



Terry Rambler
Chairman

SAN CARLOS APACHE TRIBE
P.O. Box 0, San Carlos, Arizona 85550
Phone (928) 475-1600 ❖ Fax (928) 475-2567

Tao Etpison
Vice-Chairman

October 10, 2017

Cal Joyner
Regional Forester
333 Broadway Blvd. SE
Albuquerque, NM 87102
Fax: 505-842-3800
EM: objections-southwestern-regional-office@fs.fed.us

RE: San Carlos Apache Tribe's Objections regarding the Apache Leap Special Management Area Management Plan and Amendment to the 1985 Tonto National Forest Land and Resource Management Plan and Final Environmental Assessment ("EA"), Draft Decision Notice ("DN") and Finding of No Significant Impact ("FONSI").

Responsible Official: Neil Bosworth, Forest Supervisor, Tonto National Forest

Dear Regional Forester Joyner:

Pursuant to 36 CFR Part 219 Subpart B, the San Carlos Apache Tribe ("Tribe") files this Objection to the Final EA, FONSI and Draft DN issued by Neil Bosworth for the Apache Leap Special Management Area ("ALSMA") Management Plan and Amendment to the 1985 Tonto National Forest Land and Resource Management Plan ("Plan Amendment") on or about August 25, 2017. See <https://www.fs.usda.gov/detail/tonto/news-events/?cid=FSEPRD556797>.

The Tribe filed comments on May 1, 2017 on the Proposed Apache Leap Special Management Area Plan and Notice of Public Scoping for Environmental Assessment and again filed comments on July 31, 2017 on the Modified Proposed Apache Leap Special Management Area Plan ("previous comments"). The Tribe has fully participated in the Forest Service's ("USFS", "Forest Service" or "Service") National Environmental Policy Act ("NEPA") review of this Project.

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Objection requirements pursuant to 36 CFR § 219.54(c):

The San Carlos Apache Tribe (“Tribe”) submits its objections pursuant to 36 CFR § 219.54. This objection sets forth all necessary information required by 36 CFR § 219.54(c)(1)-(7).

1. The objector is the San Carlos Apache Tribe. The Tribe’s address and telephone number are set forth in the letterhead above.

2. This objection is signed by Chairman Terry Rambler on behalf of the Tribe.

3. The Tribe is filing this objection only on its own behalf and not on behalf of multiple objectors.

4. Objection is made concerning the Apache Leap Special Management Area Management Plan (“ALSMA Plan” or “Management Plan). The responsible official is Forest Supervisor Neil Bosworth.

5. As more fully explained below, objection is made to a number of components, or parts thereof, of the ALSMA plan, Final EA, FONSI and Draft DN.

6. As more fully detailed below, a concise statement explaining the objection and suggesting how the proposed plan decision can be improved is included under each objection.

7. A statement demonstrating the link between the Tribe’s prior substantive comments and the objection made herein is included under each objection.

The Tribe affirmatively states that any objection which was not previously noted in the Tribe’s May 1 and July 31, 2017 comments (or “previous comments”) is raised herein for the first time result because the issue or statement was made for the first time by the USFS in the final ALSMA Plan, Final EA, FONSI or Draft DN after an opportunity for comment had closed. The Tribe makes the following objections:

Objections

1. The Forest Service failed to ensure meaningful public participation and failed to provide timely information and analysis in the NEPA process

In the Tribe’s May 1, 2017 comment, the Tribe objected to the adequacy of the public notice and outreach which the Forest Service provided for the proposed ALSMA Management Plan. The Tribe commented that this project was a matter of national import and, even if

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considered a matter of only regional import, the Service provided inadequate public notice. The Tribe was not the only commenting party which raised the adequacy of the Forest Service's public notice. *See* Final EA, Appendix C, at C-87 available at: http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/106562_FSPLT3_4050699.pdf.

The Forest Service responded to the Tribe's comments that was not a matter of national concern citing the definition of "effects of national concern" in 10 CFR § 1022.4. *Id* at C-92. It is legal error for the Forest Service to rely upon a definition developed by the Department of Energy for compliance with floodplain and wetlands environmental review to ascertain whether the APSMA Management Plan is a project of national concern. The Forest Service should look to the intent of 40 CFR § 1506.6 instead of a regulation which has no application to the facts here.

The lack of meaningful public engagement went beyond merely noticing this project. Throughout this NEPA process, the USFS failed to provide the Tribe and public with adequate timely environmental information ranging from responses to comments to the distribution of the Final EA, FONSI and Draft DN.

Under NEPA, the Forest Service "must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1. In preparing an EA, "the agency shall involve environmental agencies, applicants, and the public, to the extent practicable." *Id.* § 1501.4(b). *See Ctr. for Biological Diversity v. Gould*, 150 F. Supp. 3d 1170, 1181 (E.D. Cal. 2015). The Ninth Circuit has not established a minimum level of public comment and participation required by the regulations governing an EA. *Id. citing Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003). Nevertheless, the regulations "mean something" and the case law encourages agency diligence involving public participation.

Even though the Service is vested with some discretion in its outreach to the public, the Tribe maintains the Service failed to adequately involve the public in this case in the provision of information and the timeliness of providing information. The Service engaged in greater public outreach for the Resolution Copper Mining Pre-Feasibility Plan of Operations and the Resolution Baseline Hydrological & Geotechnical Data Gathering Activities EA, FONSI and DN. For the Pre-Feasibility Plan of Operations, the Service sent a general scoping letter to 135 individuals and organizations and ten tribes. *See* Resolution Pre-Feasibility Activities Plan of Operations Environmental Assessment (May 2010), p.1-15-16, available at: http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/49302_FSPLT1_028837.pdf.

For the Resolution Baseline Plan of Operations, the Service sent a general scoping letter to 338 individuals, federal, state, county, local agencies, ten Tribes, special interest groups and other interested parties. *See* Resolution Baseline Hydrological & Geotechnical Data Gathering

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Activities Final Environmental Assessment (January 2016), pp. 1-10-11, available at:
http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/98906_FSPLT3_2640925.pdf.

The Forest Service did not engage in “diligent efforts to involve the public in preparing and implementing [its] NEPA procedures” for the ALSMA Management Plan. 40 CFR § 1506.6(a). USFS failed to mail notice to individuals, organizations and federal, state and local agencies as it has for past projects which are associated with the Resolution Mine Project. See Apache Leap Special Management Area Management Plan, Appendix B; ALSMA Management Plan Final EA & FONSI, pp. 2, 6-9 & Appendices C & D.

The NEPA is a process which is designed, in part, to obtain informed agency decision-making through informed public participation. *Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 990 (E.D. Cal. 2005). In *Citizens for Better Forestry v. USDA*, 341 F.3d 961 (9th Cir. 2003), the court held that the Council of Environmental Quality (“CEQ”) regulations are mandatory, noting that “[a]lthough we have not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, we clearly have held that the regulations at issue must mean something.” *Id.* at 970. The Service was required to “offer significant pre-decisional opportunities for informed public involvement in the environmental review process . . .” *Weingardt*, 376 F. Supp. at 992. An EA that is followed by a FONSI must provide sufficient information and detail to demonstrate that the agency took the required “hard look” at the environmental consequences of the project before concluding that those impacts were insignificant. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

The scoping letter and early meetings that were conducted on this project failed to provide the public with sufficient information to allow for informed comment. The scoping postcard and publication provided sparse information. The initial draft of the Management Plan was minimal, at best. The modified Management Plan provided greater information but the Service failed to inform the public of why the modifications were made and what information the modifications were based upon.

The Service apparently failed to mail a scoping letter to individuals, organizations and government agencies as it had with past projects. The Forest Service apparently failed to mail notice to interested persons, organizations and who had already expressed interest and concern regarding matters related to the Resolution Copper mining project. The Service failed to provide meaningful pre-decisional public involvement based upon the information provided by the Forest Service on its public participation outreach.¹

No draft of the EA or FONSI was made available to the public. The public was only made aware of the USFS decision-making process with the distribution of the Final EA. It was

¹ The Tribe does not have the benefit of the administrative record on the ALSMA Management Area Plan and is basing its assertions in this paragraph on the documents which have been made public on the Service’s website.

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only with the Final EA that the Service responded to the comments on the initial and modified Management Plans. Once again, the Service sloughed off several issues and hard questions by claiming that they would be addressed in the Environmental Impact Statement (“EIS”) for the Resolution mine project and land exchange. Because of the lack of meaningful public participation from the onset of this project, the public cannot in the short time available under the Objection period meaningfully respond to the Final EA, the FONSI or the Forest’s responses to the public comments.

NEPA requires that an assessment “be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 892 (9th Cir. 2002). “The Supreme Court has stated that environmental assessments ‘shall be prepared at the feasibility analysis (go-no go) stage.’” *Id.* quoting *Andrus v. Sierra Club*, 442 U.S. 347, 351-52 n. 3, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979). That was not done here. A draft EA, or minimally, the components of a draft EA were required to be presented to the public much earlier in the NEPA process through adequate and thorough scoping.

In *Weingardt*, the court found that the Forest Service “failed to give the public an adequate pre-decisional opportunity for informed comment” where it distributed a scoping letter but no draft EA. 376 F.Supp.2d at 992. The court explained that, “depending on the circumstances, the agency could provide adequate information through public meetings or by a reasonably thorough scoping notice,” but it found that the Forest Service had not released “sufficient environmental information about the various topics” addressed in the EA prior to its finalization. *Id.* The scoping notice provided no environmental data concerning impacts and it provided no discussion of the potential cumulative effects that were discussed in the final EA. *Id.* The facts at issue here are identical. The scoping notice was inadequate and the Final EA was not prepared early enough in the NEPA process in this case.

The public was only made aware of the Service’s cumulative effects analysis with the distribution of the Final EA. No mention was made in the initial or modified Management Plans of cumulative effects. Again, because of the inadequate efforts to involve the Tribe and the public, meaningful comments responses and analysis of the cumulative effects cannot be done by the Tribe or the public. The cumulative impacts analysis in the Final EA mentions the subsidence crater resulting from Resolution’s block-caving mining operations acknowledging its effect on some aspects of the Management. For instance, the Final EA acknowledges reduced access because of future Resolution Copper mining activities “could lead to reduced recreation and cultural and spiritual uses of the area . . .” Final EA, p. 35. The Final EA also states: “Cumulative effects from these potential future actions would be primarily related to reduced access to the Apache Leap SMA through road closure or restricted access.”

The late disclosure of this specific cumulative effect has not allowed the Tribe to present other cumulative effects which would result from Resolution Copper’s future mining activities and their effect on the Tribe or its members or the impacts upon the rights of the Tribe and its

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members guaranteed under the American Indian Religious Freedom Act (“AIRFA”) and the Religious Freedom Restoration Act (“RFRA”). Reduced access is not the only cumulative consequence to the Tribe and its members. As I stated in the Tribe’s July 1, 2017 comment:

Our Creator God provided us the natural resources to survive on and these natural resources are interconnected both above and below surface. These natural resources are not compartmentalized like shelves in a dresser where you can neatly fold socks, shirts, and pants into each shelves. In the natural world, if you harm one area, it affects other adjacent areas.

Block cave mining will do harm to the Apache Leap area simply because it is connected to the other areas being planned for destruction. The Apache Leap area will not maintain its unique special character or purpose simply because no human being can make perfect or keep perfect what our Creator God has already perfected.

The Final EA completely misses the Apache spiritual and resulting physical harm in its myopic cumulative impacts analysis.

In summation, the Service failed to provide adequate pre-decisional information in a timely manner and violated NEPA by failing to present an environmental assessment at meaningful time in the decision-making process. The Tribe further incorporates by reference its comments contained in the May 1, 2017 and July 31, 2017 as they may apply to this Objection.

2. The Service failed to comply with 36 Code of Federal Regulations Part 219 Subpart A

In the Tribe’s May 1, 2017, the Tribe called attention to the Forest Service’s failure to comply with the regulations contained in 36 CFR Part 219 Subpart A. The Service responded:

Consistent with Forest Service planning regulations at 36 CFR 219.13, the Forest Supervisor has exercised his discretion in determining how to amend the forest plan and the scope and scale of any such amendment involving the Apache Leap SMA.

Final EA, Appendix C, at C-96.

The ALSMA does not constitute a plan amendment to the 1985 Tonto National Forest Land and Resource Management Plan which allows the Forest Supervisor to exercise his discretion Subpart A. The Service failed to follow the procedures set forth in Subpart A. The Tribe also incorporates by reference its comments made in its May 1, 2017 comment as it applies to this Objection.

3. The Final EA Failed to Fully Analyze All Direct, Indirect, and Cumulative Impacts

Under the NEPA, TNF must fully review the impacts from all “past, present, and reasonably foreseeable future actions.” These are the “cumulative effect/impacts” under NEPA. *See* 40 C.F.R. § 1502.16; 40 C.F.R. § 1508.8; 40 C.F.R. § 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. *See* 40 C.F.R. § 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. *See* 40 C.F.R. § 1508.8(b). Both 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.*

Congress enacted NEPA to ensure that federal agencies, before approving a project, (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. *See* 40 C.F.R. §§ 1501.2, 1502.5; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Through the NEPA process, agencies are required to take a “hard look” at the environmental impacts of their actions, as NEPA’s intent is to “focus[] the agency’s attention on the environmental consequences of a proposed project,” to “guarantee[] that the relevant information will be made available to the larger audience that may also play a role” in forming and implementing the agency’s decision, and to provide other governmental bodies that may be affected with “adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.” *Robertson*, 490 U.S. at 349-50. “The thrust of [NEPA] is . . . that environmental concerns be integrated into the very process of agency decision-making.” *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency’s attention on the environmental consequences of its proposed action, NEPA “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*, 490 U.S. at 349.

In regard to cumulative impacts, “[i]f several actions have a cumulative environmental effect, this consequence must be considered in an EIS.” *Blue Mountains Biodiversity Project*, 161 F.3d at 1214. *See also Te-Moak Tribe of Western Shoshone v. Department of the Interior*, 608 F.3d 592, 602-603 (9th Cir. 2010) (rejecting EA for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations on, *inter alia*, Native American cultural resources and religious concerns).

In its May 1, 2017 comment, the Tribe referenced connected, cumulative and similar actions. Until the Final EA, the Service had failed to make available to the Tribe or the public any of its considerations, rationales or reasoning regarding cumulative impacts or effects. As

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stated in the Tribe's lead Objection, the information provided regarding the Service's cumulative effects analysis is too little and too late. As argued above, the Forest Service violated NEPA.

TNF's cumulative impacts analysis in the Final EA is deficient. The failure to conduct a thorough and legal cumulative impacts analysis has resulted in a violation, not only of NEPA, but of AIRFA and RFRA and possibly other federal laws.

4. Miscellaneous objections

In both of its prior comments, the Tribe suggested the Service enlist the support of U.S. Geological Survey personnel for the seismic monitoring program. We reiterate that the Management Plan should enlist the support of such personnel.

In both of its prior comments, the Tribe requested the Service identify "laws and regulations". In response, the Service stated "[t]here are many pertinent laws and regulations that control mining-related disturbance on National Forest System lands that would need consideration" claiming that an exhaustive list was not possible to formulate. Final EA, Appendix C at C-97, Appendix D at D-9. The Final EA also identifies in Appendix C footnotes 1 through 7 the addition of a new guideline for the "Tribal" Section of August 2017 Management Plan stating "Tribal perspectives, needs, and concerns should be prioritized. Where activities may affect places important to tribes, the Forest should work to avoid impacts to the fullest extent of applicable laws and regulations."

The Tribe calls upon the Service to identify "laws and regulations" throughout the Management Plan and identify to the fullest extent possible in the Final EA those laws and regulations which may have application. The Forest Service's refusal to do so creates suspicion and evidences a lack of transparency on the part of the Service. The Service is in the best position to identify the laws and regulations which may apply. Perhaps, the Service could start by examining its own resources and publications such as Amie M. Brown's *Selected Laws Affecting Forest Service Activities*, USDA (4th ed. 2004).

The Service's addition of the language "Subsidence associated with any future mining adjacent to the area does not impair the special characteristics for which it was designated" to the modified plan and the decision to add this language was the subject of commentary and response which was first revealed in the Final EA. Final EA, Appendix C at C-70-72, Appendix D at D-11, D-15, D-21, D-40-D-41, D-50. The addition of the language remains puzzling, fails to consider the impact on Apache spiritual values and is wholly inconsistent with the visual and scenic guidance utilized by the Forest. This is yet another example of the Service's too little, too late approach to this NEPA process and the resulting inability of the Tribe and public to make their views known on the subsidence feature.

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5. Tribe's Suggested Remedies

The Tribe suggests that the Reviewing Officer reject the Final EA, FONSI and Draft DN. The Tribe suggests that the Proposed Management Plan serve as an interim management plan and direct the Responsible Officer to fully comply with NEPA and other federal law and Subpart A of 36 CFR Part 219. The Tribe suggests that the Reviewing Officer require the Service to revise its scoping of this Project, perform a NEPA analysis which fully complies with the law and the cases interpreting NEPA and other applicable laws within one year of the Reviewing Officer Decision.

6. Government-to-Government Consultation:

The Tribe requests government-to-government consultation with the Reviewing Officer and the full Council on these objections and the Tribe's previously filed comments.

Thank you for the opportunity to present the Tribe's objections to the Apache Leap Special Management Area Management Plan and Amendment to the 1985 Tonto National Forest Land and Resource Management Plan.

Sincerely,

SAN CARLOS APACHE TRIBE


for Terry Rambler
Chairman

Cc: Neil Bosworth, Forest Supervisor
Nanebah Nez, TNF Archaeologist

San Carlos Apache Tribe
Tao Etpison, Vice Chairman
San Carlos Council
Dee Randall, Forest Manager
Seth Pilsk, Forestry, Botanist
Vernelda Grant, THPO
A.B. Ritchie, Attorney General
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