2001). This is true not only for aquatic species, but also for wildlife and riparian vegetation dependent on the springs, seeps, and waters that will be adversely affected by Mine operations.

X. **Water Quality Protection.**

The DEIS also fails to ensure that all requirements of the federal Clean Water Act have been met. Under the Clean Water Act (CWA) Section 313, the agencies cannot approve any activity that may result in a violation of a water quality standard or water quality protection requirement.

> 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). Judicial review of this requirement is available under the Administrative Procedure Act. Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 852 (9th Cir.1987).

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998). *See also* Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182-83 (9th Cir. 1990); Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1424-25 (9th Cir. 1989); Hells Canyon Presv. Council v. Haines, 2006 WL 2252554, *4-5 (D. Or. 2006) (USFS mine approvals must comply with CWA standards). Under the Organic Act, and the 36 CFR Part 228 regulations, the agency cannot approve a mining PoO 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 water quality and habitat. *See* Rock Creek Alliance v. Forest Service, 703 F.Supp.2d 1152, 1170 (D. Montana 2010); (Forest Service PoO approval violated Organic Act and 228 regulations by failing to protect water quality and fisheries).

Under the CWA and EPA regulations, water quality standards include the protection of beneficial uses. "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 CFR § 131.2. The minimal designated use for a water body is the "fishable/swimmable" designation which "provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2).

> The text [of the CWA] makes it plain that water quality standards contain two components. We think the language of § 303 is most naturally read to require that a project be consistent with *both* components, namely, the designated uses *and* the water quality criteria. Accordingly, under the literal terms of the statute, 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 Department of Ecology, 511 U.S. 700, 714-15 (1994) (italics emphasis in original). Thus, the CWA prohibits any activity that will not fully protect all of the designated uses for that waterbody.

The Forest Service also cannot approve the project before the information and data necessary for NPDES permits have been obtained. *See* Dubois v. U.S. Dept. of Agriculture, 102 F3d 1273 (1st Cir. 1996). The Court in Dubois ruled that under the CWA, "the Forest Service was obligated to assure itself that an NPDES permit was obtained before permitting the [requested activity]." 102 F. 3d at 1300. As discussed herein, the Forest Service cannot meet its

duty under 36 CFR 228.8 to ensure that the project will comply with the CWA without an understanding of the specific nature of the discharges.

The project also cannot be approved without the required CWA Section 401 Certification. Hells Canyon Preservation Council v. Haines, 2006 WL 2252554, *4 (D. Or. 2006). Although the DEIS mentions that state water quality proceedings will be forthcoming, no information is provided about the 401 Certification, nor evidence that the project will comply with all water quality standards (outside of a vague reference to the state process). No detailed information is provided about the discharge and as noted above, the DEIS admits to a lack of information about this critical issue.

Relatedly, there is no information about the generation and disposal of byproducts from the future water treatment plant. This is especially troubling given that radiological, heavy metals, and other harmful pollutants will be "treated" and supposedly removed from the waste stream. The agency cannot comply with NEPA, and ensure compliance with the CWA and Organic Act, without a full analysis of all aspects of water quality treatment, including the generation and disposal of treatment residue and byproducts, including potential 11(e)(2) waste.

XI. Bonding and Financial Assurance.

"Forest Service regulations at 36 CFR 228.13 require a mine operator to furnish a reclamation bond before a plan of operations is approved." DEIS at 46. Under 36 CFR Part 228, financial assurance ensures the reclamation would be completed in the event of abandonment of the site or failure to comply with the PoO. As noted by the recent GAO Report on uranium mining and financial assurance/bonding: "The Forest Service also directs operators to provide a financial assurance for the full cost of reclamation. However, in contrast to BLM, the Forest Service relies on its technical staff at the district, forest, or regional level, not the operator, to calculate the estimated reclamation costs. It uses formal agency guidance issued in 2004 to calculate the estimated reclamation costs and proposes the amount of the financial assurance to cover those costs to the operator." Uranium Mining: Opportunities Exist to Improve Oversight of Financial Assurances, GAO-12-544 (May 2012), at 17, excerpts attached as Exhibit 23. "Forest Service guidance directs its staff to obtain financial assurances to cover the estimated reclamation costs for mining operations on National Forest System lands." GAO Report at 17, n. 26.

However, neither RHR's PoO or revised Reclamation Plan include an estimate for the cost of site reclamation or any analysis of the most appropriate financial assurance instrument. In exercising its authority under the bonding provision, the Forest Service must comply with its NEPA mandate by disclosing and analyzing the amount, scope, and form of financial assurance in a revised DEIS to make certain that such a critical issue is subjected to public review and comment.

The recent GAO Report highlighted the importance of adequate financial assurances/bonds:

> Having adequate financial assurances to pay for reclamation costs for federal land disturbed by uranium operations is critical to ensuring that the land is returned to its

> original state if operators fail to complete the reclamation as required. BLM, the Forest Service, DOE, and NRC play key roles in establishing and reviewing these financial assurances for uranium operations on federal land.

GAO Report at 39. As stated in the Forest Service's bonding policy: "Bonds should address all FS costs that would be incurred in taking over operations because of Operator default." Training Guide for Reclamation Bond Estimation and Administration For Mineral Plans of Operation Authorized and Administered Under 36 CFR 228A, USDA – Forest Service, April 2004, at p. 7. http://www.fs.fed.us/geology/bond_guide_042004.pdf. (USFS document adopted and included into the administrative record for this case).

Despite the fact that the reclamation bond is considered a mitigation measure needed to ensure that the Project complies with federal law, the USFS has yet to provide the public with any details of the bond, as required by NEPA. Failure to calculate a bond amount is particular troublesome in context of uranium production where previous agency approvals that did not include a bond "allowed many companies to walk away from their sites when project operations halted mid-production." DEIS at 410. The critical role of bonds is confirmed by the DEIS, but is not accompanied by the necessary analysis of an adequate bond.

> Past activities conducted under lax regulations, lack of closure bonds, and limited oversight have left contaminated sites that are being investigated and remediated by State and Federal agencies in New Mexico and elsewhere.

DEIS at 442. The public has not been allowed to see the proposed bond, and never allowed to comment upon these mitigation measures, including whether they were adequate or would be effective in protecting public resources.

XII. The Forest Service Failed to Properly Designate and Include All Cooperating Agencies.

NEPA's "one EIS" requirement compels all agencies of the federal government to cooperate in the analysis of a federal action such as the Roca Honda project to ensure a comprehensive and efficient analysis of the impacts on the environment from the perspective of present and future generations. 42 USC §§ 4331(a), 4332(2). The NEPA regulations implement the mandate that Federal agencies prepare NEPA analyses and documentation "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. 40 CFR §§ 1501.6, 1508.5. This "cooperating agencies" requirement is consistent with the NEPA mandates that prevent the federal officials from manipulating and segmenting analysis of a project so as to avoid the required analysis of the full project by sweeping difficult problems under the rug.

Thus, all such federal agencies must be included as cooperating agencies where such agencies have jurisdiction or special expertise. Although it is not mandatory for all federal, state, and local governments with special expertise to participate, it is the lead agency's duty to take the necessary steps at the "earliest possible time" to provide a meaningful opportunity for such government entities to participate as cooperating agencies. Instead of relying on an isolated and segmented approach, the Forest Service must utilize the analysis and proposals of the

"cooperating agencies" to the "maximum extent possible." 40 CFR §§ 1501.6(a)(2). As one court noted in invalidating an EA for uranium mining and leasing where BLM was a cooperating agency due to its concurrent jurisdiction with the Department of Energy over the public lands, but EPA was not included as a cooperating agency:

> [T]he Court concludes that DOE *was* required to ''[r]equest the participation of [EPA] in the NEPA process at the earliest possible time.'' 40 C.F.R. § 1501.6(a)(1). Contrary to DOE's argument, a federal agency is a ''cooperating agency in the NEPA process not only if it has ''jurisdiction by law,'' but also if it has ''special expertise'' with respect to the environmental issues involved.'' 40 C.F.R. § 1508.5. The EA itself indicates that EPA has special expertise with respect to uranium mining, specifically, radon emissions from uranium mines. (AR002634 (discussing standards established by EPA governing radon emissions from uranium mines); AR002709 (same).) *See also* 40 C.F.R. § 61.22 (''Emissions of radon–222 to the ambient air from an underground uranium mine shall not exceed those amounts that would cause any member of the public to receive in any year an effective dose equivalent of 10 mrem/y.''). *See generally* 40 C.F.R. pt. 61 subpt. B (creating ''National Emission Standards for Radon Emissions from Underground Uranium Mines'').
>
> Therefore, EPA was a ''cooperating agency'' under 40 C.F.R. § 1508.5. As a result, 40 C.F.R. § 1501.6(a)(1) *required DOE to request participation of EPA in the NEPA process at the earliest possible time*.

Colorado Environmental Coalition v. Office of Legacy Management, 819 F.Supp.2d 1193, 1216 (D. Colo. 2011)(emphasis supplied). It is not enough that some agencies are included where NEPA requires that ***all*** cooperating agencies be included. Id.

Here, EPA and three New Mexico agencies have been listed as cooperating agencies, although their contribution to the preparation of the DEIS is not apparent. DEIS at i. As stated above, EPA jurisdiction and expertise in radionuclide emissions were ignored in favor of unsupported assertions of SENES. It is unclear what, if anything, the New Mexico agencies contributed regarding their respective areas of jurisdiction and expertise regarding water impacts and other issues where "details of the discharge plan are not now available to the USFS [and] the full discharge plan will require approval by the NMED." DEIS at 175. It appears that these four agencies are merely listed in the DEIS introduction and were not involved as true cooperating agencies, as contemplated by the CEQ regulations. 40 C.F.R. § 1501.6 (describing duties of lead and cooperating agencies).

Further, the DEIS does not identify any attempt by the Forest Service to invite or to ensure the participation of **all** cooperating agencies with jurisdiction over the Roca Honda project, which also include, at a minimum, the Bureau of Land Management and Nuclear Regulatory Commission. Although the Forest Service controls the surface management and has a dominant role, BLM also has jurisdiction of all federal minerals, including the targeted uranium. As explained above, the purpose of uranium mining is to provide feedstock for milling into yellowcake, over which the NRC has jurisdiction. Further, the NRC would have jurisdiction over the possession of source material and 11(e)(2) byproduct material. NRC has already engaged in its preliminary review of the Peña Ranch milling segment of Strathmore's Roca Honda Project. *See*, Exhibit 10, NRC Document ML13003A041; Public Meeting Summary for

the Strathmore Resources, U.S. Ltd/Roca Honda Resources LLC Presubmission Audit for the Proposed Peña Ranch Conventional Uranium Mill Project. In addition to a site tour and public meeting, "NRC staff reviewed RHR's draft application, composed of a Technical Report (TR), a separate Environmental Report (ER), and supporting appendices." Id.

In preparing a new DEIS with full cooperating agency participation, Forest Service should be aware that other federal agencies that may have expertise and/or jurisdiction include the Army Corps of Engineers, Department of Energy, Fish and Wildlife Service, Federal Energy Regulatory Commission, and U.S. Department of Transportation.

XIII. The Proposed "Action Alternatives" Do Not Comply with the United States' International Human Rights Obligations.

As the lead agency responsible for evaluating and ultimately approving or rejecting the proposed PoO, the Forest Service has ultimate responsibility for ensuring the United States upholds all its legal obligations, including those embodied in human rights treaties. In this case, the DEIS implicates rights codified in two human rights treaties: the American Declaration of the Rights and Duties of Man ("American Declaration") and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").

As a member of the Organization of American States that has ratified the American Declaration on the Rights and Duties of Man, the United States is bound by its obligations. Inter-American Commission on Human Rights, Report No. 43/10, Admissibility, Mossville Environmental Action Now v. United States (March 17, 2010). Further, the United States has stated that it endorses the UNDRIP and its provisions. *See*, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted and incorporated into the administrative record in this case at: http://usun.state.gov/documents/organization/153239.pdf (last viewed June, 6 2013).

A. The Project will Violate MASE Members' Right to Culture and Religion.

Article 13 of the American Declaration provides, in relevant part, "[e]very person has the right to take part in the cultural life of the community." Article 3 provides, "[e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private." The Inter-American Commission on Human Rights (Commission) has recognized the intimate ties between indigenous cultural and religious practices and land in the context of interpreting indigenous peoples' right to property. The Commission found:

> More particularly, the organs of the Inter-American System of Human Rights have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the community as a whole and according to which *the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly*.

Mayan Indigenous Communities of the Toledo District v. Belize at ¶ 114 (emphasis added).

Other international instruments also shed light on the State's obligations under Articles 3 and 13 in this case. The International Labor Organization Convention 169, Article 5, provides the following with respect to the right to take part in the cultural and religious life of the community in the context of indigenous communities:

> In applying the provisions of this Convention[,] the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

Further, Article 13.1 provides:

> In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

The UNDRIP Articles 8.1, 11, and 25 also speak to this issue. Article 8.1 is particularly unequivocal in mandating that, "[i]ndigenous peoples have the right not to be subjected to … destruction of their culture."

Finally, the International Convention on Civil and Political Rights in Article 27 provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In this case, the Forest Service acknowledges that Tribes and Pueblos in the region have historic and contemporary cultural and religious ties to Mt. Taylor, including the proposed permit area. DEIS at 305-306; 330-337. Further, the DEIS states that the impacts of both Alternatives 2 and 3 on cultural practices and cultural and historic properties would be "significant", "irreparable", and "unavoidable." Id. at x, 358,445. Because the action alternatives will unavoidably and irreparably adversely impact the cultural/religious practices of tribal members, including MASE members affiliated with Tribes and Pueblos, if the Forest Service approves either of those alternatives, it will be violating the human rights of those tribal members as guaranteed by treaty. The Forest Service must not, therefore, approve either action alternative.

B. The Proposed Project Will Violate MASE Members' Right to Health.

Article 11 of the American Declaration guarantees the right of "every person" to "the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources." The

Commission has interpreted an analogous provision in the American Convention to include the following:

> … the essence of the State obligation to comply with legal protection to guarantee the social and economic aspirations of its people, giving priority to their needs for health, food and education. Prioritizing the "right to survive" and "basic needs" is a natural consequence of the right to personal security.

Inter-American Commission on Human Rights, Annual Report 1988, ¶ 322, OEA/Ser.L/V/II.74, Doc. 10, rev. 1 (Sept. 16, 1988).

Further, the Commission has issued precautionary measures in order to protect the right to health encompassed in the American Convention. In San Mateo de Huanchor Community v. Peru, the Commission issued a precautionary measure based on the petitioners' ongoing exposure to toxic mine waste sludge, finding "[t]he administrative decisions that were taken were not observed, more than three years have elapsed, and the toxic waste sludge of the Mayoc field continues to cause damage to the health of the population of San Mateo de Huanchor, whose effects are becoming more acute over time." San Mateo de Huachor Community v. Peru at ¶ 59, Report No. 69/04, OEA/Ser.L/V/II.122, Doc. 5, rev. 1 (2004).

Finally, the Inter-American Court on Human Rights (Inter-American Court) has likewise recognized the link between a clean environment and the right to health. In Case of the Yakye Axa Indigenous Community v. Paraguay, the Inter-American Court noted:

> Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of natural resources found on them is closely linked to obtaining food and clean water.

Case of the Yakye Axa Indigenous Community v. Paraguay at ¶ 167, Complaint No. 12.313, Judgment (Merits, Reparations and Costs) (June 17, 2005).

Similar language in other international instruments has also been interpreted to include the positive right of a clean and healthy environment. The Committee on Economic, Social and Cultural Rights' (CESCR) General Comment 14 provides the most comprehensive interpretation of this right. General Comment 14 specifically interprets Article 12 of the International Covenant on Economic, Social and Cultural Rights, which guarantees the right of "everyone to enjoyment of the highest attainable standard of physical and mental health." In interpreting this Article, the CESCR concluded:

> [T]he drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and *extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and*

> *potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.*

CESCR, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) at ¶¶4, 11, E/C.12/2000/4 (Aug. 11, 2000) (emphasis added). In the context of indigenous peoples, the CESCR further determined that:

> [T]he Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Id. ¶ 27.

The DEIS concedes that the proposed Roca Honda Mine will have similar impacts on members of the community where the mine will be located, particularly on indigenous populations. The DEIS states:

> The Native concept of health does not separate environmental and human experiences; essentially all people and all living things are connected. This means that any impact to the environment is perceived to impact the health of the Native peoples. Water contamination was the primary concern of all of the tribal groups when it came to health impacts (Bonne et al., 2012; Luarkie et al., 2012; Juanico et al., 2012). Water is not only important for farming practice and daily living; water is also a very important component of spiritual health in these communities. …
>
> This health belief likely means that any impacts to the environment resulting from the proposed action would result in human health impacts to tribal members. These impacts would be comprised of mainly mental and spiritual health impacts, both of which are key components of overall well-being (WHO, 1946).

DEIS at 414. Moreover, neither the Forest Service nor the applicant proposes any meaningful measures to address the violation of community members' human rights as guaranteed by treaty. Instead, the DEIS offers nothing more than vague and bland assurances that Tribes will be involved in conversations about impact mitigation at some undisclosed future time and that health impacts will be minimized to the "greatest extent possible." Id. at 414-415.

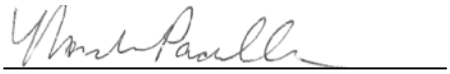
Non-indigenous community members' health will also be adversely impacted by the proposed Mine, particularly given that many community members, both indigenous and non-indigenous struggle under the burden of contamination from past uranium mining and milling. The DEIS states:

> Stress and mental health are key components of overall health and well-being. Unmanaged stress has physical health consequences that include weakened immune systems, weakened functioning of the circulatory and metabolic systems, and increased incidence of cardiovascular disease and Type 2 diabetes (Brunner and Marmot, 2006). Assigning a quantitative estimate on expected stress response is not possible given the data available; however, it could be estimated that stress will increase with perceived contamination.
> ….
>
> It was expressed several times by these community members that the idea of adding another mine to an area that has many unresolved issues with legacy contamination is unreasonable and possibly inhumane.

DEIS at 413. Both the action alternatives in the DEIS, then, will lead to health impacts on the community surrounding the proposed mine. The DEIS offers no proposal to address the anticipated human rights violations, other than the no action alternative. Thus, approval of the PoO will lead to the United States breaching its human rights obligations under the American Declaration.

XIV. Conclusion.

Thank you for your consideration of these comments and the relevant legal requirements.



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