

APACHE STRONGHOLD

POB 766 SAN CARLOS, AZ 85550



November 14, 2020

Paul Edmondson, President & CEO
National Trust for Historic Preservation
2600 Virginia Avenue NW
Suite 1100
Washington, D.C. 20037

Via email to pedmondson@savingplaces.org

RE: Invitation & Request for NHPA Sec. 106 Assistance - Chí'chil Bı́dagoteel National Historic District (Oak Flat), Western Apache Traditional Cultural Property & Sacred Place

Dear Mr. Edmondson,

On behalf the members of the San Carlos Apache Tribe who are organized as the traditional cultural advocacy organization Apache Stronghold, I respectfully request the assistance and participation of the National Trust for Historic Preservation in the ongoing and extraordinary National Historic Preservation Act (NHPA) Section 106 process and consultations in the federal undertakings of the USDA Forest Service in the proposed Southeast Arizona Land Exchange and Resolution Copper Mine.

We are heartened to learn that your Legal Department has been tracking developments in this proposed undertaking and Section 106 process over the years. We remain deeply grateful for the placement of Oak Flat on the Trust's 2015 list of America's 11 Most Endangered Historic Places and for the Trust's written March 12, 2020 testimony for the Subcommittee for Indigenous Peoples of the United States Natural Resources Committee in the U.S. House of Representatives.

We believe and assert that all concerned with the compliance duties and responsibilities of the U.S. Forest Service—and with the integrity of this Section 106 process and the substance of the conduct and products of the process—would benefit immensely from the active and sustained participation and intellectual contributions of the Trust. The addition of the Trust's expertise and insights would be of great benefit to all concerned in addressing the significant and extraordinary issues and problems involved in these undertakings.

To assist you in your appreciating the current status of the NHPA Section 106 process for the proposed undertaking, I have enclosed copies of recent correspondence between the Tribe (July 9, 2020) and John Fowler, Executive Director of the President's Advisory Council in Historic Preservation (July 21, 2020). I am also enclosing copies of the most recent related Section 106 process letters from Kathryn Leonard, Arizona State Historic Preservation Officer (September 19, 2019), and Tom McCullough of ACHP (October 25, 2019), and the two most recent Forest Service drafts of the proposed Programmatic Agreement (Version 7 [Nov. 2019] & Version 8 [July 2020]), along with Tonto Forest Supervisor Neil Bosworth's cover letter for Version 8, dated July 27, 2020.

The final enclosures are the Tribe's cover letter to Supervisor Bosworth and 24-page commentary response to that draft agreement (two enclosures dated September 3, 2020), along with two open letters from White Mountain Apache Tribe Cultural Resources Director and elder, Ramon Riley, and Apache Stronghold's recent letter to ACHP Executive Director, John Fowler.

If you have any questions, please do not hesitate to ask. We look forward to your response to this sincere invitation for assistance with this matter of grave concerns. In the meantime, we wish you and everyone at the Trust safekeeping during these trying times of the Covid-19 pandemic.

Sincerely,

APACHE STRONGHOLD



Wendsler Nosie, Sr. Ph.D.

Enclosures (listed chronologically):

September 19, 2019 letter from Arizona SHPO Leonard to USFS Supervisor Bosworth
October 25, 2019 letter from ACHP Program Manager McCullough to USFS Supervisor Bosworth
November 2019 USFS Version 7 Draft Programmatic Agreement
July 9, 2020 letter from San Carlos Apache Tribe Chairman to ACHP Executive Director John Fowler
July 21, 2020 letter from ACHP Executive Director Fowler to SCA Tribe Chairman
July 27, 2020 letter from USFS to SCA Tribe Attorney General conveying PA Version 8
July 2020 USFS Version 8 Draft Programmatic Agreement
September 3, 2020 letter from SCA Tribe Chairman to USFS Supervisor Bosworth
September 3, 2020 comments from SCA Tribe on PA Version 8 (24 pages)
September 11, 2020 open letter from White Mountain Apache Tribe Cultural Resources Dir. Ramon Riley
November 9, 2020 open letter from WMA Tribe Cultural Resources Director, Ramon Riley
November *, 2020 letter from Apache Stronghold to ACHP Executive Director Fowler

cc: Elizabeth S. Merritt, Deputy General Counsel, NTHP emerritt@savingplaces.org

San Carlos Apache Tribe:

Terry Rambler, Chairman, trambler@scatui.net
Tao Etpison, Vice Chairman, tao2k10@gmail.com
San Carlos Council Members
THPO, Vernelda Grant, apachevern@yahoo.com
Forest Manager, Dee Randall, DRandall@forestry.scat-nsn.gov
Forester, Seth Pilsk, sethpilsk@gmail.com
Attorney General, A.B. Ritchie, Alex.Ritchie@scat-nsn.gov



Doug Ducey
Governor

ARIZONA STATE PARKS & TRAILS

Robert Broscheid
Executive Director



September 19, 2019

SHPO-2005-2464(150287)

Neil Bosworth, Superintendent
Tonto National Forest Supervisor's Office
2324 E. McDowell Road
Phoenix, AZ 85006

RE: Tonto National Forest (TNF) and State Historic Preservation Office (SHPO) meeting
8/29/19 regarding the Resolution Copper Mine Programmatic Agreement

Dear Mr. Bosworth:

This letter is a follow up to and memorialization of the August 29, 2019 meeting between TNF and SHPO staff regarding the Resolution Copper Mine Programmatic Agreement (PA) and ongoing Section 106 Consultation. At our meeting, SHPO reiterated our continuing concerns with the tribal consultation process, which has not been accomplished in concert with the process laid out in 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (NHPA.)

As you are aware, at our meeting on July 13, 2017 SHPO expressed concerns that, in absence of an executed PA, the plan for government to government consultation with tribes for Section 106 compliance was unclear. At that time, our office requested that TNF develop a plan for tribal consultation that would articulate the manner by which individual tribes would be engaged during phased historic property identification and evaluation, assessment of effects, and resolution of adverse effects. We discussed how, in absence of an executed PA, a formal plan for tribal consultation would not only assist in directing TNF compliance with the government to government consultation requirements of Section 106, but also provide the basis for creating a record of such consultation on this high profile and potentially controversial project. We understand that such a plan was not developed. As a result, it appears that government to government consultation efforts for this project have become bifurcated, and we are concerned that tribal consultation under Section 106 and the provisions outlined in 36 CFR Part 800, the regulations implementing Section 106 of the NHPA, has not proceeded apace of other federal authorities guiding consultation with Native American tribes.

SHPO has received copies of correspondence from the San Carlos Apache Nation and the Pascua Yaqui Tribe expressing concern regarding the manner by which Section 106 consultation has occurred for the Resolution Copper project. The Zuni Tribe has also contacted our office expressing similar concerns, which in particular involve the distribution of a PA in early draft format with a ten-day comment period before final execution. We understand from our discussion with your team on August 29th, that the transmission of this draft PA occurred in error

as the result of internal communication issues. At this time, we are requesting TNF to provide us with a formal plan for tribal consultation under Section 106, including articulation of who the TNF point of contact will be for Section 106 compliance, as well as a plan for tribal consultation for phased identification and evaluation of historic properties (including traditional cultural properties,) assessment of effects, and the resolution of adverse effects. We are particularly concerned that sites of Traditional Ecological Knowledge (TEK) identified through the tribal monitoring program are not being integrated into the phased identification and National Register of Historic Places evaluation process as prescribed by Section 106 and would like to understand the agency's plan for how this data will be employed for Traditional Cultural Property (TCP) identification through tribal consultation.

We wish to reiterate to the TNF that information collected by tribal monitors needs to be formally integrated into historic property identification efforts, and the TNF needs to determine whether any of these TEK sites (many of which are also archaeological sites) are Register-eligible TCPs. This information (in redacted form) needs to be conveyed to our office for concurrence and also needs to be shared with consulting parties. We are happy to work with the TNF to articulate this protocol in the draft PA, as well as proposed resolution of adverse effects to register-eligible TCPs.

We appreciate your cooperation in complying with historic preservation requirements for federal undertakings. Please do not hesitate to contact me by telephone at 602.542.4009 or by email at KLeonard@azstateparks.gov, if you have any questions.

Sincerely,



Kathryn Leonard
State Historic Preservation Officer

- c. Chris Daniels, ACHP
Terry Rambler, San Carlos Apache Tribe
Vernelda Grant, San Carlos Apache Tribe
Robert Valencia, Pascua Yaqui Tribe
Karl Hoerig, Pascua Yaqui Tribe
Val Panteah, Pueblo of Zuni
Kurt Dongoske, Pueblo of Zuni



Preserving America's Heritage

October 25, 2019

Neil Bosworth
Supervisor
U.S. Forest Service
Tonto National Forest
2324 E. McDowell Road
Phoenix, AZ 85006

Ref: *Proposed Resolution Copper Mining Project and Land Exchange*
Tonto National Forest, Penal County, Arizona
ACHPConnect Log Number: 012344

Dear Mr. Bosworth:

The Advisory Council on Historic Preservation (ACHP) has reviewed the current draft programmatic agreement (PA) from the U.S. Forest Service (USFS), Tonto National Forest (TNF), for the proposed Resolution Copper Project and Southeast Arizona Land Exchange. We have provided the majority of our comments directly on the draft agreement (Enclosure 1). Overall, we remain concerned that the current draft does not evidence that the TNF has addressed previous concerns and continues to include inconsistencies in provisions for tribal consultation, conflicting usages of terminology, and procedurally challenging stipulations. Furthermore, based upon the recent correspondence and communication from Indian tribes and the Arizona State Historic Preservation Officer (SHPO), the ACHP remains concerned about the adequacy of the TNF's efforts to consult Indian tribes on the resolution of adverse effects and the development of this agreement document within the timeframes established by both by the legislated requirements of the land exchange and the TNF's ongoing environmental review. The ACHP offers the following comments and recommendations, with a particular focus on consultation with Indian tribes.

Consultation with Indian Tribes. The ACHP is sensitive to the recent concerns voiced by the San Carlos Apache Tribe, the Pascua Yaqui Tribe, the Pueblo of Zuni and other tribes regarding the status of the consultation on this undertaking. Their letters elaborate on the limited communication and understanding from the TNF in meeting its tribal consultation responsibilities, including the involvement of tribes in the development of the draft PA. In the past, ACHP staff has shared its views on the coordination challenges the TNF is experiencing in carrying out its Section 106 consultation with Indian tribes on the proposed agreement. Of particular concern is the lack of clarity on how the TNF has provided tribes with a reasonable opportunity to identify concerns about historic properties; advise on the identification and evaluation of properties of traditional religious and cultural importance to them; articulate their views on the undertaking's effects on such properties; and participate in the resolution of adverse effects. While it is apparent that there have been opportunities for the Indian tribes to engage with the TNF, the ACHP does not feel that the results of these meetings, or responses to concerns the Indian tribes have raised, have been adequately addressed or shared with the ACHP, with appropriate considerations for the government to government relationship between the USFS and the tribes and considering any confidentiality concerns they may have. With the above concerns in mind, we support the

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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recommendation by the SHPO that calls on the TNF to develop a tribal consultation plan that would guide the TNF's Section 106 consultation efforts with the Indian tribes moving forward. Such a plan would clearly describe when and how the TNF would seek input from the Indian tribes as it continues the 106 process, including primary points of contact, the sharing of information concerning historic properties including properties of religious and cultural significance to Indian tribes, and a means to address tribal needs to withhold sensitive/confidential information.

Further, the ACHP has observed some disparity in the draft agreements in the usage of some terms. First, the term "consulting party" is applied synonymously with "concurring parties" and "invited signatories." While these latter two groups are consulting parties, a consulting party does not have to be a concurring party or a signatory in order to participate in the development of an agreement. This is particularly important with respect to the consulting Indian tribes, as the current draft seems to eliminate inadvertently a tribe participating as consulting party if they are not also an invited signatory or concurring party. Second, the draft agreement appears to confuse the terms "historic property," "cultural resource," "property of religious and cultural significance," and "traditional cultural property" (TCP). The Section 106 process applies to effects to historic properties, which may be properties of religious and cultural significance to Indian tribes. The PA's language and correspondence should adhere to terminology found in the regulations concerning the identification of historic properties and not conflate terms or use them interchangeably. Included in our comments on the draft agreement are specific notations where these changes should be made.

Additionally, the ACHP appreciates the concerns raised by the SHPO, the San Carlos Apache Tribe, and other consulting parties concerning the on-going tribal monitoring program and request that the TNF clarify the purpose of the program and how information it has been generating has helped informed the TNF's identifications efforts. We recognize that the TNF provided some clarification on the program's purpose to the San Carlos Apache Tribe as part of its August 29, 2019 letter responding to the tribe's recent concerns; however, we recommend the TNF more directly inform all consulting parties on how this program is assisting/informing the Section 106 process. Further, we recommend incorporating it, as appropriate, into the above suggested tribal consultation plan. Overall, the ACHP support agencies acknowledging and utilizing the special expertise Indian tribes possess in assessing the eligibility of historic properties that may possess religious and cultural significance to them, and these efforts should be documented and inform upon the greater auspices of the 106 consultation process at hand.

Resolution of adverse effects: The ACHP is also concerned by the apparent confusion, in the current draft PA, of how the resolution of adverse effects is addressed. While the proposed PA intends to phase its identification and evaluation of historic properties for various aspects of the undertaking, we observe that since the undertaking includes the "transfer, lease, or sale of property out of federal ownership or control" without protections for those historic properties. While the ACHP supports the proposed phasing aspects of the PA, we encourage the TNF to think more broadly about what level of resolution of adverse effects can already be documented and incorporated into the agreement as this time. The PA should delineate between continued identification efforts and resolution of already identified adverse effects in a clear and precise manner. Many of our comments on the current draft aim to improve and clarify existing whereas clauses and stipulations that due to over complexity and inconsistent terminology lose their meaning.

In this same vein we recommend, in concert with the above tribal consultation recommendations, that the TNF clarify the purpose of the proposed "TCP Redress Plan." While the ACHP is supportive of consulting on and documenting such agreed to resolution efforts, we recommend this stipulation be significantly reworked and redefined to reflect the purpose of such mitigation efforts. Further, we appreciate and recognize the importance of respecting the Indian tribe's confidentiality concerns; however, as written, there is not sufficient framework to guide how the TNF will consult on, develop, and

implement this plan. Moving forward, the TNF needs to consult to establish objectives for how and when the TNF will develop the document, what it will contain, and any limitations placed on it.

Lastly, the ACHP received notification by the TNF of the next proposed meeting, scheduled for October 29, 2019, to continue consultation on the proposed PA. Mr. Christopher Daniel, Program Analyst, and myself are scheduled to participate in the meeting telephonically. We were pleased to learn that the TNF has realigned the objective of this meeting to focus on the concerns of the Indian tribes involved with this undertaking. We feel this effort will go a long way to addressing the concerns highlighted above.

We look forward to assisting the Forest Service in this consultation and working to carry out its Section 106 compliance responsibilities. We appreciate your consideration of our comments and recommendations on these issues, and look forward to participating in the upcoming meeting. If you have any questions, please contact Mr. Christopher Daniel (202) 517-0223, or via e-mail at cdaniel@achp.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom McCulloch", written over a horizontal line.

Tom McCulloch, Ph.D., R.P.A.
Assistant Director
Federal Property Management Section
Office of Federal Agency Programs

Enclosure



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

July 9, 2020

Via E-mail and U.S. Postal Service

John Fowler, Executive Director
The President's Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001
via email to jfolwer@achp.gov & First Class U.S. Mail

RE: The National Historic Preservation Act Section 106 Process for the Proposed Undertaking of the Resolution Copper Mine and the Southeast Arizona Land Exchange –

1. Request for a final Programmatic Agreement per NHPA Section 106 & 36 C.F.R. § 800.14(b)(3); and
2. Request for review per 36 C.F.R. § 800.9(a), by the President's Advisory Council on Historic Preservation ("ACHP"), of NHPA Section 106 compliance by the U.S. Forest Service (Tonto National Forest), on the proposed undertaking of the Resolution Copper Mine and Southeast Arizona Land Exchange.

Dear Mr. Fowler:

On behalf of the more than 17,000 members of the San Carlos Apache Tribe ("Tribe"), I am invoking our government-to-government relationship in a request for your prompt assistance on a matter of utmost concern. The National Historic Preservation Act ("NHPA") Section 106 process for the proposed Resolution Copper Mine and Southeast Arizona Land Exchange undertaking by the U.S. Forest Service ("USFS") has stalled and been adrift since this past autumn. It is now Summer.

There has been no substantive progress by USFS over the past half of a year, much less the essential and necessary conclusion of the process with a Programmatic Agreement ("PA") per the NHPA. The latest draft version of the PA was circulated in November 2019 (PA version 7), and we have grave concerns about the status and the lack of progress and completion of this

John Fowler

Re: NHPA compliance

July 9, 2020

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Section 106 process by the USFS. The USFS' conduct of the process would appear to a reasonable person to be dilatory, of questionable competence or fiduciary responsibility, and lacking in good faith.

The USFS' failure to advance the Section 106 process regularly and to otherwise maintain communications and discharge its trust responsibilities to the Tribe in a timely manner, obliges us now to appeal to you for substantial help, given the specialized and empowered role of the ACHP in the Section 106 process pursuant to the NHPA, ACHP's implementing regulations, published guidance, and established policy and practice.

We sincerely appreciate the advisory letter of October 25, 2019, from ACHP Assistant Director of Federal Property Management, Tom McCulloch, to Tonto National Forest ("TNF") Supervisor Neil Bosworth, and the comments and recommendations that ACHP provided therein, particularly the "focus on consultations with Indian tribes" and "the resolution of adverse effects" in the draft PA then in circulation (PA version 6):

Overall, we remain concerned that the current draft does not evidence that the TNF has addressed previous concerns and continues to include inconsistencies in provisions for tribal consultation, conflicting usages of terminology, and procedurally challenging stipulations. Furthermore, based upon the recent correspondence and communication from Indian tribes and the Arizona State Historic Preservation Officer (SHPO), the ACHP remains concerned about the adequacy of the TNF's efforts to consult Indian tribes on the resolution of adverse effects and the development of this agreement document within the timeframes established by both by the legislated requirements of the land exchange and the TNF's ongoing environmental review. (McCulloch letter to Bosworth at p.1., emphases added)

The record in this matter is replete with our extensive and detailed contributions, narratives, and explications on the historic, natural, cultural and religious significance of the air, lands, waters, minerals, plants, animals, people, and spirits that would be adversely affected by this proposed undertaking, including but not limited to our Traditional Cultural Property, the National Historic District of *Chi'chil Bildagoteel*. The Tribe has engaged in and maintained good faith in awaiting constructive and consistent USFS engagement of consultations pursuant to NHPA, and in accordance with other authorities, including E.O. 13007, E.O. 13175, the National Environmental Policy Act, and Section 3003 of the National Defense Authorization Act for Fiscal Year 2015. Our Tribe has submitted detailed comments numerous times on various aspects of this Section 106 process—since its formal initiation over two and one-half years ago—and attended the occasional informational meetings presented by USFS, most recently on December 11 and 12, 2019.

Our February 5, 2020 letter¹ to the USFS illustrates the pain and confusion that fill in the large gaps left by the USFS' failure to maintain steady, reliable consultation and make any reasonable progress over the past two-and-a-half years. Certainly these have not been the "best practices" expected of the USFS when years ago the ACHP joined with the U.S. Departments of Agriculture, Defense, Energy and Interior, in signing the *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites* (2002). In a letter dated September 19, 2019, from Arizona State Historic Preservation Officer Kathryn Leonard to TNF Supervisor Bosworth, the irregularity of the USFS' planning and conduct in the sporadic course of this particular Section 106 process was noted with "continuing concerns" by the Arizona State Historic Preservation Office ("AZSHPO").

Pertinent passages from the AZSHPO letter include:

This letter is a follow up to and memorialization of the August 29, 2019 meeting between TNF and SHPO staff regarding the Resolution Copper Mine Programmatic Agreement (PA) and ongoing Section 106 Consultation. At our meeting, SHPO reiterated our continuing concerns with the tribal consultation process, which has not been accomplished in concert with the process laid out in 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (NHPA).

...it appears that government to government consultation efforts for this project have become bifurcated, and we are concerned that tribal consultation under Section 106 and the provisions outlined in 36 CFR Part 800, the regulations implementing Section 106 of the NHPA, has not proceeded apace of other federal authorities guiding consultation with Native American tribes.

SHPO has received copies of correspondence from the San Carlos Apache Nation and the Pascua Yaqui Tribe expressing concern regarding the manner by which Section 106 consultation has occurred for the Resolution Copper project. The Zuni Tribe has also contacted our office expressing similar concerns, which in particular involve the distribution of a PA in early draft format with a ten-day comment period before final execution. We understand from our discussion with your team on August 29th, that the transmission of this draft PA occurred in error as the result of internal communication issues. (Leonard letter to Bosworth at p.1, emphases added).

¹ We inquired of TNF Supervisor Bosworth about a rumored TNF contract with a private party company to cut down oak trees in sacred areas within and around the area of potential effects of the proposed mine, including *Chi'chil Bildagoteel* (Oak Flat), *Gaan Bik'oh* (Gaan Canyon), and *Hakií* (Apache Leap).

In reviewing some of our correspondence to the USFS on this proposed undertaking, particularly in regard to NHPA-related issues and matters of substance and procedure over the past twelve (12) months, we note these letters especially:

June 27, 2019 – The Tribe objected to the USFS attempt through officials at the Tonto National Forest to complete and execute the PA without required consultations, stating, “The Tribe will not be inconvenienced or penalized by TNF failure to manage the Section 106 process and other regulatory requirements.”

July 10, 2019 – The Tribe provided extensive detailed comments on PA version 5.

July 26, 2019 – The Tribe alerted the consulting parties to not only USFS failures to follow regulatory and customary NHPA Section 106 rules, but also USFS attempts to subvert and undermine tribal sovereignty via the novel unilateral invention of the USFS-Resolution Copper “Tribal Monitoring Program.”

September 30, 2019 – “The Tribe is especially confounded by TNF’s failure to address in version 6 the Tribe’s comments and suggestions.... Additionally, the Tribe hereby repeats our requests that TNF at least show the Tribe the courtesy of explaining why it is disregarding or discounting our recommendations. It is the Tribe’s view that TNF would be well-advised to address the PA and its consultation obligations correctly and in the spirit of tribal and public trusteeship and in accord with pertinent statutes, regulations, and policies.”

Our diligence and our patience have been for nothing. The reasonable time for presentation of version 8 of the PA has been squandered away. With the expected publication of the Final Environmental Impact Statement (“FEIS”) in the near future as announced by the Forest Service,² the lingering absence of a PA now effectively looms as a constructive termination of the NHPA Section 106 process in violation of our rights.

The extraordinary delay in completing the Section 106 process prejudices and unduly burdens the free exercise of our religion, and our other fundamental legal, constitutional, and human rights. For example, throughout this extended time period since the formal initiation of the Section 106 consultation process, pre-mining activities and operations have been permitted within the proposed project area and have been ongoing for many, many months without full and proper pre-undertaking compliance with NHPA Section 106.

² See, “Est. FEIS NOA in Federal Register 12/2020.” Tonto National Forest Schedule of Proposed Actions (April 2020 through June 2020), Resolution Copper Project and Land Exchange EIS.
<https://www.fs.fed.us/sopa/components/reports/sopa-110312-2020-04.pdf>

John Fowler

Re: NHPA compliance

July 9, 2020

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It is necessary to complete the Section 106 process in a reasonable time in advance of completing the FEIS which, pursuant to the National Environmental Policy Act (“NEPA”) and its implementing regulations, must integrate and adequately communicate an understanding of the content, proceedings, conclusions and implications of the Section 106 process—and the expressed terms of the PA—in regard to NEPA-compliant management of the cultural resources involved and affected.

Since time is now of the essence, we have little choice but to request prompt production and implementation of a final PA within thirty (30) days of this letter.

We also request pursuant to 36 C.F.R. § 800.9(a), that the ACHP—as the special agency charged by Congress in the NHPA with federal agency compliance oversight responsibility—conduct a review and report on USFS Section 106 compliance in this proposed undertaking. That review should not further delay the USFS’ production of the PA for signature, but rather it should stimulate the USFS to promptly comply with the law, produce the PA, and then implement it in a meaningful and timely manner, without further prejudice to our tribal members and the other interested and affected Indian tribes.

As we say in our Apache language, Ahi’yi’é (thank you) for your prompt attention to our requests and assistance in this matter.

Sincerely,

SAN CARLOS APACHE TRIBE



Terry Rambler
Chairman

Cc: Reid Nelson, Director, ACHP Office of Federal Agency Programs, rnelson@achp.gov
Kathryn Leonard, Arizona State Historic Preservation Officer, kleonard@azstateparks.gov
U.S. Representative Raúl M. Grijalva
U.S. Representative Tom O’Halloran
U.S. Senator Bernie Sanders

San Carlos Apache Tribe
Tao Etpison, Vice Chairman
San Carlos Council Members
Vernelda Grant, THPO
Dee Randall, Forest Manager, Forest Resources
A.B. Ritchie, AG
Chrono



July 21, 2020

The Honorable Terry Rambler
Chairman
San Carlos Apache Tribe
Post Office Box 0
Apache Gem Rd. Marker 2
San Carlos, AZ 85550

Ref: *Resolution Copper Mining Project and Southeast Arizona Land Exchange*
Tonto National Forest, Penal County, Arizona
ACHP Project Number: 012344

Dear Chairman Rambler:

Thank you for your July 9, 2020, letter concerning the U.S. Forest Service's (USFS) on-going Section 106 consultation under the National Historic Preservation Act for Resolution Copper Mine and Southeast Arizona Land Exchange at the Tonto National Forest. In your letter, the San Carlos Apache Tribe requests the Advisory Council on Historic Preservation's (ACHP) assistance in moving forward the consultation to ensure the execution of a programmatic agreement (PA) for the undertaking. Additionally, the San Carlos Apache Tribe requests the ACHP "review and report" on whether the USFS has complied with the Section 106 regulations for this undertaking.

The ACHP appreciates the San Carlos Apache Tribe's desire to see the Section 106 process completed in a reasonable time and prior to the issuance of the Final Environmental Impact Statement. In addition, we share the San Carlos Apache Tribe's frustration in the delays and challenges that have hampered this consultation to date. However, the production and execution of a final agreement within the thirty-day timeframe that you have requested lies in the hands of the USFS, not the ACHP. The USFS, as lead Federal agency, is responsible for fulfilling the requirements of Section 106 process, including the development of the PA. The ACHP cannot mandate a time requirement for completion of this task.

Based on conversations between my staff and the USFS, following your letter, it is our understanding that the release of a revised agreement by USFS to all consulting parties is imminent. We expect this revised agreement to incorporate comments received during and following the meetings on December of 2019. In recognition of the constraints placed on this consultation, we have encouraged the USFS to provide a framework and schedule for how it intends to conclude the Section 106 process and finalizing the agreement, including milestones for responding to comments, coordinating any future consultation, and managing signature process. I encourage your office, as well as the other consulting parties, to continue to provide comments to the USFS on this revised document. If the USFS moves expeditiously, we believe consultation can still conclude with execution of the PA soon thereafter.

As to your second request, I am glad to direct our Office of Federal Agency Programs (OFAP) to undertake a review, pursuant to 36 C.F.R. § 800.9(a), of the USFS efforts to comply with Section 106 for this undertaking. I do not foresee this effort hindering the ACHP's continued participation in the ongoing

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consultation nor the development of a final agreement document. Conversely, such a review will better inform both the ongoing consultation as well as assist the USFS in avoiding the systemic problems that have hindered this consultation for future undertakings. To help initiate this effort, I invite you and your staff to provide input to the OFAP on specific areas where you believe the USFS has not met its Section 106 responsibilities for this undertaking in order to focus our review. Mr. Reid Nelson, Director of OFAP, will initiate these conversations on the ACHP's behalf. Following such discussions, we will begin our review.

The ACHP appreciates your raising these concerns, and is committed to working with you and the other consulting parties to ensure the USFS complies with its Section 106 responsibilities and concludes this PA as soon as possible. I am available to discuss the matters raised in this letter with you if you would like. Please do not hesitate to contact me at 202-517-0191 or at jfowler@achp.gov at any time.

Sincerely,



John M. Fowler
Executive Director

Cc: Vernelda Grant, Tribal Historic Preservation Officer
Kathryn Leonard, Arizona State Historic Preservation Officer
U.S. Representative Raúl M. Grijalva
U.S. Representative Tom O'Halleran
U.S. Senator Bernie Sanders
Sandy Watts, Acting Southwestern Region, Regional Forester
Neal Bosworth, Tonto National Forest Supervisor



File Code: 1560
Date: July 27, 2020

Alex Ritchie
Attorney General
San Carlos Apache Tribe
P.O. Box "0"
#3 San Carlos Ave.
San Carlos, AZ 85550



Dear Attorney General Ritchie:

On Sept 28, 2018, the Tonto National Forest initiated consultation on the Programmatic Agreement (PA) for Resolution Copper Mine compliance with the National Historic Preservation Act (NHPA). Since that time, we have shared several draft versions that Forest staff has been revising to incorporate and accommodate the concerns and recommendations provided by tribes.

I would like to offer you a final opportunity to review the Programmatic Agreement. The external drive included with this letter contains the draft final of the Resolution Copper Mine Project Programmatic Agreement (PA) and accompanying appendices.

The purpose of the PA between the Tonto National Forest, the Arizona SHPO, the Advisory Council on Historic Preservation, and other signatories is to ensure the Forest is meeting its obligations under the National Historic Preservation Act (NHPA) and the National Defense Authorization Act for FY2015 (Section 3003 PL 113-291). PAs are legally binding documents that commit the signatories to conduct the actions outlined therein. This final draft is the result of comments gathered during numerous meetings with tribes, cooperators, consulting parties and the public over the past two years.

Key changes from PA version 7 include the following:

- The Salt River Project has been added as a Signatory.
- Stipulations in IX Measures to Resolve Adverse Effects, have been greatly expanded to include descriptions of the four compensatory funds to support Emory oak restoration, a tribal monitoring program, a youth engagement program, and community development.
- A windshield survey for Top-of-the-World historic buildings was added.
- The historic facilities evaluations for Globe and Miami historic districts were updated.
- The project APE has been better-defined and the map of the APE in the appendix has been updated to include the 404 mitigation sites.



- A decision was made to complete separate NAGPRA Plans of Action (PoA): one to address the activities listed in the Oak Flat Historic Preservation Treatment Plan (HPTP); and a second that will be developed for the HPTPs for the remainder of the GPO area as it is developed (the PoA originally located in Appendix D has been removed from the PA and will be appended to the Oak Flat HPTP).

Please provide all comments on the draft using the comment matrix included with the PA documents. Comments on this **draft final PA** are due by end of business on Friday, September 4, 2020.

As I stated in my last letter, I want to acknowledge the tribe is currently fighting the pandemic and has limited capacity to engage consultation. I intend to be flexible with how and when we communicate as well as how we provide the information the Forest has an obligation to share with you regarding this project. Please let us know if there are specific ways we can meet this intent.

I appreciate your reviewing these documents to ensure that the Forest has been responsive to your concerns. It is important to me that the Forest is doing everything we can to **record and accommodate requests heard through government-to-government consultation**. If you have any questions or would like to request a formal meeting, please contact Nanabah Lyndon, at 602-621-3507 or nanebah.nezlyndon@usda.gov.

Sincerely,

THOMAS
TORRES

Digitally signed by
THOMAS TORRES
Date: 2020.07.27
12:03:18 -0700

FOR: NEIL BOSWORTH
Forest Supervisor

Enclosure

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PREAMBLE

With the recent inclusion of U.S. Department of the Interior Bureau of Land Management (BLM) lands in the analyses for the Resolution Copper Project Environmental Impact Statement (EIS), additional Tribes that do not typically consult with the Forest Service but regularly consult with the BLM in southern Arizona were sent letters on December 12, 2018, regarding an alternative on BLM land (the Peg Leg Alternative). These Tribes are the Ak-Chin Indian Community, Fort Sill Apache Tribe, Pascua Yaqui Indian Tribe, and the Tohono O'odham Nation. The Forest Service, in coordination with the BLM, will continued to engage these Indian Tribes in consultation on the undertaking along with other previously identified Indian Tribes, consistent with their preferences.

Furthermore, representatives of the Hopi Tribe, the Mescalero Apache Tribe, the Pueblo of Zuni, the San Carlos Apache Tribe, the Tonto Apache Tribe, and the White Mountain Apache Tribe have crafted the following statement: *The Tribes have had the opportunity to be active in the consultation, review, and comment processes of the project and it has been made clear to the Forest Service that no Tribe supports the desecration/destruction of ancestral places where ancestors have lived, as these are considered alive and sacred. It is a tribal cultural imperative that these places should not be disturbed for any reason. For tribal members, continued access to the land and all its resources is necessary for their culture and they have expressed that access should be accommodated for present and future generations. Tribal members have communicated that participation in the design of this destructive activity has caused*

1 *considerable emotional stress and brings direct harm to the traditional way of life to Tribes; however,*
2 *it is still deemed necessary to ensure ancestral homes and ancestors receive the most thoughtful and*
3 *respectful treatment possible.*

4 **1. WHEREAS**, Resolution Copper Mining, LLC (Resolution Copper), proposes to conduct mining
5 operations on land administered by the U.S. Department of Agriculture (USDA) Forest Service (Forest
6 Service) Tonto National Forest (TNF), land administered by the Arizona State Land Department (ASLD),
7 and private land near Superior, Pinal County, Arizona, based on a General Plan of Operations (GPO); and

8 **2. WHEREAS**, the GPO details Resolution Copper's proposed mining operations as consisting of five
9 locations: East Plant Site, West Plant Site, Magma Arizona Railroad Company (MARRCO) corridor,
10 filter plant and loadout facility, and tailings storage facility, with associated pipeline and/or power line
11 corridors, with the five locations presented in the GPO estimated to disturb a total of 3,846 acres of TNF,
12 ASLD, and private land within a 14,950-acre project area (See Figure A.1 in Appendix A); and

13 **3. WHEREAS**, the GPO includes the mining and processing (concentrator and filter plant/rail loadout)
14 operations, transportation corridors for conveying concentrate and tailings, utility corridors, and a tailings
15 facility as described in the draft EIS; and

16 **4. WHEREAS**, the Forest Service and Resolution Copper have developed alternatives for comparative
17 analysis and compliance with the National Environmental Policy Act (NEPA, 42 United States Code
18 [U.S.C.] 4321 *et seq.*) that involve lands and surface resources administered by the U.S. Department of
19 the Interior Bureau of Land Management (BLM) Tucson Field Office, TNF, ASLD, or lands held as
20 private property; and

21 **5. WHEREAS**, on December 12, 2014, Congress passed the Southeast Arizona Land Exchange and
22 Conservation Act (Section 3003 of Public Law 113-291), which authorizes a land exchange between the
23 U.S. government (U.S. Department of Agriculture and U.S. Department of the Interior) and Resolution
24 Copper. Under the exchange, Resolution Copper will receive 2,422 acres of land known as the Oak Flat
25 Federal Parcel (Selected Lands) managed by the Forest Service in exchange for 5,376 acres of private
26 land (Offered Lands) owned by Resolution Copper, in a total of eight parcels. (Lands going to the Forest
27 Service consist of: Apache Leap South End Parcel (142 acres) near Superior in Pinal County; Tangle
28 Creek Parcel (148 acres) in Yavapai County; Turkey Creek Parcel (147 acres) in Gila County; Cave
29 Creek Parcel (149 acres) near Cave Creek in Maricopa County; and East Clear Creek Parcel (640 acres)
30 near Payson in Coconino County; lands going to the BLM consist of: Lower San Pedro River Parcel
31 (3,050 acres) near Mammoth in Pinal County; Appleton Ranch Parcel (940 acres) near Elgin in Santa
32 Cruz County; and Dripping Springs Parcel (160 acres) near Kearny in Gila and Pinal Counties); and

33 **6. WHEREAS**, the overall Resolution Copper Project encompasses 38,446 acres and multiple land
34 jurisdictions as shown on Figure A.1 in Appendix A, and consists of the Selected Lands leaving the
35 jurisdiction of the Federal Government (2,422 acres) per Section 3003 of Public Law 113-291, and the
36 project components and all alternatives associated with the Resolution Copper GPO (36,865 acres not
37 including those also within the land exchange); and

38 **7. WHEREAS**, both the land exchange mandated by the Southeast Arizona Land Exchange and
39 Conservation Act and the implementation of the GPO submitted by Resolution Copper constitute a
40 Federal undertaking (Undertaking) as defined by 36 Code of Federal Regulations (CFR) 800.16(y) which
41 requires compliance with Section 106 of the National Historic Preservation Act (NHPA; 54 U.S.C.
42 306108), and the Southeast Arizona Land Exchange and Conservation Act (Section 3003 of Public Law
43 113-291) mandates that impacts to cultural and archaeological resources are assessed under NEPA per
44 Section 3003(c)(9)(C); and

1 **8. WHEREAS**, on August 9, 2019, the Forest Service identified the tailings alternative location known as
2 Skunk Camp as the agency preferred alternative; and

3 **9. WHEREAS**, the Forest Service has determined due to the scale and complexity of the Undertaking,
4 that it will develop this Programmatic Agreement (Agreement), pursuant to 36 CFR 800.14(b)(1), to
5 address further identification requirements and resolution of adverse effects; and

6 **10. WHEREAS**, the Forest Service is the Federal lead agency for the Section 106 compliance process as
7 mandated by the Southeast Arizona Land Exchange and Conservation Act (Section 3003 of Public Law
8 113-291); and

9 **11. WHEREAS**, the area of potential effects (APE) consists of a 6-mile buffer around the project
10 footprint (including the tailings facility alternatives) and the Oak Flat Federal Parcel, including where the
11 buffer has been extended outward to 7 miles to the east to include the community of Top-of-the-World
12 and up to 9 miles southeast to incorporate additional historic mining areas, as well as the historic districts
13 of Globe and Miami, and the compensatory mitigation lands required by the U.S. Army Corps of
14 Engineers Clean Water Act Section 404 permit which is designed to capture direct, indirect, and
15 cumulative effects within three zones (physical effects within the project footprint and Oak Flat Federal
16 Parcel, auditory effects within 2 miles of the project footprint and Oak Flat Federal Parcel, and
17 visual/atmospheric/socioeconomic effects within 6 miles and the historic districts of Globe and Miami) as
18 shown on Figure A.1 in Appendix A and further described in Stipulation IV; and

19 **12. WHEREAS**, the Forest Service has consulted with the Arizona State Historic Preservation Office
20 (SHPO) pursuant to 36 CFR 800.6 on the Undertaking and the APE, and SHPO is authorized to enter into
21 this Agreement in its role of advising and assisting Federal agencies in carrying out their Federal
22 responsibilities under Sections 101 and 106 of the NHPA, at 36 CFR 800.2(c)(1)(i) and 36 CFR 800.6(b),
23 and to fulfill its state historic preservation responsibilities under Arizona Revised Statutes (ARS) 41-
24 511.04(D)(4), and SHPO is a Signatory to this Agreement; and

25 **13. WHEREAS**, the BLM Tucson Field Office may be responsible for issuing Federal authorizations
26 related to the mitigation, construction, operations, maintenance, and reclamation of portions of the
27 proposed Undertaking on BLM-administered lands, depending on which alternative is selected and any
28 potential, subsequent APE modification. Such BLM authorizations must also comply with Section 106 of
29 the NHPA and applicable portions of the Archaeological Resources Protection Act (ARPA; 16 U.S.C.
30 470aa–470mm), the American Indian Religious Freedom Act (42 U.S.C. 1996), and the Native American
31 Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001 *et seq.*), and the BLM is participating
32 as a Invited Signatory to this Agreement; and

33 **14. WHEREAS**, the U.S. Army Corps of Engineers (USACE) may be responsible for issuing a Clean
34 Water Act Section 404 permit for the Undertaking depending on which alternative is selected. Off-site
35 compensatory mitigation may be needed if a Section 404 permit is required, but the location and types of
36 mitigation are as yet unknown. The USACE recognizes the Forest Service as the lead Federal agency
37 under 36 CFR 800 2(a)(2) to act on its behalf under Section 106, and USACE is an Invited Signatory to
38 this Agreement; and

39 **15. WHEREAS**, the Salt River Project Agricultural Improvement and Power District (SRP), a public
40 municipal corporation and political subdivision of the State of Arizona, will construct and maintain
41 electrical transmission facilities and associated access routes under a Special Use Permit from the Forest
42 Service in support of the Undertaking and is an Invited Signatory to this agreement; and

43 **16. WHEREAS**, the Undertaking includes State Trust land administered by the ASLD, and the ASLD
44 will use provisions of this Agreement to address the applicable requirements of the Arizona State Historic

1 Preservation Act (ARS 41-861 *et seq.*) on State land in Arizona, and the ASLD is an Invited Signatory to
2 this Agreement; and

3 **17. WHEREAS**, the Arizona State Museum (ASM) has been invited to participate in consultations
4 regarding resolution of adverse effects because it has mandated authority and responsibilities under the
5 Arizona Antiquities Act (AAA), ARS § 41-841 *et seq.*, that apply to that portion of the Undertaking on
6 State land, and mandated authority and responsibilities under ARS § 41-865 that apply to that portion of
7 the Undertaking on private land, and ASM is an Invited Signatory to this Agreement; and

8 **18. WHEREAS**, Resolution Copper, the applicant, is required to participate in the Section 106
9 consultation process under 36 CFR 800.2(c)(4) and in the development of this Agreement per 36 CFR
10 800.6(a)(2), because of its obligations and duties to implement measures to resolve adverse effects as
11 required under both the Southeast Arizona Land Exchange and Conservation Act (Sec. 3003) and the
12 Agreement, and is an Invited Signatory under 36 CFR 800.6(c)(2)(iii); and

13 **19. WHEREAS**, in accordance with 36 CFR 800.6(a)(1), the Forest Service notified the Advisory
14 Council on Historic Preservation (ACHP) of the Undertaking, and the ACHP has chosen to participate in
15 this Agreement as a Signatory (letter dated December 21, 2017); and

16 **20. WHEREAS**, the Forest Service has assumed the lead Federal agency status for government-to-
17 government consultation with Indian Tribes (Tribes), and has the delegated authority of the Secretary of
18 Agriculture to implement the Southeast Arizona Land Exchange and Conservation Act including the
19 mandate to “*consult with Resolution Copper and seek to find mutually acceptable measures to—*
20 *(i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected*
21 *Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution*
22 *Copper under this section.* (Sec. 3003(c)(3))”; and

23 **21. WHEREAS**, during project initiation for the GPO in 2008, the Forest Service initiated consultation
24 with the Tribes for the prefeasibility exploration plan for the Resolution Copper Project via a letter dated
25 June 6, 2008, and for the land exchange in 2015 via a letter dated August 4, 2015, and for the EIS via a
26 letter dated April 1, 2016, and continues to consult with the federally recognized Tribes with which it
27 regularly consults because they have traditional territory claims to the area in which the TNF is located—
28 the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Mescalero
29 Apache Tribe, the Pueblo of Zuni, the Salt River Pima-Maricopa Indian Community, the San Carlos
30 Apache Tribe, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Nation,
31 and the Yavapai-Prescott Indian Tribe; and

32 **22. WHEREAS**, the Forest Service recognizes that the landscape to be affected by this Undertaking is
33 sacred to many Tribes and has been for many generations and continues to this day to be utilized for
34 cultural and spiritual purposes. Some Tribes have declared that they consider some adverse effects from
35 the Undertaking to be unmitigable and, they consider the resolution of effects in this Agreement to be
36 insufficient; and

37 **23. WHEREAS**, alternative locations have been proposed for detailed consideration in the EIS for the
38 permanent disposal and management of the mine tailings, including an alternative on BLM land, and
39 BLM routinely consults with four additional Tribes—the Ak-Chin Indian Community, the Fort Sill
40 Apache Tribe, the Pascua Yaqui Tribe, and the Tohono O’odham Nation—that may also have traditional
41 and/or cultural interests within the APE, and the BLM and Forest Service have initiated consultation with
42 these Tribes via a joint letter dated December 12, 2018; and

43 **24. WHEREAS**, according to the Indian Claims Commission map of *Indian Land Areas Judicially*
44 *Established 1978*, the APE is located within the adjudicated territory of the “Pima-Maricopa,” the

1 “Yavapai,” and the “Apache,” who are represented by the Fort McDowell Yavapai Nation, the Gila River
2 Indian Community, the Mescalero Apache Tribe, the Salt River Pima-Maricopa Indian Community, the
3 San Carlos Apache Tribe, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-
4 Apache Nation, and the Yavapai-Prescott Indian Tribe; and

5 **25. WHEREAS**, the Forest Service has completed an ethnographic and ethnohistoric study regarding
6 places of traditional or cultural importance to Indian Tribes within and adjacent to the area of Resolution
7 Copper’s proposed action, Oak Flat, and the Superstition Wilderness Area (Hopkins et al. 2015); and

8 **26. WHEREAS**, the Forest Service directed the completion of pedestrian surveys to cover the portions of
9 the physical APE that include the Oak Flat Federal Parcel, GPO project components (East Plant Site,
10 West Plant Site, MARRCO corridor, and filter plant and loadout facility), and the proposed tailings
11 locations for all Alternatives 2, 3, 4, 5, and 6. Additional survey is in progress for the Section 404
12 compensatory mitigation parcels and is scheduled to be completed prior to the publication of the final
13 EIS. See Appendix B: Previous Survey Coverage and Identified Cultural Resources; and

14 **27. WHEREAS**, for portions of the physical APE that have not already been surveyed for historic
15 properties, the Forest Service proposes to phase any remaining identification and evaluation needs,
16 pursuant to 36 CFR 800.4(b)(2), and complete all inventory of the physical APE by the publication of the
17 final EIS; and

18 **28. WHEREAS**, According to Hopkins et al. 2015, some tribes consider ancestral home places
19 (archaeological sites), water features (springs, seeps, and waterways), and resource collection areas
20 (plants, minerals, etc.) all to be historic properties of traditional religious and cultural importance.
21 The TNF has conducted inventories for historic properties of traditional religious and cultural importance
22 including traditional cultural properties (TCPs) through a tribal monitoring program. Trained tribal
23 monitors have worked both with the archaeological survey crews and independently to record places of
24 traditional or cultural significance and to identify those that would qualify as historic properties under
25 Section 106 of the NHPA; and

26 **29. WHEREAS**, one TCP has been formally listed on the National Register of Historic Places (NRHP),
27 and 11 historic properties of traditional religious and cultural importance have been formally identified by
28 tribal representatives and will be evaluated as TCPs and consulted on with SHPO. With surveys ongoing,
29 more historic properties are expected to be identified; and

30 **30. WHEREAS**, the Forest Service has identified 721 archaeological sites (both prehistoric and historic)
31 within the APE for physical effects, and efforts are currently ongoing to identify and evaluate historic
32 properties of traditional religious and cultural importance (see figures in Appendix B for identified
33 historic properties and previous survey report references); and

34 **31. WHEREAS**, the Forest Service, in consultation with the SHPO, has determined that
35 523 archaeological sites to date in the physical APE are eligible for the NRHP under Criterion D; one
36 TCP has been listed in the NRHP under Criteria A, B, C, and D; and 118 sites are unevaluated for NRHP
37 eligibility and will require eligibility evaluation and the Forest Service has determined that the
38 Undertaking will result in adverse effects on historic properties that have been determined eligible for the
39 NRHP under Criteria A, B, C, and/or D, and has consulted with the SHPO, pursuant to 36 CFR 800.5(a),
40 regarding the implementation of Section 106 of the NHPA; and

41 **32. WHEREAS**, the Forest Service has conducted a preliminary Class I literature review of the 6-mile
42 visual/atmospheric/socioeconomic APE for historic properties listed in or eligible for the NRHP under
43 Criteria A, B, and/or C (properties where effects on setting could alter the characteristics that make the
44 property eligible for the NRHP) in October 2018. No ground disturbance is planned outside the physical

APE; therefore, properties eligible only under Criterion D were not included. The search included records at the TNF Forest Supervisor's Office, BLM, and via AZSITE and NRHP online databases, and identified 14 historic buildings, structures, or districts listed in the NRHP and 37 archaeological sites eligible for the NRHP under Criteria A, B, and/or C; and

33. WHEREAS, TNF has consulted with Archaeology Southwest, Arizona Mining Reform Coalition, Boyce Thompson Arboretum, Inter Tribal Association of Arizona, Scott Wood, and Tom Wright, regarding the effects of the undertaking on historic properties; and

34. WHEREAS, the Forest Service has prepared a Historic Properties Treatment Plan (HPTP) to address the resolution of adverse effects on historic properties on the Oak Flat Federal Parcel, the Forest Service has sent the HPTP to the SHPO and Tribes for review, and the SHPO has concurred with the proposed treatments in the HPTP; and

35. WHEREAS, the Forest Service is committed to respecting the sensitive and private nature of tribal traditional knowledge under the authority of Section 3056 of 25 U.S.C. 32A and Forest Service Handbook titled *American Indian and Alaska Native Relations Handbook* (FSH 1509.13), and Tribes have the opportunity to designate information they consider to be confidential prior to all final reports being drafted; and

36. WHEREAS, TNF has sought and considered the views of the public concerning this undertaking through use of and in coordination with the agency's public involvement under NEPA, as provided for in 36 CFR 800.2(d)(3), and these public outreach efforts included five public scoping meetings in 2016, two workshops concerning alternative development in 2017, and six public meetings about the draft EIS in 2019; and

37. WHEREAS, TNF has also held three workshops specifically to identify public concerns and comments about Section 106 compliance and plans for this Agreement in 2018, and has received comments on this Agreement as it was presented in the draft EIS; and

38. WHEREAS, TNF will continue to disseminate information about the Undertaking and will afford the public opportunities to comment through the conclusion of the NEPA process; and

39. WHEREAS, the Forest Service, in consultation with all Consulting Parties, will explore both standard and alternative measures to resolve adverse effects that are in the public and tribal interest and provide the best use of available funding and resources as it seeks to resolve adverse effects on historic properties; and

40. WHEREAS, participation as a Consulting Party does not imply endorsement of the Undertaking, and per 36 CFR 800.6(c)(2)(iv) and 36 CFR 800.6(c)(3), the refusal of any party invited to become a Consulting Party will not invalidate this Agreement nor will it preclude them from participating in further consultation; and

41. WHEREAS, definitions used in this Agreement are outlined in Appendix C of this document or as defined in 36 CFR 800.16; and

NOW THEREFORE, the Forest Service, SHPO, and the ACHP agree that this Agreement shall be implemented in accordance with the following stipulations to address the effects of the Undertaking on historic properties.

STIPULATIONS

The Forest Service shall ensure that the following stipulations are carried out:

I. ROLES AND RESPONSIBILITIES

A. U.S. FOREST SERVICE, TONTO NATIONAL FOREST

1. The Signatories agree that the Forest Service is the lead Federal agency for administering and implementing this Agreement with responsibilities that include:
 - consulting and coordinating with the Consulting Parties;
 - engaging in government-to-government consultation with affected Indian Tribes concerning issues of concern related to the Undertaking;
 - carrying out their responsibilities in accordance with applicable laws and authorities ensuring that all Signatories fulfill their obligations;
 - making determinations of NRHP eligibility and findings of effect for historic properties;
 - implementing Section 3003(c)(9)(C) of the Southeast Arizona Land Exchange and Conservation Act;
 - overseeing all cultural resource management work including additional historic property inventory in coordination with appropriate land-managing agencies, and drafting and/or assembling all submissions to the Consulting Parties, including additional historic properties inventory reports (if needed), plans to resolve adverse effects such as HPTPs, and the preliminary and final treatment reports;
 - seeking SHPO concurrence with agency decisions as required by 36 CFR 800 relating to the treatment of historic properties;
 - implementing the plans to resolve adverse effects; and
 - notifying SHPO and the other Consulting Parties of the selection of the tailings alternative and the measures to resolve adverse effects for the tailings alternative per Stipulation IX within 14 days of the issuance of the final Record of Decision (ROD).
2. The Forest Service shall follow the Forest Service policy, *Consultation with Indian Tribes and Alaska Native Corporations* (Forest Service Manual 1563.1) and shall proceed in full and complete compliance with Federal laws, regulations, policies, and executive orders to guide its tribal consultation procedures and relationships.

B. RESOLUTION COPPER MINING, LLC

1. Per the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015 (NDAA 2015) § 3003, Resolution Copper “shall agree to pay, without compensation, all costs that are associated with the land exchange and any environmental review document.” As part of the environmental review process, Resolution Copper is financially responsible for all work that is associated with complying with the NHPA and the Arizona State Historic Preservation Act (ARS 41-861 *et seq.* and ARS 41-865).
 - a. This work includes, but is not limited to: inventories of archaeological sites, data entry, historic buildings and structures, and historic properties of traditional religious and cultural importance within the APE; evaluation of all historic properties for inclusion in the NRHP; recommendations of the effects of the Undertaking on historic properties for review and

1 consideration by the Forest Service; and creation and implementation of the HPTPs and any
2 mitigation measures for the historic properties within the APE as agreed to by the Signatories
3 to this Agreement through the consultation process.

4 C. BUREAU OF LAND MANAGEMENT

- 5 1. For the purposes of this Undertaking, the BLM recognizes the Forest Service as the lead Federal
6 agency and shall work in coordination with the Forest Service to comply with Section 106 of the
7 NHPA. The BLM will participate only in those activities related to its jurisdiction or decision-
8 making authorities, unless otherwise invited by the Forest Service. The BLM's status as a
9 Consulting Party and Invited Signatory to this Agreement does not affect its independent
10 responsibilities under applicable Federal statutes and regulations that may pertain to the agency's
11 special expertise and/or jurisdictional authorities.
- 12 2. The BLM retains jurisdiction and management authority of all resources and historic properties
13 on BLM-administered lands. If the selected alternative or any subsequent APE modification
14 involves BLM-administered lands, the BLM will engage in government-to-government
15 consultation with affected Indian Tribes to develop a NAGPRA Plan of Action. This Agreement
16 does not subrogate the authority of the BLM in its NAGPRA-related consultations, nor the
17 authority of the Tribes to engage in government-to-government consultations with the BLM.
- 18 3. Should ambiguities or contradictions arise among project-related HPTPs and the BLM's
19 NAGPRA Plan of Action, the BLM NAGPRA Plan of Action shall prevail on BLM-administered
20 lands.
- 21 4. If an alternative that does not involve BLM-administered land becomes the selected alternative,
22 the BLM's responsibilities and involvement in this Agreement shall cease. The BLM will cease
23 being an Invited Signatory to this Agreement, will withdraw, and will formally notify the
24 Consulting Parties of its withdrawal. Such change will not require an amendment to this
25 Agreement.

26 D. U.S. ARMY CORPS OF ENGINEERS

- 27 1. For purposes of this Undertaking, the USACE recognizes the Forest Service as the lead Federal
28 agency and shall work in coordination with the Forest Service to comply with Section 106 of the
29 NHPA. USACE will only participate in those activities within their defined permit area related to
30 Clean Water Act Section 404 permitting per 33 CFR Part 325 Appendix C(1)(g). This also
31 extends to compensatory mitigation activities, yet to be specifically defined, that may be required
32 of the permittee, Resolution Copper.
- 33 2. If an alternative that does not require a Section 404 permit becomes the selected alternative, the
34 USACE's responsibilities and involvement in this Agreement shall cease. The USACE will cease
35 being an Invited Signatory to this Agreement, will withdraw, and will formally notify the
36 Consulting Parties of its withdrawal. Such change will not require an amendment to this
37 Agreement.

38 E. ARIZONA STATE LAND DEPARTMENT

- 39 1. The ASLD, in coordination with the ASM, the Forest Service, and the SHPO, will be responsible
40 for reviewing all cultural resources work completed on State Trust land, including inventories,
41 determinations of eligibility and effect, HPTPs, and the preliminary and final treatment reports.
42 ASLD shall work in close coordination with the Forest Service to complete the Section 106
43 process and in close coordination with ASM to ensure compliance with the Arizona Antiquities
44 Act (ARS 41-841 et seq.). The ASLD shall retain responsibility for the management of cultural
45 resources that are located on ASLD land within the APE of this Undertaking during the duration

of this Agreement. The ASLD will participate only in those activities in those areas related to its jurisdiction or decision-making authorities, unless otherwise invited by the Forest Service.

F. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

1. As described in the GPO and the EIS for the undertaking, SRP will be responsible for constructing, operating, and maintaining electrical transmission facilities and associated access routes for the Resolution Copper Mine. The Forest Service shall issue a Special Use Authorization to SRP for all electrical transmission facilities on Forest Service lands based on a final ROD and a complete application with construction plans are submitted and reviewed for compliance with the EIS and this Agreement. SRP will pursue easements and/or other land rights across ASLD and private lands, as necessary.
2. In coordination with Resolution Copper, SRP shall ensure that necessary identification and evaluation of potentially affected historic properties and resolution of any adverse effects that may result from SRP's construction and maintenance activities are carried out prior to their construction and according to the provisions of this Agreement.

II. PROFESSIONAL QUALIFICATIONS AND PERMITS

- A. For all cultural resource-related activities, Resolution Copper shall ensure that its cultural resources contractors use qualified historic preservation professionals that meet the Secretary of the Interior's standards (48 Federal Register 44716), as per Section 112(a)(1)(A) of the NHPA and 36 CFR 800.2(a)(1).
- B. For cultural resource-related activities on Federal land, the Forest Service and/or BLM shall ensure that all agency personnel responsible for historic properties shall meet Professional Qualification Standards as defined by the Office of Personnel Management: Heritage Program Professionals (GS-170 historian, GS-190 anthropologist, and GS-193 archaeologist; see definition in Appendix C). For work on Forest Service land, only Heritage Program Professionals may make management recommendations and review and recommend approval of heritage work done by qualified personal. For work on BLM land, only BLM-designated Cultural Heritage Program Specialists may make recommendations and review and recommend approval of heritage work done by BLM employees, contractors, and volunteers.
- C. For cultural resource-related activities on Federal land, Resolution Copper shall ensure that all necessary permits and permissions are obtained from the appropriate land-managing agency prior to any fieldwork, including applicable ARPA permits and Field Authorizations for any ground-disturbing work.
- D. For all cultural resource-related activities on State land, Resolution Copper shall ensure that its cultural resources contractors obtain an Arizona Antiquities Act Permit from the ASM prior to conducting archaeological activities on State land pursuant to ARS 41-841 *et seq.* Archaeologists working on State lands must also be qualified under the Rules Implementing the AAA. Resolution Copper shall also ensure that its cultural resources contractors obtain a burial agreement from the ASM prior to all ground-disturbing activity on State and private lands pursuant to Rules Implementing ARS 41-844 and 41-865.
- E. In recognition of the special expertise of tribal experts concerning properties of traditional religious and cultural significance, the standards of 36 CFR 61 will not apply to tribally designated representatives carrying out or assisting in identification and evaluation efforts for such properties of tribal interest.

III. COORDINATION WITH OTHER FEDERAL REVIEWS

- A. In the event that another Federal agency not initially a party to or subject to this Agreement receives an application for funding/license/permit for the Undertaking as described in this Agreement, that agency may fulfill its Section 106 responsibilities by stating in writing it concurs with the terms of this Agreement and notifying the Forest Service, the SHPO, and the ACHP that it intends to do so. In the event that an above Federal agency's application for funding/license/permit does not match the Undertaking as described in this Agreement, that agency may complete a separate review to fulfill its Section 106 responsibilities or request of the Signatories that the Agreement be amended to account for those changes in the Undertaking, in accordance with Stipulation XVIII.

IV. AREA OF POTENTIAL EFFECTS

- A. The APE consists of a 6-mile buffer around the Oak Flat Federal Parcel, the GPO project areas, and tailings alternatives, except where it has been extended outward to 7 miles to the east to include the community of Top-of-the-World, and up to 9 miles southeast to incorporate additional historic mining areas, as well the historic districts in Globe and Miami, and the compensatory mitigation lands required by the U.S. Army Corps of Engineers Section 404 permit to take into consideration potential direct, indirect, and cumulative effects of the Undertaking.
- B. Within the 6-mile APE, the Forest Service has identified three "zoned" APEs to tailor its identification efforts and assessment of effects (direct, indirect, and cumulative). The Forest Service has determined that physical effects may occur within the GPO project areas and Selected Lands, plus a 250-foot buffer; the Forest Service has determined that auditory effects may occur within 2 miles of the project footprint; and the Forest Service has determined that visual/atmospheric effects may occur within 6 miles of the project area.
- C. Physical effects: The APE for physical effects will include the Selected Lands leaving Federal management under the land exchange and the project areas associated with the GPO to the fence lines and buffered by 250 feet outside the fence lines, which includes all areas likely to be affected by such activities associated with construction, operations, and reclamation (see Appendix A). The physical effects APE associated with the GPO will be modified as necessary to allow for adjustments in construction, operations, and access road placement to avoid, when possible, natural, cultural, or modern features such as outcrops, historic properties, and historic properties of religious and cultural importance.
- Auditory effects: The APE for auditory effects including noise and vibrations shall be areas within 2 miles from any project component (including any access routes, facilities, and relocated facilities) or where consultation identifies a need to expand this APE in certain locations (see Appendix A).
- Visual/Atmospheric/Socioeconomic effects: The APE for visual/atmospheric/socioeconomic effects shall be areas within 6 miles from any project component (including any access routes, facilities, and relocated facilities) except where it has been extended outward to 7 miles to the east to include the community of Top-of-the-World, and up to 9 miles southeast to incorporate additional historic mining areas, as well the historic districts in Globe and Miami (see Appendix A).
- D. Cumulative effects: The APE for cumulative effects shall be the same as that for the physical, auditory, and visual/atmospheric/socioeconomic effects combined. The cumulative APE encompasses most of what is known as the "Copper Triangle."

- 1 E. The Forest Service shall ensure that any modification of the APE will be done through consultation
2 conducted among the Consulting Parties. The Forest Service shall notify the Consulting Parties to the
3 Agreement of any proposed modifications. Consulting Parties shall have 30 calendar days to respond
4 to the proposed changes; if no response is received, the Forest Service will make a good-faith effort to
5 contact the Signatories and, if no response is received, will proceed with the modifications.
6 Modifications to the APE will not require an amendment to the Agreement.

7 **V. TRIBAL CONSULTATION**

- 8 A. Through Section 106 and government-to-government consultation with Indian Tribes, pursuant to
9 36 CFR 800.2(c)(2), as well as Section 3003(c)(9)(C) of the Southeast Arizona Land Exchange and
10 Conservation Act, the Forest Service and other Federal land-managing agencies, as appropriate, have
11 made and will continue to make a good-faith effort to identify historic properties that have religious
12 and cultural importance to one or more Indian Tribes and to determine whether they are NRHP-
13 eligible historic properties. Tribal comments and concerns will be compiled by the respective land-
14 managing agency and/or the Forest Service; comments will be considered during the inventory,
15 evaluation of NRHP eligibility, determination of effects, and resolution of adverse effects as
16 described in Stipulations VI through IX. All parties to this Agreement will respect any historic
17 properties of religious and cultural importance to Indian Tribes (NHPA 101(d)(6)(A)) and
18 confidentiality concerns expressed by Indian Tribes to the extent allowed by law (see Stipulation
19 XIII).
- 20 B. In compliance with Chapter 10, Consultation with Indian Tribes and Alaska Native Corporations of
21 the Forest Service Handbook titled *American Indian and Alaska Native Relations Handbook* (FSH
22 1509.13), the Forest Service will continue to engage Indian Tribes in government-to-government
23 consultation throughout the duration of the Undertaking through in-person meetings, telephone calls,
24 and on-site field visits. Information and documents will be provided to the Tribes via mail, email, or
25 in person.
- 26 C. The Forest Service has prepared a Tribal Consultation Plan (see Appendix F) that was distributed to
27 the Tribes and Signatories on October 29, 2019, for a 30-day comment period. Comments received
28 were considered for incorporation into the final Tribal Consultation Plan. The Tribal Consultation
29 Plan details previous Section 106 and government-to-government consultation and procedures to be
30 used by the Forest Service for continuing consultation after the execution of this Agreement.
31 The Forest Service will adhere to the guidance in the Tribal Consultation Plan. Consultation will be
32 flexible and tailored to feedback from each individual Tribe. The Forest Service will take every
33 opportunity to accommodate individual Tribe preference for how consultation will be conducted.
- 34 D. The TNF Forest Supervisor and Tribal Liaison at a minimum, often accompanied by Forest Service
35 subject experts, shall as requested, travel at least once per year for the duration of this Agreement to
36 each consulting Tribe to provide updates on ongoing or proposed projects within the TNF. Additional
37 meetings with the associated cultural groups (Apache, Akimel O'odham, Puebloan, and Yavapai) will
38 be accommodated as requested. Updates will be regularly provided via telephone, email, and formal
39 letter correspondence to tribal leaders and representatives. The Forest Service will consistently
40 consult with Tribes while documents are in draft form and before they are finalized.

VI. IDENTIFICATION OF HISTORIC PROPERTIES

- A. **Physical APE Identification.** The Forest Service shall survey for historic properties within the footprints up to the proposed limit of public access around the perimeter of the GPO and the 250-foot buffer (APE for physical effects) of all of the Selected Lands, GPO project areas, and tailings alternatives prior to the Final EIS as directed by Section 3003 of Public Law 113-291 (see Appendix A). Historic properties inventory surveys conducted to date are shown in Appendix B. The Forest Service shall coordinate these inventories with SHPO, Tribes, and other consulting parties per Stipulation VI.F.
- B. **Additional Inventories.** Additional archaeological inventories for historic properties which may be directly or indirectly impacted within the auditory and visual/atmospheric/socioeconomic APEs will be completed within one year of the issuance of the ROD. These inventories will only focus on the selected tailings alternatives.
- C. **Tribal Monitor Inventories.** Separate inventories are being conducted with tribal monitors and tribal field visits to identify historic properties of traditional religious and cultural importance within the Selected Lands, GPO project areas, and alternatives, in addition to the archaeological and historic building/structure inventory.
- D. **Inventory for Modifications.** If additional areas are identified that need historic property inventories due to necessary changes in the GPO, alternative refinements, or permitting/licensing requirements after the signing of this Agreement, the Forest Service shall ensure that all inventories will be carried out in conformance with current professional standards. Any sampling for less than 100 percent pedestrian survey of the physical APE for the final selected alternative will be consulted on with SHPO and Tribes prior to survey. The APE will be updated in consultation with the Consulting Parties.
- E. **Auditory and Visual/Atmospheric/Socioeconomic APE Inventories.** Within 6 months of the issuance of the draft ROD, the Forest Service shall conduct an inventory of the auditory and visual/atmospheric/socioeconomic APEs through a Class I literature review and reconnaissance survey, if necessary, to identify historic properties which may be affected by the Undertaking. The Forest Service shall coordinate these identification efforts with SHPO, Tribes, and other Consulting Parties per Stipulation VI.F.
1. For the auditory APE, the Forest Service shall ensure that the Class I inventory will include archaeological sites, historic buildings and structures, historic districts, and historic properties of traditional religious and cultural importance. Windshield surveys, if needed, will be conducted in the auditory APE. Data sources not checked for the preliminary Class I inventory, such as Google Earth and the Archaeological Records Office at ASM, will be searched for historic properties in the auditory APE. Other information will be sought through records searches and consultation with SHPO and Tribes.
 2. For the visual/atmospheric/socioeconomic APE, the Forest Service shall ensure that the Class I inventory will include archaeological sites, historic buildings and structures, historic districts, and historic properties of traditional religious and cultural importance. Data sources not checked for the preliminary Class I inventory, such as Google Earth and the Archaeological Records Office at ASM, will be searched for historic properties in the visual/atmospheric/socioeconomic APE. Other information will be sought through records searches and consultation with SHPO and Tribes.
 3. For the visual effects within the visual/atmospheric/socioeconomic APE, the Forest Service will use visual modeling to determine areas from which the Undertaking is visible. Within those

1 identified areas, windshield or reconnaissance surveys will be conducted to identify historic
2 properties which may be affected by the Undertaking, including historic properties of traditional
3 religious and cultural importance.

- 4 4. The Forest Service will also use the visual/atmospheric/socioeconomic APE to determine if other
5 effects on historic properties are anticipated for the communities of Superior, Top-of-the-World,
6 Globe, and Miami. Four previous inventories of historic buildings have been conducted in
7 Superior and one each in Miami and Globe; the Globe Commercial and Civic Multiple Resource
8 Area is listed in the NRHP. If the Forest Service determines that there may be adverse effects on
9 historic properties in Superior and/or Top-of-the-World, the Forest Service shall ensure that a
10 windshield survey is conducted for the historic buildings/structures and/or districts of the affected
11 town(s).

- 12 5. Assessment and determination of effects, if any, outside the current APE will not be known until
13 the draft ROD is completed. If the analysis for the final EIS demonstrates that there will be
14 adverse effects on historic properties outside the current APE, the Forest Service will extend the
15 APE per Stipulation IV Section E and ensure that any necessary inventories, evaluation, effects
16 assessment, and resolution of adverse effects are completed per Stipulations VI through IX.

17 **F. Review of Identification Efforts:** Per Federal and State guidelines, the Forest Service will ensure
18 that the draft inventory report(s) generated through the identification efforts of historic properties
19 (i.e., those generated from archaeological surveys) will be reviewed and revised in three steps:

- 20 1. The draft inventory report(s) of historic properties will first be concurrently reviewed by both the
21 Forest Service and other appropriate land-managing agencies (BLM or ASLD) for a 30-day
22 comment and review period. Comments will then be incorporated into a revised draft report.
- 23 2. Once accepted by the jurisdictional agency's cultural resource specialist, the revised draft historic
24 properties inventory reports and associated documentation including tribal comments will be
25 submitted by the Forest Service to all Consulting Parties for a 30-day review and comment
26 period. The Forest Service will also submit the Forest Service's determinations of eligibility and
27 effects to the SHPO and Tribes along with a revised draft report for a 30-day review and
28 comment period.
- 29 3. The Forest Service will consider all comments received during this period, and a draft final
30 historic properties inventory report will be produced that will be submitted to the Consulting
31 Parties for a 30-day review period. If the Forest Service does not receive a response from a
32 Consulting Party during these review periods, the Forest Service will make a good-faith effort to
33 contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an
34 unresponsive party (14 days), there is no response, the Forest Service may proceed to the next
35 step prescribed by this Agreement (Stipulation VII).

36 **G. Review of Identification Efforts by Tribal Monitors.** Per Federal and State guidelines, the Forest
37 Service will ensure that the draft inventory report(s) generated through the identification efforts of
38 historic properties of traditional religious and cultural importance (i.e., those generated from the work
39 of the tribal monitor surveys) will be reviewed and revised in the steps as outlined below. The Forest
40 Service shall ensure that information from the Tribes will remain confidential per Section 3056 of
41 25 U.S.C. 32A, which prohibits the disclosure of confidential tribal information on sites or resources
42 used for traditional and cultural purposes shared with the Forest Service.

- 43 1. The Forest Service Tribal Relations Program Manager will review the draft inventory reports on
44 historic properties of traditional religious and cultural importance. At the same time, the Forest
45 Service Tribal Relations Program Manager will distribute the report to the Tribes for a 30-day
46 comment and review period.

2. If the Forest Service does not receive a response from a Tribe during these review periods, the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive party over the next 14 days, there is no response, the Forest Service may proceed. Comments will then be incorporated into a revised draft report.

VII. EVALUATION OF HISTORIC PROPERTIES

- A. The historic properties identified as of June 6, 2019, are listed in Appendix B. In total, 721 archaeological sites have been recorded within the Oak Flat Federal Parcel, GPO project components, and the proposed tailings location for Alternatives 2, 3, 4, and 5. Of these, 523 sites have been determined eligible for the NRHP, and 86 sites have been determined not eligible for the NRHP. Another 118 sites are unevaluated. Two sites are exempt from Section 106 consultation because they are in-use gas pipelines, per the ACHP's *Exemption Regarding Historic Preservation Review Process for Projects Involving Natural Gas Pipelines* (Federal Register, Vol. 67, No. 66, April 5, 2002). In addition, other property types that will need to be evaluated may include historic buildings and structures, as well as historic linear infrastructure.
- B. The Forest Service will evaluate potential historic properties of traditional religious and cultural importance in accordance with 36 CFR 800.4(b)(2) in consultation with the Tribes. The Forest Service and/or the appropriate land-managing agency will invite Tribal Historic Preservation Officers and/or designated Tribal Representatives, as well as elders and traditional practitioners, to visit the resources identified by the tribal monitors and included in the inventory reports of historic properties of traditional religious and cultural importance per Stipulation VI Section G.. The Forest Service has identified one historic property of traditional religious and cultural importance, which has been listed on the NRHP as a TCP, in the physical APE. A currently unknown number of additional historic properties of traditional religious and cultural importance are present in the physical APE; the Forest Service is identifying additional historic properties through tribal consultation, historic property inventory efforts, and the efforts of tribal monitors as described in Stipulation VI Section G.
- C. The Forest Service shall ensure that all previously identified unevaluated historic properties located within the APE for physical effects will be evaluated for their NRHP eligibility during the implementation of the Treatment Plan as described in Stipulation IX. The Forest Service shall make determinations of eligibility based on the results of the testing and in consultation with SHPO, Tribes, and Consulting Parties.
- D. The Forest Service shall ensure all cultural resources identified during additional Class I literature review, Class III inventory, historic building surveys, and through tribal consultation will be evaluated by the Forest Service for their eligibility for the NRHP and for project effects in accordance with 36 CFR 800.4(b)(2) and in consultation with the appropriate Consulting Parties. The Forest Service shall make determinations of eligibility and effect upon completion of all inventory reports in coordination with land-managing agencies when appropriate; the SHPO shall be afforded 30 days to review and concur on the determinations (see Stipulation VI Section F.2).
- E. The Forest Service in consultation with the Tribes shall evaluate potential historic properties of traditional religious and cultural importance; historic properties identified as TCPs by tribal representatives will be evaluated according to the criteria set forth in National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. The Forest Service shall make determinations of eligibility and effect upon completion of all historic properties of traditional religious and cultural importance inventory reports in coordination with land-managing agencies when appropriate; the SHPO shall be afforded 30 days to review and concur on the determinations.

- 1 F. If the NRHP eligibility of cultural resources cannot be determined at the time of initial inventory, the
2 Forest Service will either (a) ensure that an eligibility testing program is conducted according to the
3 provisions outlined in Stipulation IX below, or (b) treat unevaluated cultural resources as eligible for
4 the NRHP. The Forest Service's subsequent NRHP determinations after testing and in concurrence
5 with the land-managing agency when appropriate will then be submitted to the SHPO for concurrence
6 in accordance with 36 CFR 800.4(b)(2).
- 7 G. Should the SHPO or other Consulting Party disagree with these determinations, refer to process
8 described in Stipulation XIX.

9 **VIII. DETERMINATION OF EFFECTS**

- 10 A. The Forest Service has determined that the Undertaking will have an adverse effect on historic
11 properties; however, two approaches are needed because there are two parts to this Undertaking:
12 1) one approach for Forest Service lands within the Oak Flat Federal Parcel, and 2) a second approach
13 for all other lands involved in the GPO. Because the Oak Flat Federal Parcel will be leaving Federal
14 ownership without adequate and legally enforceable restrictions or conditions to ensure long-term
15 preservation, the Forest Service has determined the Undertaking will have an adverse effect on all
16 historic properties within the parcel. For historic properties outside of the Oak Flat Federal Parcel,
17 the Forest Service, in consultation with the appropriate land-managing agency, will determine on a
18 property-by-property basis if the Undertaking will have an adverse effect on specific historic
19 properties in the GPO.
- 20 B. The Forest Service shall assess the visual effects on historic properties in the
21 visual/atmospheric/socioeconomic APE whose eligibility is in any way contingent on its visual
22 setting using viewshed simulations of the visibility of project components and factoring qualities such
23 as distance from the project component, intervening landforms and/or human-made constructions, and
24 overall modifications to the visual landscape. The assessment of visual effects on historic properties
25 will be done in consultation with the Tribes and other Consulting Parties. This analysis will be
26 completed within 2 years of issuing the draft ROD.
- 27 C. For disputes regarding determinations of effects, the Forest Service shall request that the ACHP
28 resolve the dispute, pursuant to 800.4 (d)(1)(ii) and 800.5(c)(3) per Stipulation XIX.

29 **IX. MEASURES TO RESOLVE ADVERSE EFFECTS**

- 30 A. Because of the size and complexity of the Undertaking, the Forest Service shall implement measures
31 to resolve adverse effects on historic properties through several procedures aimed at providing a
32 comprehensive program. The following is a summary of the documents that have been or are to be
33 prepared by the Forest Service and detailed below, Sections C through G.
- 34 1. Oak Flat HPTP: The Forest Service has prepared an archaeological HPTP with support from
35 Resolution Copper for the Selected Lands prior to the land exchange and the execution of this
36 Agreement. The Oak Flat HPTP is attached to this Agreement as Appendix E. The Forest Service
37 shall begin implementation of this HPTP immediately following execution of this Agreement.
38 The implementation of the Oak Flat HPTP may begin prior to the formal transfer of the Oak Flat
39 Federal Parcel and will, if required, continue after the transfer is completed.
- 40 2. GPO Research Design: Separate from the Oak Flat HPTP, the Forest Service, with support from
41 Resolution Copper, will ensure that an overall archaeological Research Design for the GPO is
42 prepared to guide mitigations such as archaeological data recovery, avoidance, and monitoring
43 within 3 months of the execution of the Agreement. Detailed Treatment Plans for each GPO

component and the Section 404 mitigation sites (if needed) will then be prepared under the GPO Research Design after the Agreement is executed.

The Forest Service has determined that the multiple treatment plans approach, rather than a GPO HPTP, is needed because the GPO covers several large areas, each with its own cultural background and topography. The Treatment Plans will then be written under the overall GPO Research Design, be tailored for each GPO project area or the Section 404 mitigation parcels (i.e., West Plant Site, MARRCO corridor, tailings facility, etc.), and be implemented per each GPO project area. The Forest Service will begin implementation of the Treatment Plans within 6 months of the issuance of the final ROD.

3. Visual, Atmospheric, Auditory, socioeconomic, and Cumulative Effects Mitigation Plan(s): The Forest Service will ensure that additional mitigation plan(s) are prepared after the publication of the final EIS that describe mitigation measures to address visual, atmospheric, auditory, and cumulative effects on historic properties. This plan will be implemented upon concurrence of all of the signatories to this document. Tribal monitors may participate in mitigation of adverse effects as described below. Roles and responsibilities for tribal monitors will be outlined in the Oak Flat HPTP, GPO Research Design and Treatment Plans, and any Visual, Atmospheric, Auditory, and Cumulative Effects Mitigation Plan(s) and will include fieldwork and interpretation of fieldwork results.
4. Increase size of Apache Leap Special Management Area. Resolution Copper will provide 32 acres of privately owned land within the Apache Leap South End Parcel, in addition to 807 acres of land required by Section 3003 of the NDAA. With this additional land, the Apache Leap Special Management Area (SMA), a sacred landscape for the Apache and Yavapai, will be 839 acres. The Apache Leap SMA is named after its signature feature, an escarpment of sheer cliff faces and hoodoos and preserves the natural character of Apache Leap, allows for traditional uses of the area by Native Americans, and protects and conserves the cultural and archaeological resources of the area. Upon completion of the land exchange outlined in Section 3003 of the NDAA, the additional 32 acres will be transferred into Federal ownership and the entire Apache Leap SMA will include only Federal lands. This measure would mitigate impacts on cultural and tribal values and would require no additional ground disturbance.
5. Resource Salvage within the Land Exchange, the tailings storage facility footprint, and the pipeline corridor with priority to Indian Tribes for traditional and cultural use. To the extent practicable and in collaboration and partnership with Indian Tribes, Resolution Copper will salvage select natural resources within the Land Exchange area, pipeline corridor, and tailings storage facility footprint for use by Tribes.
6. The Emory Oak Collaborative Tribal Restoration Initiative: In partnership with the TNF, Resolution Copper will fund the Emory Oak Collaborative Tribal Restoration Initiative, a multi-year restorative fieldwork program for Emory oak groves located in the Tonto National Forest and the Coconino National Forest. The TNF will direct the identification and restoration work of the Emory oak groves and fieldwork in consultation with tribal elders from Yavapai-Apache Nation, White Mountain Apache Tribe, San Carlos Apache Tribe, and Tonto Apache Tribe, and Northern Arizona University. Program treatments under consideration for Emory oak groves include installation of select fencing to exclude cattle and large herbivores, invasive species control, shrub canopy thinning, prescribed burns, mastication, and reseeded through seed transplantation to increase recruitment of juvenile oaks. The program is designed to restore and protect Emory oak groves that are accessed by Apache communities for traditional subsistence gathering and ensure their sustainability for future generations.
7. Tribal Cultural Heritage Fund: Resolution Copper will establish a cultural heritage foundation for consulting Native American Tribes for long-term funding of cultural heritage projects.

1 In response to government-to-government consultation to address the concerns of Indian Tribes
2 and in compliance with the mandate from the Southeast Arizona Land Exchange and
3 Conservation Act to “consult with Resolution Copper and seek to find mutually acceptable
4 measures to – (i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse
5 effects on the affected Indian tribes resulting from mining and related activities on the Federal
6 land conveyed to Resolution Copper under this section. (Sec. 3003(c)(3)).” Resolution Copper
7 will fund a cultural heritage foundation for consulting Indian Tribes. The fund shall be
8 administered by a “to be determined” 501(c)(3) corporation that will be managed by an
9 appropriate governance structure to permit the implementation of the funding described in this
10 stipulation. Resolution Copper shall deposit money within 6 months of the Forest Service ROD
11 into the fund. Applications to the fund shall be reviewed by a committee consisting of
12 representatives from SHPO, the applicable 501(c)(3) corporation, and the affected Tribes. Funds
13 from the foundation would be available to the following Tribes for completion of cultural
14 preservation projects: the Fort McDowell Yavapai Nation, Gila River Indian Community, Hopi
15 Tribe, Mescalero Apache Tribe, Pueblo of Zuni, Salt River Pima-Maricopa Indian Community,
16 San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache
17 Nation, and Yavapai-Prescott Indian Tribe.

- 18 8. Foundation(s) for Long-term Funding. Resolution Copper will establish a foundation or
19 foundations for funding the continuation of the Tribal Monitor Program, long-term maintenance
20 and monitoring of the Emory Oak Collaborative Tribal Restoration Initiative, and development of
21 a Tribal Youth Program in partnership with the Forest Service and consulting Tribes. All three
22 programs will be available to the following Tribes: the Fort McDowell Yavapai Nation, Gila
23 River Indian Community, Hopi Tribe, Mescalero Apache Tribe, Pueblo of Zuni, Salt River Pima-
24 Maricopa Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain
25 Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe.
- 26 9. Community Development Fund: Resolution Copper shall establish a fund for the rehabilitation of
27 historic buildings within the communities of Superior, Miami, Globe, Kearny, Hayden, and
28 Winkelman. The fund shall be administered by a “to be determined” 501(c)(3) corporation that
29 will be managed by an appropriate governance structure to permit the implementation of the
30 funding described in this stipulation. Resolution Copper shall deposit funds within 6 months of
31 the Forest Service ROD into the fund. Applications to the fund shall be reviewed by a committee
32 consisting of representatives from SHPO, the applicable 501(c)(3) corporation, and the affected
33 communities. All funded projects must comply with the Secretary of the Interior's Standards for
34 the Treatment of Historic Properties, with compliance determined by SHPO. Specific parameters
35 for the fund shall be defined through consultation between Resolution Copper, the 501(c)(3)
36 entity, and SHPO, and must include:
 - 37 a. availability to municipalities, counties, non-profits, private citizens, and private
38 organizations;
 - 39 b. preference for projects participating in other historic preservation incentive programs;
 - 40 c. preference for projects agreeing to repay funds within five (5) years of award, with extensions
41 possible.
- 42 10. Archaeological Database Funds: In recognition of the substantial loss of cultural resources on
43 State lands occurring through development of the preferred alternative, Resolution Copper shall
44 fund the creation and/or enhancement of existing electronic archaeological databases to assist the
45 State of Arizona with management of these assets. Within 3 months of the issuance of the final
46 Special Use Permit, Resolution Copper will transfer no less than \$2 million into a restricted fund
47 to provide for State’s use.

11. Access to Oak Flat. Resolution Copper will ensure access to the Oak Flat campground to Tribes as long as safety allows. Resolution Copper will develop an Oak Flat Campground Management Plan prior to completion of the land exchange. The management approach is consistent with the current management of the campground by the Forest Service, but would also incorporate additional measures requested by Tribes, including closure of the campground to the public periodically or upon request by Indian Tribes for traditional and ceremonial purposes.
12. Castleberry Campground. Resolution Copper will establish an alternative campground site, known as Castleberry, to mitigate the loss of Oak Flat Campground, which is a historic property. The development of the new campground is on private property owned by Resolution Copper and contains numerous historic-era historic properties which would be avoided by campground facilities and preserved in place with interpretive signage.

B. Preparation of the GPO Research Design and Treatment Plans:

1. The Forest Service is in the process of developing, in consultation with SHPO and Tribes, a Research Design for the GPO which will consist of a context and research design that will apply to all areas of the GPO, tailings location alternatives, and Section 404 mitigation parcels (if needed). The Forest Service shall prepare Treatment Plans detailing the plan of work for each GPO project component area or Section 404 mitigation parcels under the umbrella document of the GPO Research Design.
 - a. Once the selected tailings storage facility is identified, the GPO Research Design and Treatment Plans will be modified to include only the selected tailings location and the GPO project areas.
 - b. If Alternative 5 (Peg Leg) is selected, the Forest Service will ensure that the Treatment Plan for the tailings alternative area and associated infrastructure will be prepared in direct coordination with the BLM and submitted to SHPO, the Tribes, and other Consulting Parties for review and comment. If the Forest Service does not receive a response from a Consulting Party during these review periods, the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive party over the next 14 days, there is no response, the Forest Service may proceed.
 - c. If Alternative 6 (Skunk Camp) is selected, the Forest Service will ensure that the Treatment Plan for the tailings alternative area and associated infrastructure and the Treatment Plan for the Section 404 mitigation parcels will be prepared in direct coordination with the USACE and submitted to SHPO, the Tribes, and other Consulting Parties for review. If the Forest Service does not receive a response from a Consulting Party during these review periods, the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive party over the next 14 days, there is no response, the Forest Service may proceed.
2. The GPO Treatment Plans shall also include measures to resolve adverse effects with methods other than data recovery, such as avoidance or burial in place, for historic properties that are eligible for the NRHP under Criterion D when appropriate. Adverse effects on historic properties may be avoided through design or facility placement and any avoidance measures to be taken will be clearly outlined in the Plans.
3. The GPO Treatment Plans shall include a plan for NRHP-eligibility testing of unevaluated sites which may be adversely affected by the Undertaking if they are determined eligible for the NRHP. Testing shall be conducted as part of the first stage of work at each project component. Once testing fieldwork is complete, the Forest Service shall ensure that a technical report is prepared detailing the eligibility recommendation for the site(s). The Forest Service shall make

determinations of eligibility based on the technical report which will be submitted to the SHPO, Tribes, and affected land-managing agency, for a review and comment period of 30 days. Comments will then be addressed by the Forest Service. If the Forest Service does not receive a response from a Consulting Party during these review periods, the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive party over the next 14 days, there is no response, the Forest Service may proceed with the data recovery if warranted.

4. The Forest Service shall ensure that the data recovery strategy specified in the GPO Research Design in conjunction with the Treatment Plans is consistent with the *Secretary of the Interior's Standards and Guidelines* (48 Federal Register 44716-44742), the ACHP's *Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites* (64 Federal Register 95:27085–27087), and guidance from the Forest Service and SHPO.
5. The Forest Service and ASLD shall ensure that the archaeological strategies for work conducted on State Trust land specified in the GPO Research Design are consistent with ARS 41-841 *et seq.* and ARS 41-865. The Forest Service shall ensure that the archaeological strategies for work conducted on private lands specified in the GPO Research Design are consistent with ARS 41-865.
6. The Forest Service shall ensure that the GPO Research Design in conjunction with the Treatment Plans specify at a minimum:
 - a. The results of previous research and a research design that discusses the questions to be addressed through data recovery, archival research, analysis and interpretation, with an explanation of their relevance and importance;
 - b. The process for interfacing the results of eligibility testing, the resultant determinations of eligibility, and any prior excavations performed as a result of the Undertaking with the relevant data recovery methodology;
 - c. The results of tribal consultation regarding the incorporation of tribal perspectives into the culture history, research design, data recovery methods, analysis, and interpretation;
 - d. The properties or portions of properties where data recovery is to be carried out, and any property or portion of property that would be affected by the Undertaking without treatment, and a rationale for dealing with affected properties or portions (e.g., discussion of the sampling strategy, avoidance, etc.);
 - e. If the data recovery is to be phased (i.e., additional data recovery is required), a discussion of the transition between Phase I and Phase II including time frames for review of preliminary reports and field visits/consultations;
 - f. The archival, field, and laboratory methods to be used, with an explanation of their relevance to the research questions;
 - g. Specification of the methods and level of effort to be expended on the treatment of each historic property;
 - h. The methods to be used in the management and dissemination of the resultant data to the professional community and the public including a proposed schedule for tasks outlined in the GPO, and a schedule for the submittal of draft and final reports (Preliminary Treatment Report[s] and Final Treatment Report[s]) to Consulting Parties for review and comment;
 - i. A discussion of permits and personnel qualifications for archaeological crews;
 - j. The proposed disposition and curation of recovered materials and records in accordance with relevant state and Federal laws (36 CFR 79).

- 1 C. Visual, Atmospheric, Auditory, Socioeconomic and Cumulative Effects Mitigation Plan(s). Within
2 9 months of execution of this Agreement, the Forest Service shall prepare, in consultation with SHPO
3 and the other Consulting Parties, a plan or plans outlining the mitigation of adverse visual,
4 atmospheric, auditory, and cumulative effects (indirect or direct). The draft plan or plans shall be
5 submitted for review and comment to SHPO and the Consulting Parties per Stipulation IX Section I.
6 If the Forest Service does not receive a response from a Consulting Party during these review periods,
7 the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a
8 reasonable and good-faith effort to reach an unresponsive party over the next 14 days, there is no
9 response, the Forest Service may proceed. The plan or plans shall include at a minimum:
- 10 1. Methods for identifying historic properties within the APEs for visual, atmospheric, auditory, and
11 cumulative effects;
- 12 2. Results of data searches and fieldwork in the APEs for visual, atmospheric, auditory, and
13 cumulative effects including a description of the historic properties that will be adversely affected
14 and the type of effect (direct or indirect);
- 15 3. A description of measures to minimize or mitigate adverse effects on historic properties including
16 schedules for implementation and reporting requirements.
- 17 D. The Forest Service shall ensure a separate Monitoring and Discovery Plan after the signing of the
18 final ROD for the GPO with procedures for monitoring, evaluating, and treating discoveries of
19 unexpected or newly identified nonhuman remains and archaeological resources during
20 implementation of the Undertaking, including the consultation process and timelines with appropriate
21 Consulting Parties.
- 22 1. If historic properties will be avoided by activities associated with the Undertaking on Federal or
23 State land, but could be threatened by the Undertaking, the Forest Service shall ensure that the
24 Monitoring and Discovery Plan will include a program for monitoring for the duration of the
25 Agreement of these historic properties on Federal or State land for those activities.
- 26 2. As part of the Monitoring and Discovery Plan, the Forest Service will also detail a program of
27 cultural and archaeological sensitivity training for construction personnel, and an outline of topics
28 to be covered in sensitivity trainings, including tribal participation, if possible, in leading the
29 trainings. Training may consist of written instructional materials, classes with videos and/or
30 PowerPoint demonstrations, and tailgate sessions.
- 31 a. The Forest Service will develop training materials in cooperation with Resolution Copper and
32 in consultation with Tribes, SHPO, and other Consulting Parties after issuing the final ROD.
33 Consultation on the Monitoring and Discovery Plan shall follow the steps and timeline
34 outlined in Stipulation IX Section I.
- 35 E. The Forest Service shall prepare NAGPRA Plans of Action for TNF lands and ASM Burial
36 Agreements for State and private lands in accordance with Stipulation X and include them as
37 appendices in all documents discussing Section 106 compliance, including the Oak Flat HPTP and
38 the GPO Research Design and Treatment Plans.

1 F. The Forest Service shall develop a strategy for a public education program per ACHP guidelines
2 presented in *Recommended Approach for Consultation on Recovery of Significant Information from*
3 *Archeological Sites* (June 17, 1999) with the goal of disseminating information to the general public
4 about the results (either ongoing or post-data recovery) of the historic properties investigations,
5 completed in coordination with the Tribes and Consulting Parties. The Forest Service shall develop
6 this strategy within 1 year of the publication of the final EIS and to be implemented when complete.
7 This program shall include at a minimum: presentation of data recovery results at a local
8 archaeological conference, public lectures and presentations, and a display for Arizona Archaeology
9 Awareness Month activities.

10 G. Section 106 Mitigation Documents Review

- 11 1. Upon receipt of a draft of the documents as described in Stipulation IX Sections A–F, the Forest
12 Service will submit the draft to all the Consulting Parties to this Agreement for the opportunity to
13 review and comment. All parties will have 30 calendar days from receipt to review and provide
14 comments to the Forest Service.
- 15 2. If revisions to the documents are needed, all Consulting Parties to this Agreement will have
16 30 calendar days from receipt to review and comment on the revisions.
- 17 3. The Forest Service will reach out to the Tribes to schedule in-person meetings with the Tribes to
18 discuss their comments, if wanted.
- 19 4. If the Forest Service does not receive a response from a Consulting Party during these review
20 periods, the Forest Service will make a good-faith effort to contact the party by email and
21 telephone. If, after a reasonable and good-faith effort to reach an unresponsive party over the next
22 14 days, there is no response, the Forest Service may proceed.
- 23 5. Copies of the final documents in electronic and hard-copy format will be provided by the Forest
24 Service to all Consulting Parties to this Agreement.

25 H. Oak Flat HPTP, GPO Treatment Plans, Funding Plans Implementation

- 26 1. The Forest Service will begin implementation of the Oak Flat HPTP within 1 month of execution
27 of this Agreement and may continue after the land exchange.
- 28 2. The Forest Service shall begin implementation of the GPO Treatment Plans and the Funding Plan
29 after the issuance of the ROD.
- 30 3. The land-managing agencies will only authorize the proposed archaeological fieldwork or other
31 agreed-upon mitigation strategies after the Forest Service has sent the HPTP and GPO Treatment
32 Plans for review and comment to SHPO and the Tribes, the comments have been addressed, and
33 the Forest Service has approved the final Oak Flat HPTP and Funding Plans with SHPO
34 concurrence.
- 35 4. If in-field modifications of the Oak Flat HPTP or GPO Treatment Plans are necessary, the Forest
36 Service shall consult with SHPO, the Tribes, and the affected land-managing agency, if needed,
37 about the modification. They shall have 30 days to provide comments; the Forest Service will
38 address any comments received. If appropriate, the Forest Service will share with the affected
39 land-managing agencies the proposed modification. If the Forest Service does not receive a
40 response during the review period, the Forest Service will make a good-faith effort to contact the
41 party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive
42 party over the next 14 days, there is no response, the Forest Service may proceed with
43 modifications to the HPTP or GPO Treatment Plans. Modifications will be discussed and justified
44 in the report(s) of the work.

1 I. Preliminary Treatment Report(s)

- 2 1. The Forest Service shall ensure that Preliminary Treatment Reports summarizing the
3 implementation of the Oak Flat HPTP and GPO Treatment Plans, as described in Sections A.1
4 and A.2 of Stipulation IX, or other treatments are prepared within 30 calendar days after
5 fieldwork or other mitigation strategies are completed. Separate reports may be prepared for
6 archaeological work and non-archaeological mitigation. The Preliminary Treatment Report is
7 intended to provide a brief overview of treatment conducted after the conclusion of fieldwork to
8 document that treatment has occurred at a location within the APE prior to the issuance of a
9 Notice to Proceed from the Forest Service. Full documentation of the treatment and analysis will
10 then be provided in the Final Treatment Report.
- 11 2. The Preliminary Treatment Report for archaeological work will contain at a minimum:
- 12 a. Descriptions and justifications of any changes in field methods from those presented in the
13 HPTP or Treatment Plans.
- 14 b. A map of each treated site showing excavated areas, feature locations, areas monitored, and
15 other data as appropriate.
- 16 c. A list of features identified at each site, brief descriptions, extent of investigation, and
17 assessment of function and age.
- 18 d. A summary of the data recovery results, including summary descriptions of recovered
19 artifacts and samples, by class.
- 20 e. A discussion of any suggested changes or refinements to the research questions or analyses
21 identified in the research design that might be warranted based on the preliminary findings
22 and the character of the recovered assemblages.
- 23 f. A schedule for the completion of all analyses and submission of the Final Treatment Report.
- 24 3. Preliminary Treatment Reports for all other mitigation strategies (non-archaeological) will
25 include:
- 26 a. A description of the work conducted in accordance with the treatment plans.
- 27 b. Any deviations from the plans with justifications.
- 28 c. Results of work conducted, and deliverables completed.
- 29 4. The Forest Service shall submit the draft Preliminary Treatment Report to the SHPO and
30 simultaneously afford all Consulting Parties to this Agreement the opportunity to review and
31 comment on the report(s) within 30 calendar days of receipt of the report. The Forest Service will
32 consult with the SHPO and other Consulting Parties to this Agreement to ensure, to the extent the
33 Forest Service agrees, that any comments are addressed in the final Preliminary Treatment
34 Report. If the Forest Service does not receive a response from a Consulting Party during these
35 review periods, the Forest Service will make a good-faith effort to contact the party by email and
36 telephone. If, after a reasonable and good-faith effort to reach an unresponsive party over the next
37 14 days, there is no response, the Forest Service may proceed.

38 J. Final Treatment Report(s)

- 39 1. Draft Final Treatment Reports will be prepared for each treated project component (i.e., the Oak
40 Flat Federal Parcel, East Plant Site, West Plant Site, tailings facility, etc.). The Final Treatment
41 Reports will provide complete documentation of all treatment including analysis of materials and
42 interpretation of the results.

2. The Forest Service shall ensure that Draft Final Treatment Reports are completed within 1 year of completion of applicable fieldwork, and Final Treatment Reports within 2 years of completion of applicable fieldwork or mitigation tasks.
3. The Draft and Final Treatment Report(s) will contain at a minimum:
 - a. Discussion of the methods and treatments applied to the historic properties with an assessment of the degree to which these methods and treatments followed the direction provided by the plans.
 - b. Discussion of any changes in methods from those proposed in the plans.
 - c. A topographic plan view map for each treated historic property investigated, depicting all features, treatment areas, and other data as appropriate.
 - d. Final descriptions, drawings, and/or photographs for each feature.
 - e. Final descriptions and analyses of all recovered data classes.
 - f. Final interpretation of each site according to the research contexts identified in the plans.
 - g. Overall synthesis of the data recovery and analysis results with an interpretation of perceived patterns.
 - h. Interpretation of the project results in a regional context.
 - i. If a burial agreement with the ASM has been acquired, all information relevant to compliance with the reporting requirements under the burial agreement.
 - j. A schedule for the completion of all curation and repatriation requirements.
4. The Forest Service will provide the Draft Final Treatment Reports to the SHPO and simultaneously afford all Consulting Parties to this Agreement the opportunity to review and comment on the report(s). SHPO and the other Consulting Parties to this Agreement will have 30 calendar days from receipt of the Draft Final Treatment Report to review and comment.
5. If the Forest Service does not receive a response from a Consulting Party during these review periods, the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive party, there is no response, the Forest Service will move forward after the 30 days.
6. Forest Service will direct Resolution Copper in the completion of the Final Treatment Report to address all comments. Electronic and hard copies of the Final Treatment Report will be provided to the Forest Service and in turn to the SHPO, land-management agencies, and other Consulting Parties to this Agreement. Resolution Copper, on behalf of land-management agencies, is responsible for filing this documentation with the curation repository for their collections.

X. TREATMENT OF HUMAN REMAINS AND FUNERARY OBJECTS

The Forest Service shall treat human remains, associated funerary objects, sacred objects, objects of cultural patrimony discovered on Federal land in compliance with NAGPRA, ARPA, and the Forest Service Region 3 policy for the treatment and disposition of Native American human remains and associated funerary objects recovered from Forest Service Southwestern Region lands (Region 3 Supplement 2300-99-3 to Forest Service Manual, Chapter 2360 – Special Interest Areas, Section 2361.29–Recovery, Curation and Public Use, 08/12/1999).

The Forest Service and the BLM have NAGPRA responsibilities that are specific to a Federal agency's jurisdictional authority. Two NAGPRA Plans of Action shall be developed in consultation with the

1 affected Tribes regarding the treatment and disposition of any human remains, funerary objects, sacred
2 objects, objects of cultural patrimony, objects of tribal patrimony, or formal non-human burials
3 discovered on Federal land. The first Plan of Action will be attached as an appendix to the Oak Flat HPTP
4 and will be specific to that Oak Flat area. The second Plan of Action will be developed specifically for the
5 GPO area and will be attached to the GPO Research Design and Treatment Plan.

6 Human remains, funerary objects, sacred ceremonial objects, objects of national or tribal patrimony,
7 discovered on lands controlled by the State of Arizona, its counties, or municipalities will be treated in
8 compliance with ARS §41-844, and on private land, they will be treated in compliance with §ARS §41-
9 865 under the jurisdictional authority of the Director of the ASM. Resolution Copper will be responsible
10 for ensuring that its archaeological contractor obtains a Burial Agreement with the Director of the ASM
11 for archaeological investigations on state, county, municipal, or private lands.

12 Inadvertent discoveries of human remains, sacred objects, or objects of cultural patrimony will be treated
13 according to the plans incorporated into the Historic Properties Treatment Plans for Oak Flat and for the
14 GPO and following the laws pertinent to the entity that owns or manages the land.

15 XI. AUTHORIZATION OF PROJECT ACTIVITY IMPLEMENTATION

16 A. For activities on TNF land, ground-disturbing/GPO activities may be authorized by the Forest Service
17 line officer once the Forest Service line officer and the TNF Heritage Program Manager,
18 in consultation with the SHPO, pursuant to Stipulations VI through IX, determines that:

- 19 1. No historic properties are present within the physical APE at the location of the proposed activity
20 as identified per Stipulation VI and evaluated for their NRHP-eligibility per Stipulation VII; or
- 21 2. Historic properties that are present within the physical APE at the location of the proposed
22 activity will not be adversely affected as determined per Stipulation VIII; or
- 23 3. The HPTP or Treatment Plan has been fully implemented for historic properties that are present
24 within the physical APE at the location of a proposed activity that will be adversely affected per
25 Stipulation IX, and the Preliminary Treatment Report documenting compliance with the HPTP
26 has been accepted by the Forest Service and the SHPO with the understanding that a full report is
27 in preparation per Stipulation IX.

28 B. For activities on BLM land, ground-disturbing/GPO activities may be authorized once the Forest
29 Service line officer, the TNF Heritage Program Manager, the BLM Field Manager, and the BLM
30 Heritage Program Manager, in consultation with the SHPO, pursuant to Stipulations VI through IX,
31 determine that:

- 32 1. No historic properties are present within the physical APE at the location of the proposed activity
33 as identified per Stipulation VI and evaluated for their NRHP eligibility per Stipulation VII; or
- 34 2. Historic properties that are present within the physical APE at the location of the proposed
35 activity will not be adversely affected as determined per Stipulation VIII; or
- 36 3. The HPTP or Treatment Plan has been fully implemented for historic properties that are present
37 within the physical APE at the location of a proposed activity that will be adversely affected per
38 Stipulation IX, and the Preliminary Treatment Report documenting compliance with the HPTP
39 has been accepted by the Forest Service, the BLM, and the SHPO with the understanding that a
40 full report is in preparation per Stipulation IX.

41 C. For activities on ASLD land, ground-disturbing/GPO activities may be authorized once the Forest
42 Service line officer, the TNF Heritage Program Manager, and the ASLD Commissioner, in
43 consultation with the SHPO, pursuant to Stipulations VI through IX, determine that:

1. No historic properties are present within the physical APE at the location of the proposed activity as identified per Stipulation VI and evaluated for their NRHP eligibility per Stipulation VII; or
 2. Historic properties that are present within the physical APE at the location of the proposed activity will not be adversely affected as determined per Stipulation VIII; or
 3. The HPTP or Treatment Plan has been fully implemented for historic properties that are present within the physical APE at the location of a proposed activity and will be adversely affected per Stipulation IX, and the Preliminary Treatment Report documenting compliance with the HPTP has been accepted by the Forest Service, the ASLD, and the SHPO with the understanding that a full report is in preparation per Stipulation IX.
- D. For activities located on non-Federal lands within the USACE's permit area associated with a Section 404 permit, ground-disturbing/GPO activities may be authorized once the Forest Service line officer, the TNF Heritage Program Manager, and the USACE Commander, in consultation with the SHPO, pursuant to Stipulations VI through IX, determine that:
1. No historic properties are present within the physical APE at the location of the proposed activity as identified per Stipulation VI and evaluated for their NRHP eligibility per Stipulation VII; or
 2. Historic properties that are present within the physical APE at the location of the proposed activity will not be adversely affected as determined per Stipulation VIII; or
 3. The HPTP or Treatment Plan has been fully implemented for historic properties that are present within the physical APE at the location of a proposed activity that will be adversely affected per Stipulation IX, and the Preliminary Treatment Report documenting compliance with the HPTP has been accepted by the Forest Service with the understanding that a full report is in preparation per Stipulation IX.
 4. Although execution of this Agreement would satisfy USACE's NHPA responsibilities, such an authorization for ground-disturbing activities by the Forest Service shall not be construed as, nor negate, the need for any required USACE permit.

XII. COMMUNICATION AMONG PARTIES TO THE PROGRAMMATIC AGREEMENT

Electronic mail (email) will serve as the preferred official correspondence for all communications regarding this Agreement and its provisions. See Appendix D for a list of contacts and email addresses. Contact information in Appendix D may be updated as needed without an amendment to this Agreement. It is the responsibility of each Consulting Party to immediately inform the Forest Service of any change in name, email address, or telephone number for any point-of-contact. The Forest Service will forward this information to all Consulting Parties by email.

XIII. CONFIDENTIALITY

- A. To the maximum extent allowed by Federal law, the Forest Service will maintain confidentiality of sensitive information regarding historic properties that could be damaged through looting or disturbance, and/or to help protect a historic property to which a Tribe attaches religious and cultural significance. However, any documents or records the Forest Service has in its possession are subject to the Freedom of Information Act (FOIA) (5 U.S.C. 552 *et seq.*) and its exemptions, as applicable, and also to the prohibition on disclosure in Section 3056 of 25 U.S.C. 32A which protects confidential tribal information shared with the Forest Service.

- 1 B. The Forest Service shall evaluate whether a FOIA request for records or documents would involve a
2 sensitive historic property, a historic property to which a Tribe attaches religious and cultural
3 significance, or confidential information provided to the Forest Service, and if such documents
4 contain information that the Forest Service is authorized to withhold from disclosure by other statutes
5 including Section 3056 of 25 U.S.C. 32A, Section 304 of the NHPA, and the provisions of the ARPA.
6 If this is the case, the Forest Service will consult with the Keeper of the Register and the ACHP
7 regarding withholding the sensitive information per 36 CFR 800.11(c). If a tribally sensitive property
8 is involved, the Forest Service will also consult with the relevant Tribe prior to making a
9 determination in response to a FOIA request.
- 10 C. Information on historic properties of traditional religious and cultural importance will not be withheld
11 from duly designated tribal representatives.

12 **XIV. EMERGENCIES**

13 Should an emergency situation occur that represents an immediate threat to life or property and may
14 affect historic properties, the Forest Service shall immediately notify the SHPO, Tribes, and land
15 managers (as applicable) as to the situation, the potential effects on historic properties, and the measures
16 taken to respond to the emergency or hazardous condition. Should land managers or Tribes desire to
17 provide technical assistance to the Forest Service, they shall submit comments within 7 calendar days
18 from notification, if the nature of the emergency or hazardous condition allows for such coordination.

19 **XV. CURATION**

20 The Forest Service shall ensure that all records and materials resulting from compliance with Section 106
21 for the Undertaking are curated at a repository approved by the Forest Service or participating land-
22 managing agency, and that the facility meets the standards set forth in the 1980 ACHP Handbook on
23 Treatment of Archaeological Properties and the 1990 Guidelines for 36 CFR 79. In compliance with the
24 Arizona Antiquities Act, the Forest Service will ensure that all materials recovered from State and private
25 land and the associated reports will be curated at the ASM or another approved repository. Curation costs
26 will be the responsibility of Resolution Copper.

27 **XVI. ANNUAL REVIEW OF PROGRAMMATIC AGREEMENT AND ANNUAL REPORT**

- 28 A. The Forest Service shall host an annual meeting among the Consulting Parties on or near the
29 anniversary date of the execution of this Agreement to review the progress and effectiveness of this
30 Agreement. The Forest Service is responsible for setting up this meeting, in coordination with all the
31 Consulting Parties.
- 32 B. No less than 60 days prior to the annual meeting, the Forest Service will provide Consulting Parties
33 with an annual report (Annual Report) to review the progress under this Agreement and under the
34 approved HPTP(s). The Annual Report will include:
- 35 1. acreage of new historic property surveys and results;
 - 36 2. status of measures to resolve adverse effects and associated activities;
 - 37 3. monitoring efforts;
 - 38 4. unanticipated discoveries,
 - 39 5. ongoing and completed public education activities;

6. any issues that are affecting or may affect the ability of the Federal agencies to continue to meet the terms of this Agreement;
 7. any disputes and objections received, and how they were resolved;
 8. any additional parties who have become Signatories or Consulting Parties to this Agreement in the past year; and
 9. proposed plans for next year's activities.
- C. Consulting Parties will have 30 calendar days to review the Annual Report and provide comments to the Forest Service, which will then consolidate the comments to develop the agenda for the annual meeting.
- D. Within 14 calendar days after the annual meeting, the Forest Service will summarize the meeting, including proposed action items and how they are to be addressed, in a letter to Consulting Parties. After the meeting, Consulting Parties will have 20 calendar days to review and comment on the meeting notes and, if necessary, provide the Forest Service with any edits to the meeting notes. If changes are needed, the Forest Service will produce revised meeting notes within 30 calendar days of receipt of comments and will provide the final notes to the Consulting Parties.
- E. The Forest Service will prepare and release a public version of the Annual Report based on the approved report and meeting notes within 30 days of the annual meeting. The public version will be intended to provide an update on the project to interested parties and will not contain any sensitive information.
- F. Evaluation of the implementation of this Agreement may also include in-person meetings or conference calls among Consulting Parties. If the Forest Service does not receive a response from a Consulting Party, the Forest Service will make a good-faith effort to contact the party by email and telephone. If, after a reasonable and good-faith effort to reach an unresponsive party, there is no response within 30 days, the Forest Service will assume there are no further concerns. If modifications or amendments to this Agreement are proposed during the evaluation, the process to address the proposed modifications or amendments will follow the steps described in Stipulation XVIII.

XVII. POST-REVIEW DISCOVERIES OF CULTURAL RESOURCES

- A. The Forest Service will ensure that procedures regarding post-review discoveries are included as provisions of Resolution Copper's GPO. The protocol to be followed will also be identified in the Monitoring and Discovery Plan.
- B. The Forest Service will ensure that the project supervisor immediately halts ground-disturbing activities within a 100-foot radius of any new discovery of cultural resources, clearly marks the area of discovery, takes steps to ensure that the area is protected and secured, implements additional measures, as appropriate, to protect the discovery from looting and vandalism, and has a professional archaeologist inspect the area and vicinity to determine the extent of the discovery and provide recommendations to the Forest Service regarding NRHP eligibility, effect, and mitigation treatment.
- C. The Forest Service will notify the SHPO, affiliated Tribes, and applicable land managers within 48 hours of the discovery, and will provide its assessment of the NRHP eligibility of the discovery and measures proposed to resolve adverse effects. The Forest Service will take into account the SHPO's, Tribes', and applicable land manager's recommendations on eligibility and treatment of the discovery, as tiered off of the Oak Flat HPTP or the GPO Research Design, and will notify Resolution Copper of any appropriate actions required to resolve adverse effects.

- 1 D. If the post-review discovery consists of human remains or funerary objects, the Forest Service shall
2 follow the procedures outlined in the applicable NAGPRA Plan of Action for discoveries on Federal
3 land or those outlined in the burial agreement for discoveries on State or private land per ARS 41-844
4 and ARS 41-865 (see Stipulation X). In addition, human remains and funerary objects shall be treated
5 in accordance with Stipulation X.
- 6 E. The Forest Service, in coordination with any applicable land manager, may allow construction
7 activities to proceed in the area of discovery after the Forest Service has determined that
8 implementation of the actions taken to address the discovery pursuant to this Stipulation have been
9 completed.

10 **XVIII. AMENDMENTS**

11 A. This Agreement may be amended when such an amendment is agreed to in writing by all Signatories.
12 Any Signatory may propose an amendment in writing to the Forest Service. The amendment will be
13 effective on the date a copy signed by all of the Signatories is filed with the ACHP.

14 B. Copies of the amendment will be provided by the Forest Service to all parties to this Agreement.

15 **XIX. DISPUTE RESOLUTION**

16 Should any Signatory or Concurring Party to this Agreement object at any time to any actions proposed or
17 the manner in which the terms of this Agreement are implemented, the Forest Service shall consult with
18 such party to resolve the objection for a period of no more than 30 days from the date of the objection,
19 and shall include a site visit if one is requested as a part of the consultation. The Forest Service shall
20 notify the SHPO and other Consulting Parties of the objection. If the Forest Service determines that such
21 objection cannot be resolved, the Forest Service will:

22 A. Forward all documentation relevant to the dispute, including the Forest Service's proposed resolution,
23 to the ACHP. The ACHP shall provide the Forest Service with its opinion on the resolution of the
24 objection within 30 calendar days of receiving adequate documentation. Prior to reaching a final
25 decision on the dispute, the Forest Service shall prepare a written response that takes into account any
26 timely opinion or comments regarding the dispute from the ACHP, Signatories, and Consulting
27 Parties, and provide them with a copy of this written response. The Forest Service will then proceed
28 according to its final decision.

29 B. If the ACHP does not provide comments regarding the dispute within the 30-day time period, the
30 Forest Service may make a final decision on the dispute and proceed accordingly. At the time of
31 reaching a final decision, the Forest Service shall prepare a written response that takes into account
32 any timely comments regarding the dispute from the Signatories and Consulting Parties to the
33 Agreement and provide them and the ACHP with a copy of such written response.

34 C. The responsibilities of the Forest Service to carry out all other actions subject to the terms of this
35 Agreement that are not the subject of the dispute remain unchanged.

36 **XX. ADDITIONAL SIGNATORIES**

37 If additional Federal and State land-managing agencies or other agencies are identified as having an
38 active role in the Undertaking because of project or regulatory changes after execution of this Agreement,
39 they are invited to become Invited Signatories after execution of this Agreement. The process for
40 becoming an Invited Signatory is for the agency to request approval for joining the Agreement from the
41 Forest Service. Upon approval, the Forest Service will send the signature page found at the end of this

1 Agreement to the agency for their signature. The agency shall then return the signed signature page to the
2 Forest Service. If an agency does not request to be an Invited Signatory, they will be considered a
3 Consulting Party to this Agreement.

4 **XXI. TERMINATION, WITHDRAWAL, AND SUSPENSION**

- 5 A. If any Signatory to this Agreement determines that its terms will not or cannot be carried out, the
6 Forest Service shall immediately consult with the other Signatories to attempt to develop an
7 amendment per Stipulation XVIII. If, within 30 calendar days (or another time period agreed to by all
8 Signatories), an agreement about an amendment cannot be reached, any Signatory may terminate this
9 Agreement upon written notification to the other Signatories.
- 10 B. Once this Agreement is terminated, and prior to work continuing on the Undertaking, the Forest
11 Service must either (a) execute an Agreement pursuant to 36 CFR 800.6, or (b) request, take into
12 account, and respond to the comments of the ACHP under 36 CFR 800.7. The Forest Service shall
13 notify the Signatories as to the course of action it will pursue.
- 14 C. At any point after the execution of this Agreement, and after providing written notice to the
15 Signatories, a Signatory may determine that it no longer has Section 106 responsibilities associated
16 with the Undertaking because the Undertaking has changed, or the relevant alternative was not
17 selected. The Signatory will provide written notice to all the Consulting Parties. Such a decision by a
18 Signatory will not affect this Agreement with regard to other land managers and/or permitting entities
19 who are Signatories and will not require an amendment to this Agreement.
- 20 D. If the project is suspended or terminated for any reason, in-process mitigation will be completed
21 according to the appropriate plan to the extent applicable. This includes data recovery and mitigation
22 of adverse effects on historic properties of traditional religious and cultural importance. Resolution
23 Copper will be responsible for the costs associated with completion of the mitigation. For data
24 recovery, the Forest Service shall ensure that any in-process data recovery fieldwork is completed and
25 that all analysis, interpretation, reporting, curation of artifacts, and repatriation of remains be
26 completed within 1 year of project suspension or termination. For other mitigation, the Forest Service
27 shall, in consultation with the land-managing agencies, SHPO, and Tribes, develop steps for
28 completion of the mitigation within 1 year of the suspension or termination. The Forest Service shall
29 notify the Consulting Parties of the suspension or termination via letter and shall ensure that
30 completed reports are submitted for review as described in Stipulation IX Section I.

31 **XXII. TRANSFER OF PERMITS TO SUCCESSOR**

32 Any transfer or assignment of the Agreement for the Undertaking to another party other than Resolution
33 Copper will require the assignee or successor to replace Resolution Copper in this Agreement and assume
34 all responsibilities and obligations of Resolution Copper under this Agreement for mitigation of adverse
35 effects, and any successor or assignee of Resolution Copper is bound to the terms of this Agreement.
36 Any transfer or assignment of the permits for the Undertaking to another party will require the assignee or
37 successor to sign an amendment to this Agreement to become an Invited Signatory at the time of transfer
38 or assignment. All Consulting Parties will be notified if an amendment to reassign the duties of
39 Resolution Copper to the new applicant is proposed.

40 **XXIII. DURATION OF PROGRAMMATIC AGREEMENT**

41 This Agreement shall be in effect for 20 years and will be extended (in accordance with Stipulation
42 XVIII) if needed until the completion of all requirements of this Agreement. If the requirements of this

Agreement are completed prior to 20 years, the Agreement may be terminated jointly by the Signatories according to Stipulation XXI.

XXIV. ANTI-DEFICIENCY ACT

The Forest Service's obligations under this Agreement are subject to availability of appropriated funds, and the stipulations of this Agreement are subject to the provisions of the Anti-Deficiency Act (31 U.S.C. 1341). The Forest Service shall make reasonable and good-faith efforts to secure the necessary funds to implement this Agreement in its entirety. If compliance with the Anti-Deficiency Act alters or impairs the Forest Service's ability to implement the stipulations of this Agreement, the Forest Service shall consult in accordance with the amendment and termination procedures found at Stipulations XVIII and XXI of this Agreement.

XXV. AUTHORIZING SIGNATURES

In witness hereof, the following authorized representatives of the parties have signed their names on the dates indicated, thereby executing this Agreement. This Agreement may be signed by the Signatories and Invited Signatories using photocopy, facsimile, or counterpart signature pages. The Forest Service will distribute copies of all signed pages to the Consulting Parties, once the Agreement is executed.

Execution of this Agreement by the Forest Service, the SHPO, and the ACHP, and implementation of its terms, evidence that the Forest Service has taken into account the effects of this Undertaking on historic properties and has afforded the ACHP an opportunity to comment.

APPENDICES

- A.** Area of Potential Effects
- B.** Previous Survey Coverage and Identified Cultural Resources
- C.** Glossary, Acronyms, and Abbreviations
- D.** Key Project Staff and Contact Information
- E.** Oak Flat Historic Properties Treatment Plan and Addendum
- F.** Tribal Consultation Plan

SIGNATORY PAGE

**PROGRAMMATIC AGREEMENT AMONG THE
USDA FOREST SERVICE TONTO NATIONAL FOREST,
ARIZONA STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
REGARDING COMPLIANCE WITH THE
NATIONAL HISTORIC PRESERVATION ACT
ON THE RESOLUTION COPPER PROJECT
AND SOUTHEAST ARIZONA LAND EXCHANGE
NEAR SUPERIOR, ARIZONA**

USDA Forest Service, Tonto National Forest

By: _____

Printed Name: _____

Title: _____

Date: _____

SIGNATORY PAGE
PROGRAMMATIC AGREEMENT AMONG THE
USDA FOREST SERVICE TONTO NATIONAL FOREST,
ARIZONA STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
REGARDING COMPLIANCE WITH THE
NATIONAL HISTORIC PRESERVATION ACT
ON THE RESOLUTION COPPER PROJECT
AND SOUTHEAST ARIZONA LAND EXCHANGE
NEAR SUPERIOR, ARIZONA

Arizona State Historic Preservation Officer

By: _____

Printed Name: _____

Title: _____

Date: _____

SIGNATORY PAGE

**PROGRAMMATIC AGREEMENT AMONG THE
USDA FOREST SERVICE TONTO NATIONAL FOREST,
ARIZONA STATE HISTORIC PRESERVATION OFFICER,
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REGARDING COMPLIANCE WITH THE
NATIONAL HISTORIC PRESERVATION ACT
ON THE RESOLUTION COPPER PROJECT
AND SOUTHEAST ARIZONA LAND EXCHANGE
NEAR SUPERIOR, ARIZONA**

The Advisory Council on Historic Preservation

By: _____

Printed Name: John M. Fowler

Title: Executive Director

Date: _____

1 INVITED SIGNATORY PAGE

2 PROGRAMMATIC AGREEMENT AMONG THE
3 USDA FOREST SERVICE TONTO NATIONAL FOREST,
4 ARIZONA STATE HISTORIC PRESERVATION OFFICER,
5 THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
6 REGARDING COMPLIANCE WITH THE
7 NATIONAL HISTORIC PRESERVATION ACT
8 ON THE RESOLUTION COPPER PROJECT
9 AND SOUTHEAST ARIZONA LAND EXCHANGE
10 NEAR SUPERIOR, ARIZONA

11 Resolution Copper Mining, LLC

12 By: _____

13 Printed Name: _____

14 Title: _____

15 Date: _____

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7 **NATIONAL HISTORIC PRESERVATION ACT**
8 **ON THE RESOLUTION COPPER PROJECT**
9 **AND SOUTHEAST ARIZONA LAND EXCHANGE**
10 **NEAR SUPERIOR, ARIZONA**

11 **U.S. Department of the Interior, Bureau of Land Management**

12 By: _____

13 Printed Name: _____

14 Title: _____

15 Date: _____

1 **INVITED SIGNATORY PAGE**

2 **PROGRAMMATIC AGREEMENT AMONG THE**
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8 **ON THE RESOLUTION COPPER PROJECT**
9 **AND SOUTHEAST ARIZONA LAND EXCHANGE**
10 **NEAR SUPERIOR, ARIZONA**

11 **United States Army Corps of Engineers, Los Angeles District**

12 By: _____

13 Printed Name: _____

14 Title: _____

15 Date: _____

1 **INVITED SIGNATORY PAGE**

2 **PROGRAMMATIC AGREEMENT AMONG THE**
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6 **REGARDING COMPLIANCE WITH THE**
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8 **ON THE RESOLUTION COPPER PROJECT**
9 **AND SOUTHEAST ARIZONA LAND EXCHANGE**
10 **NEAR SUPERIOR, ARIZONA**

11 **Arizona State Museum**

12 By: _____

13 Printed Name: _____

14 Title: _____

15 Date: _____

INVITED SIGNATORY PAGE

**PROGRAMMATIC AGREEMENT AMONG THE
USDA FOREST SERVICE TONTO NATIONAL FOREST,
ARIZONA STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
REGARDING COMPLIANCE WITH THE
NATIONAL HISTORIC PRESERVATION ACT
ON THE RESOLUTION COPPER PROJECT
AND SOUTHEAST ARIZONA LAND EXCHANGE
NEAR SUPERIOR, ARIZONA**

Salt River Project Agricultural Improvement and Power District

By: _____

Printed Name: _____

Title: _____

Date: _____



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

September 3, 2020

Via E-mail and U.S. Postal Service

Neil Bosworth
Supervisor
Tonto National Forest
2324 E. McDowell Road
Phoenix, Arizona 85006
E-Mail: nbosworth@fs.fed.us

RE: USFS–Resolution Copper NHPA Programmatic Agreement Draft Version 8

Dear Forest Supervisor Bosworth:

On behalf of the approximately 17,000 members of the San Carlos Apache Tribe (“Tribe”), I appreciate the opportunity to provide comments on the July 27, 2020 version 8 draft Programmatic Agreement (“PA”), regarding the U.S. Forest Service (“USFS”) compliance with the National Historic Preservation Act (“NHPA”) requirements for the proposed Resolution Copper Mine Project and Southeast Arizona Land Exchange (“RCMPLX”) near Superior, Arizona. As with prior drafts, the version 8 draft PA remains fundamentally flawed, and for this reason, I cannot agree with its terms and conditions.

Generally, the version 8 draft PA was not developed pursuant to the procedural standards provided under 36 CFR Part 800 or with the Secretary of Interior’s Standards and Guidelines for Archaeology and Historic Preservation, and thus the document itself is premature. More fundamentally, the terms and conditions of the document stands against and unduly burdens traditional Apache religious beliefs and rights.

Given the Tribe’s earlier comments on prior drafts of the PA, the comments of other interested parties and the additional comments of the Arizona State Historic Preservation Office (September 19, 2019) and the President’s Advisory Council on Historic Preservation (October 25, 2019), the Tribe expected version 8 to be substantially improved. The USFS had many

Neil Bosworth

Re: USFS–Resolution Copper NHPA Programmatic Agreement Draft Version 8

September 3, 2020

Page 2 of 2

months to make responsive changes to revise earlier drafts of the PA. However, as you know, the USFS suspended discussions with tribal officials regarding version 7 of the draft PA in December 2019, resulting in a lapse of more than eight months.

Affected tribes, other consulting parties, and the American public have the right to expect USFS's expertise and stewardship in the preparation of a final PA. These qualities are particularly necessary in the circumstances presented by the RCMPLX. The PA should establish detailed and enforceable procedures for (a) considering historic properties potentially affected by the sprawling, complex, and controversial Resolution Copper Mine and its integrated mining facilities and (b) avoiding, minimizing, or mitigating adverse effects to historic properties. For RCMPLX, this means careful and consistent attention to a large number of highly and diversely significant historic properties—not the least of which are Chi'chil Biłdagoteel National Register Historic District, and the Tribe's religious places and sacred sites. Unfortunately, the version 8 draft completely misses the mark.

For the record, I am enclosing the Tribe's detailed comments on PA version 8 on the formatted comment form provided by USFS. The Tribe's comments consist of twenty-four pages in the formatted comment form. Additional correspondence from the Tribe will follow.

As we say in our Apache language, Ahi'yi'é (thank you) for your consideration of the Tribe's attached comments on version 8 draft PA. The Tribe looks forward to meeting with you on September 9th, your response to this correspondence and the attached comments.

Sincerely,

SAN CARLOS APACHE TRIBE



Terry Rambler
Chairman

Enclosure

San Carlos Apache Tribe Technical Comments on PA Version 8 (24 pages)

Cc: Tribal Leaders of Arizona
c/o Maria Dadgar, Exec. Dir., ITAA, maria.dadgar@itcaonline.com

San Carlos Apache Tribe
Tao Etpison, Vice Chairman
San Carlos Council Members
Vernelda Grant, THPO
Vanessa Nosie
Dee Randall, Mgr., Forest Resources
Seth Pilsk, Ethnobotanist, Forest Resources
A.B. Ritchie, AG, DOJ
Chrono

COMMENT FORM PAGE 1 OF 244

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	Overall	N/A	<p>This version of the programmatic agreement (PA) was intended to conclude the process prescribed under Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations at 36 CFR Part 800 for the proposed land exchange and mine (Undertaking); however, this latest version, like earlier versions, remains flawed, incomplete, and unacceptable. A PA must, per NHPA Section 106, be dedicated primarily to the avoidance, minimization, or mitigation of adverse effects to historic properties. This PA and previous versions: (1) fail to meet that mandate; (2) attempt to avoid and minimize signatory duties to protect historic properties; (3) attempt to vacate USFS and other government fiduciary responsibilities for the welfare of the affected tribes and our members; (4) seek to avoid and minimize USFS, Resolution Copper (Applicant), and other signatory duties to plan and implement measures to protect historic properties affected by the Undertaking; (5) do not include most recommendations made by the Tribe. The PA should thus be redrafted to explicitly implement the letter and spirit of NHPA, focusing on the values, functions, and attributes of the potentially affected historic properties—most especially the religious and cultural values, functions and attributes. Doing so will allow the PA to comport not only with NHPA, but with other applicable federal laws, including the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act (RFRA), as amended. PA re-emphasis on the resolution of adverse effects to historic properties should be guided by and support other applicable programmatic agreements, memoranda, policies, standards and guidelines, particularly the <i>Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation</i>.</p>
SCA Tribe	Overall	N/A	<p>PA should reference Federal Government trusteeship for American Indians. PA Should explain how USFS will attend to its fiduciary duties. USFS is advised to recognize and act in priority accord with these duties.</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	Overall	N/A	<p>Procedures outlined in the PA cannot, without accompanying substantive consultations, be used to attempt to substitute for or retroactively satisfy USFS duties to consult with tribes, the public, or signatories. USFS failure to foster communications with tribes about the Section 106 process and to channel those exchanges to comments on the PA (instead of, as required by law, on defining the APE, determining types and levels of historic property significance, assessing types and levels of Undertaking effects on historic properties, and avoiding and otherwise resolving adverse effects) has corrupted PA and the entire Section 106 process.</p> <p>USFS is advised to use the PA to present explicit plans to: (1) remediate these prior failures. In particular, PA should detail steps to be taken to consult with consulting parties, explicitly including tribes, to identify historic properties, per 36 CFR §800.4(b); (2) evaluate significance and determine eligibility, per §800.4(c); (3) assess adverse effect, per §800.5; (4) compose reasonable resolutions of adverse effect, per §800.6; and (5) involve the public, per §800.2(d) and §800.6(a)(4) and §800.14(b)(2)(ii).</p> <p>PA must clarify and act upon these required consultative steps and responsibilities as distinct from USFS duties, per §800.14(b)(2)(ii), to arrange for public participation in preparation of an agreement document.</p>
SCA Tribe	Overall Incl. p. 10	Many 10–11	<p>PA has grown significantly in size, complexity, uses legal jargon, and in the number of enforceable provisions. Accordingly, and to enable ease of understanding and use by the many and diverse consulting and interested parties, PA should include:</p> <p>1) A flow chart or other graphic to illustrate and explain the process being proposed under the PA</p> <p>At a minimum, this should include a Gantt chart, or other time table, depicting all requisite actions that have prefigured PA structure and content and must follow PA execution. The parties require unambiguous descriptions, sequences, and time frames of what has happened in the Section 106 process prior to PA execution, what the PA requires to happen, and what the PA authorizes, contingent on other developments.</p> <p>2) A plain language descriptive and procedural summary of the goals and purposes of each section and part of the PA</p> <p>The parties require clear and complete rationales for <u>why</u> the PA is structured, sequenced, and endowed with specific content, including disclosures for each substantive objective and procedural subpart. Whereas clauses are good places for these disclosures.</p> <p>3) Improved, updated, higher resolution maps for the Undertaking and all its parts to allow parties to visit and inspect the boundaries of the various APEs to determine adequacy at this stage and compliance at possible later stages</p> <p>The parties require detailed and consistent information on <u>where</u> the Undertaking and all its anticipated effects on historic properties will and will not occur. The PA must, of course, continue to recognize that information specifying or relating to the location of historic properties and information identified as confidential by tribal representatives is legally protected from disclosure.</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	Overall	N/A	PA uses both “will” and “shall” indiscriminately. Use only “ <u>shall</u> ” and always couple this imperative with a specified signatory party responsible for the obligation and with a specific time frame. It is, of course, essential for the PA to clarify and emphasize that all duties and sequences created in and through this PA are contractually binding on all parties. A PA without clear and complete provisions for monitoring, remediation, enforcement, and public disclosures about violations of the terms of the contract is not an agreement that meets the requirements at 36 CFR 800 and elsewhere.
SCA Tribe	Many E.g., p. 2, line 42–44	many	<p>PA recitations of agency obligations to follow applicable rules at various and sundry PA junctures (see, e.g., p. 7, line 26) prompt concerns that USFS or other signatories (1) misunderstand the narrow limits of their discretion, (2) require reminders about their fundamental legal obligations, (3) discount the value of consistency and rigor in the presentation of contracts, or (4) some combination.</p> <p>Remove or provide rationales for the inclusion of legal recitations not explicitly linked to obligatory actions to fulfil the terms of the PA, especially the avoidance, minimization, or mitigation of adverse effects from the proposed Undertaking to historic properties.</p>

Commenter	Page	Line	Comment/Change Requested																						
SCA Tribe	Many	N/A, but see Glossary	<p>Define (or provide a rationale for not defining) every key term not defined in pertinent statutes or regulations, including at a minimum the following <u>23 terms not defined adequately in the PA</u>:</p> <table><tr><td>affected tribes</td><td>affiliated tribes</td></tr><tr><td>alternative refinements</td><td>archaeological inventory (see also 100 percent pedestrian survey)</td></tr><tr><td>cultural resource specialist</td><td>Field Authorizations</td></tr><tr><td>heritage activity</td><td>historic building / structure inventory</td></tr><tr><td>Physical APE</td><td>Auditory APE Visual/Atmospheric/Socioeconomic APE</td></tr><tr><td>necessary changes in the GPO</td><td>Physical effects</td></tr><tr><td>post-review discoveries</td><td>professional standards</td></tr><tr><td>project component</td><td>project supervisor</td></tr><tr><td>Selected Lands</td><td>subject experts</td></tr><tr><td>Tribal experts</td><td>tribal field visits</td></tr><tr><td>Tribal Monitors</td><td>Tribal Representatives (also Tribal representatives)</td></tr></table> <p>Note, in relation to the APE, terms and references that the PA includes confusing and undefined uses of “current APE,” “footprint,” “GPO project area,” ”project area,” etc. It is vital to have clear conceptual, as well as spatial, definitions of all APEs that are consistently articulated and rigorously applied and adhered to. High resolution maps, cadastral descriptions, or both, are required.</p> <p>In addition, specifically the PA should clarify where and how USFS is considering the adverse effects to historic properties linked to increases in (1) air- and water-borne toxins and (2) biological harms and mortalities to plants, animals, and humans dependent on groundwater-dependent ecosystems and other habitats linked to or within identified historic properties.</p>	affected tribes	affiliated tribes	alternative refinements	archaeological inventory (see also 100 percent pedestrian survey)	cultural resource specialist	Field Authorizations	heritage activity	historic building / structure inventory	Physical APE	Auditory APE Visual/Atmospheric/Socioeconomic APE	necessary changes in the GPO	Physical effects	post-review discoveries	professional standards	project component	project supervisor	Selected Lands	subject experts	Tribal experts	tribal field visits	Tribal Monitors	Tribal Representatives (also Tribal representatives)
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Tribal experts	tribal field visits																								
Tribal Monitors	Tribal Representatives (also Tribal representatives)																								
SCA Tribe	1	3-5	List all signatories and clarify the rationale for differentiation between signatories and invited signatories. The exclusion of the Applicant from the printed list of signatories implies that this Undertaking has no proponent and is somehow in the government’s or public’s interest. If signatory parties believe this to be the case then that belief should be stated rather than implied.																						
SCA Tribe	1 Also 11 12	26 11-16	PA should provide a full reference to and explication of the importance and required uses of “the ethnohistoric study.” Prior versions of the PA ignored that study. Both the Section 106 process to date and the current PA version fails to employ the substance and recommendations of that study to guide to the proper conduct of the Section 106 process for this Undertaking. PA should, per the Tribe’s comments relating to pages 11 and 12 of this PA (see below), either substantially employ the results of and recommendations from that important 2015 study or provide a rationale for USFS failure to do so.																						

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	2	13	PA should either list the Town of Superior and its substantial groupings of structural historic properties on par with Globe and Miami, or provide a rationale for USFS-Applicant and PA inattention to that Town's historic properties. PA should provide procedures and time frames for the identification, assessments of significances and effects, and treatments to protect Superior's historic properties from this Undertaking. Understood from the vantage of Superior's historic structures and landscapes, this Undertaking is <u>already in progress</u> and has been for years. The cultural, socioeconomic, mechanical, and biophysical effects of the Undertaking are already affecting Superior's historic properties. Plans and actions to address those effects are long overdue. USFS and Applicant are advised to expedite plans, consultations, and actions so obviously required to avoid, minimize, or mitigate adverse effects to Superior's historic properties.
SCA Tribe	2	14-15	"a tailings facility": in fact, the EIS describes multiple alternative tailings facilities. PA phrases here should harmonize with language @ p. 4, line 37.
	2	33-37	"Project encompasses 38,446 acres . . . shown on Figure A.1 in Appendix A, and consists of the Selected Lands leaving the jurisdiction of the Federal Government (2,422 acres) . . . and the project components and all alternatives associated with the Resolution Copper GPO (36,865 acres not including those also within the land exchange)": Signatories should verify, and PA should confirm, that only 841 GPO acres are within the land exchange (check the math). PA requires consistent definitions and uses of spatial terms of reference, along with companion map(s) having sufficient detail to allow tribes and public to verify Project and APE boundaries, acreages, and actual versus potential effects.
SCA Tribe	2	38–40	Clarify and adequately describe, here or elsewhere in the PA text or an appendix, all actions, decisions, and deliberate inactions that are part of the "Undertaking." Clarify and provide rationale for why these actions and inactions—multiple, diverse, and interrelated—are referenced here as a single "Undertaking".
SCA Tribe	2	42–44	"and the Southeast Arizona Land Exchange and Conservation Act (Section 3003 of Public Law 113-291) mandates that impacts to cultural and archaeological resources are assessed under NEPA per Section 3003(c)(9)(C)": Exclude this reference, or provide an explicit rationale for inclusion, apparently arbitrary, of this specific citation to pertinent law and failure to cite dozens of other applicable legal authorities. Regardless of which option is elected, here or elsewhere the PA must provide a full roster of applicable legal authorities that intersect or overlap with NHPA—including NAGPRA, ARPA, AIRFA, RFRA, and APA. The list provided in the appendices as "Attachment A" (pages F-4 & F-5) is incomplete (pertinent regulations and the <i>Secretary's Standards and Guidelines for Archaeology and Historic Preservation</i> , among other authorities, are not included), and not properly or consistently cited in the PA text. PA should also explain the implications of those intersections and overlaps. Alternative is for PA to offer explicit rationales for USFS / signatory failures to reference and prescribe how those authorities and their overlaps with Section 106 will be addressed.
SCA Tribe	3 many	1 many	Provide rationale for inclusion of the August 9, 2019 date for this identification or, far more appropriately, include specific dates for every decision and determination referenced in the PA and its appendices.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	3	3	PA recognizes “the scale and complexity of the Undertaking” as a rationale for this PA. Accordingly, PA must recognize that same “scale and complexity,” along with adverse effects to historic properties as the rationale for more, and more deliberate and more transparent, tribal and public involvements in the Section 106 process.
SCA Tribe	3	21	PA must: (1) incorporate by reference the <i>USFS Region 3 Programmatic Agreement</i> (2003); (2) list all applicable terms of that 2003 PA; and (3) explain how the proposed PA will comport with the terms of that 2003 PA. If the signatories choose to ignore this obligation, then the PA must provide explicit rationales for deviations from and failures to observe and attend to that applicable, binding agreement.
SCA Tribe	3	39-42	<p>This version of the PA suddenly invites SRP to participate as a signatory. The apparent motivation is to alleviate USFS, SRP, and the Applicant of near- and long-term duties to comply with Section 106 and other law. USFS invitation of SRP to sign the PA without consultations with affected tribes indicates USFS inattention to its fiduciary, statutory, and government-to-government consultation duties to tribes.</p> <p>The conflicts of interest created through the attempted addition of SRP are abundant and substantial complicating factors. The Applicant is or seeks to become a major SRP industrial customer. It is common knowledge that SRP dedicated itself for decades to claiming water rights owned by tribes, to infringing upon tribal sovereignty, and to directly harming tribal lands and tribal historic properties to boost its power and profits. In light of SRP’s historical conflict with tribal interests, this unheralded twist belies the good faith required by NHPA Section 106, by USFS trust responsibilities for tribes and the public, and by government-to-government consultation duties to tribes.</p> <p>PA must, at a minimum, provide (1) an explicit and complete rationale for including SRP as a PA signatory and (2) a complete accounting of foreseeable SRP actions. Here, or in a section clearly referenced here, the PA should (1) describe SRP’s particular duties and responsibilities in the Section 106 process; (2) provide a rationale for how SRP duties and responsibilities are distinct from USFS duties and responsibilities; (3) provide the protocols to be used to pursue NHPA and NEPA compliance for the proposed special use permit to be granted to SRP; and (4) specify provisions for eliminating SRP’s interest conflicts in relation to the Undertaking.</p> <p>Perhaps most to the point, unless SRP is obligating itself to contribute to the resolution of adverse effects then there is no legal or logical basis for its participation as a signatory.</p>
SCA Tribe	4 & 9 Etc.	3-7, etc. & 37-39	Per comments from the SCA Tribe on previous versions, the PA should clarify that, because (1) USFS remains in substantial control of Undertaking activities on non-federal lands, and (2) the Arizona State Museum is a recipient of federal funds, NAGPRA also applies to activities on non-federal lands, especially to any disturbance, alteration, or removal of cultural items, as defined in NAGPRA. This PA and the NAGPRA POA should recognize NAGPRA applications to all land jurisdictions and affected cultural items.
SCA Tribe	4	16	Provide the full delegation referenced here in an appendix to the PA.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	4	19, etc.	Eliminate this arbitrary exclusion of Section 3003(c)(3) language requiring USFS tribal consultations. PA should include all pertinent language from legal authorities or refrain from recitations of statutory and regulatory language without providing explicit rationale(s) for doing so. PA should explain how quoted or referenced authorities relate to the core purpose of the PA, that is, to avoiding, minimizing, or mitigating adverse effects to historic properties.
SCA Tribe	5	6, etc.	Follow 36 CFR 800 by listing “religious” with “cultural” in <u>every reference</u> to historic properties having this type of significance.
SCA Tribe	5	9-13	SCA Tribe cannot review or evaluate portions of the PA that rely on maps or data that have not been provided to the Tribe. Provide copies of all appendices to all tribal consulting parties, and allow adequate time for review and verification, or provide explicit rationale for withholding from tribes the necessary and requested data and maps.
SCA Tribe	5 & 9 & 12	12-16, etc. & 8 & 5	<p>As drafted, the PA references at least 7 milestones as anchors for contingent steps or processes:</p> <ol style="list-style-type: none"> 1) the execution of the PA, 2) the publication of the final EIS, 3) the “issuance of the draft ROD,” 4) the “issuance of the ROD,” 5) the “signing of the final ROD,” 6) the transfer of federal ownership, 7) “formal transfer of the Oak Flt Federal Parcel” (p. 15, line38), etc. <p>PA should be explicit and consistent, here and throughout, which Section 106 steps will and which ones need not be completed prior to an explicit and consistent milestone (or two, if needed). PA should be explicit and consistent in reference to Section 106 process steps that will be complete, partially complete, and yet to be completed prior to a key milestone. PA should be explicit and consistent that:</p> <ol style="list-style-type: none"> 1) Identification, evaluation and treatment of historic properties shall either be complete or completely and explicitly specified and scheduled on the basis of required consultations <u>before the execution of the PA</u>. 2) PA shall be executed <u>before</u> release of the final EIS. <p>Timing and sequencing of Section 106 steps and procedures should be specified in relation to PA execution or other Section 106 milestones, not to NEPA. Affected tribes and public require explicit and consistent descriptions of sequenced actions prescribed to complete Section 106 (and NEPA).</p>
SCA Tribe	6	5-6	“TNF has consulted with Archaeology Southwest, Arizona Mining Reform Coalition ... regarding the effects of the undertaking on historic properties”: This is a false and misleading claim. USFS has consulted only about the preparation of the PA and only generally and minimally (see p. 1 of these comments).

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	6	17-19	“TNF has sought and considered the views of the public concerning this undertaking through use of and in coordination with the agency’s public involvement under NEPA, as provided for in 36 CFR 800.2(d)(3)”: This is a false and misleading claim, and is also inconsistent with pertinent parts of the Section 106 regulations and with the 2013 ACHP-CEQ Handbook for <i>Integrating NEPA and Section 106</i> . 36 CFR 800.2(d)(3) allows USFS to use NEPA “in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.” USFS has failed, per 800.2(d)(1), to “seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.”
SCA Tribe	6	27-28	“explore both standard and alternative measures to resolve adverse effects that are in the public and tribal interest”: PA should define these terms and clarify meaning of this and other ambiguous phrases. PA should explicitly disclose USFS understandings of “tribal interest” and, per NDAA Section 3003, of “concerns of the affected Indian tribes,” then be explicit about “measures” proposed to address these. The PA should not reference any measures that are not explicitly and effectively designed to avoid, minimize, or mitigate adverse effects to historic properties.
SCA Tribe	6	35	“definitions used in this Agreement are outlined in Appendix C”: This is false. The PA includes many undefined terms. See p. 2 of these comments and comments, below, on the Appendix C glossary.
SCA Tribe	6	37–39	“shall be implemented in accordance with the following stipulations to address the effects of the undertaking on historic properties”: As written, this action could be delayed indefinitely. Instead, provide explicit timeframe for completion of this and all other steps. Clarify that all of the effects to historic properties under consideration thus far are adverse (or specify instances of beneficial effects). Provide detailed procedural sequences with specific dates for actions to resolve effects.
SCA Tribe	7	10-11	“carrying out their responsibilities in accordance with applicable laws and authorities ensuring that all Signatories fulfill their obligations”: PA should clarify and define the referents for the two uses of “their” in this phrase. Also clarify (1) the specific rationale for acknowledging that USFS will comply with applicable rules and (2) the authority and process USFS will employ to ensure “that all Signatories fulfill their obligations.” The Tribe is pleased to learn that USFS will enforce the PA. PA requires incorporation by reference to a condition monitoring and violation enforcement plan, and inclusions of that plan as a PA appendix. PA should make explicit the processes, conditions, standards, and performance measures for monitoring and enforcement programs. PA cannot be executed without these essential provisions.
SCA Tribe	7	37–39	This list and others lack requisite parallelism and violate rules of logic. Technical editing required.
SCA Tribe	8	5–7	Redundant.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	8	10–11	“independent responsibilities under applicable Federal statutes and regulations that may pertain to the agency’s special expertise and/or jurisdictional authorities”: Purpose is unclear. Here and elsewhere the PA wobbles between specific assurances that specific applicable rules will be followed and vague and unenforceable suggestions of other sorts. PA whereas clauses exist to specify all pertinent legal, procedural, and Undertaking-specific “background”; Stipulations exist to prescribe sequenced procedures for satisfying “foreground” signatory obligations arising from those rules and facts.
SCA Tribe	8 24	17 3–4	“authority”: It seems that the word “right” or “prerogative” is more consistent with intended meaning. Here or elsewhere, per BLM policy (see Handbook 1780-1; USFS policy may also be relevant), affirm that all affected tribes are to be invited to sign any BLM NAGPRA POA. USFS should also provide the affected tribes with the courtesy of an invitation to sign the NAGPRA POA referenced on p. 24, lines 3-4. If not, PA should provide an explicit rationale for excluding tribes from invitation, customary elsewhere in the Federal Government, to sign the POA.
SCA Tribe	8	29–32	“only participate in those activities within their defined permit area related to Clean Water Act Section 404 permitting per 33 CFR Part 325 Appendix C(1)(g)”: PA should specify the time frame, content, scale, and related standards for a map and other detailed information regarding this permit area and the areas for all mitigation activities, as necessary to explain proposals and enable consultations. See comments provided on page 2 of these comments, above.
SCA Tribe	9	4, 9	Consulting parties cannot review and evaluate provisions tied to a Final EIS that is not available. PA should include all data and materials referenced in appendices or incorporate such data and materials by reference to open access documents. PA should not attempt to incorporate by reference or otherwise rely upon information not available to tribes and the public, except site-specific location data and information deemed sensitive by one or more tribes. See comments provided on page 2 above.
SCA Tribe	9 9	16–19 40-42	Explain and fully describe here, or in another part of the PA that is precisely referenced here, and how the Tribal Monitors satisfy these provisions. Also explain how the PA and proposed Tribal Monitoring Program conforms with the long-established ACHP guidance, “Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites” (June 17, 1999). PA should, after due and proper consultations with tribes on this point, define “tribal experts” and “tribally designated representatives,” then consistently clarify and differentiate between these and Tribal Monitors PA should be explicit and consistent in affirming that Tribal Monitors <u>are not</u> “tribally designated representatives” or “tribal experts” duly designated by tribes as such. Signatories are advised to leave it to tribes to designate or identify individuals as our representatives and experts. Indeed, per the Tribe’s comments on previous versions of the PA, tribes should be consulted about the Tribal Monitors

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	9	28	Tribe opposes use of volunteers to satisfy Federal and Applicant compliance mandates. Remove all references to volunteer participation in Section 106 process or consult with tribes explicitly on this matter.
SCA Tribe	10	2–4	Provide explicit rationale for this provision. What agency might join? Signatories are advised to refrain from using the PA to endorse this and all other vaguely specified pre-approvals.
SCA Tribe	10	10 & 11	<p>Provide the rationale for inclusion of both of these provisions and the specifications in the Appendix. APE definitions are too important to relegate to an appendix. PA inconsistencies and efforts to partition the Undertakings' various impact modes (sounds, smells/pollutants, mechanical activities, human transactions, etc.) confuse the plain meaning of APE.</p> <p>The modes by which effects are transmitted, the direct, indirect, and cumulative effects of those transmittals, and the steps that could be and should be taken to avoid, minimize, and mitigate those transmittals of adverse effects all require full disclosure and consultation. Consultation should occur both in substantive terms—i.e., when, where, what kind, and how much effect—and in the procedural terms that are the proper and necessary focus of a PA.</p> <p>Which APE? Given the proliferation of APEs it is essential that the PA be consistently explicit about which APE is being referenced at each mention in the PA. Because the PA is a contract that includes spatially explicit terms of reference, the PA should include a similarly explicit map and an enumerated list of APEs. Tribe requires a map of all APEs suitable for use in navigation on the ground to determine whether an observed or experienced effect is within (or outside of) one or more APE.</p> <p>See p. 2 of these comments, above, regarding multifarious uses of APE and need for detailed maps.</p>
SCA Tribe	10	18	"identification efforts": clarify that this is in reference to "historic properties".
SCA	10	32	Provide explicit rationale for two mile spacing, which otherwise appears arbitrary.
SCA Tribe	10	40	"The cumulative APE encompasses most of what is known as the "Copper Triangle"": This cvlaim is pointless without an explicit rationale and, more importantly, specific provisions to avoid, minimize, and mitigate adverse effects on historic properties.
SCA Tribe	11	14-16	Tribes have already provided detailed recommendations, largely ignored by USFS without justification, on precisely these important steps in the Section 106 process. PA should either (1) specify when, how, and using what standards the signatories will consider the extensive and detailed recommendations provided by the duly designated representatives of the 10 tribes that participated in the production of the 2015 Ethnographic and Ethnohistoric Study, or (2) provide a detailed and explicit rationale for the continuing USFS failure to consider and follow those tribally endorsed recommendations.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	11	16–17	“All parties to this Agreement will respect any historic properties of religious and cultural importance to Indian Tribes”: PA should provide a rationale for and definition of respect that incorporates the actuality of desecration and destruction. This is another apt juncture for reference to the First Amendment to the U.S. Constitution and the RFRA. PA should specify steps underway and in planning to avoid the signatories’ violation of those laws.
SCA Tribe	11	27–28	“Comments received were considered for incorporation into the final Tribal Consultation Plan”: Specify the date of the Plan; provide the Tribe with this final Plan; include a dated final Plan as an appendix to the PA. The plan included in the appendix provided is not dated, has been prepared to comply with NDAA, not Section 106. That plan fails to define consultation and is otherwise faulty, incomplete, and unacceptable. PA should specify all developments, actions, etc. that will “trigger” consultation, and standards for and goals of tribal consultation, all in relation to the Section 106 process.
SCA Tribe	11	36	“provide updates on ongoing or proposed projects within the TNF”: Explain and establish relevance or remove. This provision needlessly confuses existing USFS obligations with Undertaking-specific duties. “Updates” and status reports have no place in agreement stipulations, but may find a home in whereas clauses.
SCA Tribe	11	40	“will consistently consult with Tribes while documents are in draft form and before they are finalized”: Delete either “draft” or “and before they are finalized.” Specify which documents or categories of documents. The SCA Tribe requires, and all consulting parties deserve, unambiguous and rigorous specification of what to expect and not expect, when, from whom, on the basis of what rationales, and to fulfill which specific purposes. Almost pervasive imprecise language, omissions, and other flaws throughout the PA create needless and counterproductive confusions. That these defects persist despite exhaustive efforts by our Tribe and other parties to provide corrections appear to indicate that PA preparation has been turned over to undisclosed non-USFS parties. Or, alternatively, that the USFS simply has not read any of the SCA Tribe’s or other parties copious comments. In either case, USFS and other governmental signatories are advised to follow federal law, especially protection of the tribes’ rights under the First Amendment to the Constitution and discharge of fiduciary responsibilities by USFS for the welfare of its tribal consulting parties and beneficiaries.
SCA Tribe	12	3	“footprints”: What are these and how are they the same or different from the many APEs and the Project area? As per comment on PA page 2 above, line 34, PA should explicitly and consistently reference and map all spatially explicit aspects of this Undertaking in detail sufficient to enable tribal and public review and evaluation.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	12	9, et seq.	<p>“Additional archaeological inventories for historic properties which may be directly or indirectly impacted within the auditory and visual/atmospheric/socioeconomic APEs will be completed within one year of the issuance of the ROD. These inventories will only focus on the selected tailings alternatives.”: PA again fails tests of logical construction here.</p> <p>PA should provide a rationale for granting a year-long extension. Here or elsewhere, PA should also explicitly describe, disclose, and specify the following:</p> <ol style="list-style-type: none"> 1) lands within the 38,446 acres not inventoried for historic properties; 2) lands within the 38,446 acres that will be inventoried for historic properties (when and under what applicable standards); 3) lands within the 38,446 acres that will not be inventoried for historic properties (explain why not); 4) whether “only focus,” as used here, means that other APE additions (i.e., those unassociated with tailings facilities) will not be inventoried. 5) a rationale for how the prior and proposed historic property inventory and significance evaluation activities comport with and satisfy the <i>Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation</i>. Those <i>Standards</i> affirm that, “Identification activities should use a search procedure consistent with the management needs for information and the character of the area to be investigated. Careful selection of methods, techniques and level of detail is necessary so that the gathered information will provide a sound basis for making decisions” (1983, 11/60). <p>The Tribe fails to find in the PA, or other records of the Section 106 process to date, clear attention to the phased, research-driven process prescribed by the <i>Secretary's Standards</i> to develop and apply historic contexts “to ensure that the range of properties representing the important aspects of each historic context is identified, evaluated and treated. Then priorities should be set for all goals identified for each historic context. The goals with assigned priorities established for each historic context should be integrated to produce a comprehensive and consistent set of goals and priorities for all historic contexts in the geographical area” (1983, 3/60). This essential work, and many other steps consistent with and in satisfaction of the <i>Standards and Guidelines</i> should have been done with and through the identification effort, not afterwards.</p> <p>PA should clarify precisely how this deficit will be remediated.</p>
SCA Tribe	12	20	<p>“conformance with current professional standards”: Clarify meaning and references. Which specific standards? Standards “current” today, or at the date of the future inventory? PA should reference and prescribe explicit steps to meet and adhere to the <i>Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation</i>.</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	12	22–23	<p>“APE will be updated in consultation with the Consulting Parties”: The definition of Consulting Parties in C-1 excludes tribes. This apparent attempt to exclude tribes from rightful participation in the Section 106 process, as required to protect our venerated cultural and religious places and sacred sites is harmful and contrary to applicable federal law, rules, policies, and professional practice standards.</p> <p>The apparent attempt to exclude tribes from participation at this late stage warrants explanation by USFS and rigorous scrutiny by the other consulting parties.</p> <p><u>Every use of “Consulting Party” and variants (e.g., “Consulting Parties”) must explicitly include tribes.</u></p>
SCA Tribe	12	24–45, etc.	<p>“Within 6 months of the issuance of the draft ROD, the Forest Service shall conduct an inventory of the auditory and visual/atmospheric/socioeconomic APEs”: See the preceding three (3) comments immediately above and reconcile. Provide rationale for the unexplained, counterproductive, and arbitrary:</p> <ol style="list-style-type: none"> 1) delays in background environmental studies essential to planning to avoid, minimize and mitigate adverse effects to historic properties and significant impacts to cultural resources; 2) specification of 6 months (why not 3?); 3) use of draft ROD as the trigger (why not PA execution? If FEIS, why not provide that date, which USFS has published elsewhere?); 4) failures thus far to initiate consultations with tribes and other parties on these longstanding requirements; 5) failures to employ the results and recommendations of the 2015 Ethnographic and Ethnohistoric Study; 6) failures to apply visual modeling to date, which would have enabled experience-based assessment. <p>In sum, the PA asks consulting parties in general and tribes in particular to “forgive and forget” fumbles and defects in the Section 106 process to date and to then endorse a set of incompletely described, unusual, and untested procedures going forward. Detailed consultations are required to establish actionable steps for consultative consideration of historic properties and resolution of adverse effects.</p>
SCA Tribe	13	6	<p>“Four previous inventories of historic buildings have been conducted”: When, how, by whom, and with what results? Provide results in PA appendices. Include explicit provisions for the required consultations. Rules of logic, construction, good faith, equity, and common sense and courtesy preclude signatories from stipulating to reports that have not been introduced and incorporated by reference. All parties, and especially tribes and the public, require access to the results of these inventories, along with consultative opportunities to share views and to have those views considered.</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	13	12–15	“Assessment and determination of effects, if any, outside the current APE will not be known until the draft ROD is completed. If the analysis for the final EIS demonstrates that there will be adverse effects on historic properties outside the current APE, the Forest Service will extend the APE”: False and misleading. Final EIS is not required to “demonstrate” adverse effects beyond the “current APE.” More to the point in the context of the Section 106 process, this agreement document, not some possible future ROD, is the essential source and guarantor of prescriptive steps to avoid, minimize, and mitigate adverse effects. Amendments to the PA may become necessary, but the current PA cannot incorporate by reference adverse effects or steps to resolve those effects that have yet to be determined. At a minimum, the PA must fulfill its core functions by prescribing consultative processes to assess and determine significance and effects, then prescribe additional consultative steps to plan and implement measures to resolve adverse effects.
SCA Tribe	13	17 & 36	“Per Federal and State guidelines”: Which ones? Same “guidelines” for both inventory reports and Tribal Monitor reports? Again, PA lacks clear and consistent definitions and references to applicable rules, standards, performance measures, etc.
SCA Tribe	13	40	“information from the Tribes will remain confidential”: What information? All of it? USFS should consult with tribes about an affirmation, perhaps that <i>information deemed to be sensitive by any tribal official or by the Forest Service will remain confidential per Section 3056 of 25 U.S.C. 32A, and related authorities</i> (Section 3056 is not the sole basis for non-disclosure of sensitive information).
SCA Tribe	14	10–11	“86 sites have been determined not eligible for the NRHP. Another 118 sites are unevaluated”: PA should provide protocols and associated rationales, criteria, and standards (or references to these) for the evaluation and non-evaluation of historic properties and for determining, specifying, and scheduling treatments for all adversely affected properties. PA should provide justification for plan to proceed to PA execution with 118 sites still “unevaluated” and without specific and required consultations regarding the significance, eligibility, and Undertaking effects on those sites.
SCA Tribe	14	27–29	“ensure that all previously identified unevaluated historic properties located within the APE for physical effects will be evaluated for their NRHP eligibility during the implementation of the Treatment Plan”: PA must provide rationales for and results of consultations regarding protocols for: 1) NRHP evaluation (or non-evaluation) of historic properties eligibility, including provisions for consultations; 2) ignoring required evaluations and associated consultations for historic properties not located within the “APE for physical effects”; 3) allowing additional adverse effects to historic properties through “testing”; 4) any and all further deviation(s) from the <i>Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation</i>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	15	1–4	“If the NRHP eligibility of cultural resources cannot be determined at the time of initial inventory, the Forest Service will either (a) ensure that an eligibility testing program is conducted according to the provisions outlined in Stipulation IX below, or (b) treat unevaluated cultural resources as eligible for the NRHP”: PA should specify and describe in detail the processes, standards, or criteria. USFS will use to determine which option to elect and follow.
SCA Tribe	15	7	“Should the SHPO or other Consulting Party disagree with these determinations”: PA should include provisions for sharing the results of USFS evaluations and determinations with consulting parties, for soliciting comments on these, and for responding to those comments. Include these and all other provisions for consultation in the revised Consultation Plan (current, deeply flawed draft is Appendix F).
SCA Tribe	15	24–26	<p>“The assessment of visual effects on historic properties will be done in consultation with the Tribes and other Consulting Parties. This analysis will be completed within 2 years of issuing the draft ROD.”</p> <p>PA should provide explicit and complete rationales for all of the following:</p> <ol style="list-style-type: none"> 1) USFS failures to complete the assessment of visual effects on historic properties prior to the execution of this PA and completion of FEIS; 2) USFS decision to delay this essential assessment for as long as 2 years following issuance of the draft ROD; 3) USFS failures to provide standards and protocols for meeting agency responsibilities to avoid, minimize, or mitigate adverse effects; 4) USFS failures to provide or consider providing a supplemental EIS for the disclosure, analysis, and avoidance, minimization, or mitigation of adverse effects/ significant impacts; and 5) USFS failures to meet and adhere to the <i>Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation</i>.

SCA Tribe	15 – 22	Many	<p>PA provisions in Section IX (8 pages), “aimed at providing a comprehensive program” for the resolution of adverse effects offer a hodgepodge of three elements--</p> <p>1) <u>Updates on planning documents</u>, including the Research Design, Treatment Plans, the “Visual, Atmospheric, Auditory, Socioeconomic and Cumulative Effects Mitigation Plan(s),” and the Monitoring and Discovery Plan.</p> <p>Comments on existing and proposed planning documents: The summaries of existing documents prepared (IX.A.1-2, IX.E) are not stipulations. Move these to whereas clauses and include the referenced documents as appendices. More importantly, all or most of the essential guidance documents referenced here (IX.A.3, IX.B.1-6, IX.C) require prompt completion through consultative steps. They also need to be readily available to consulting parties as foundations for a future version of this PA. Lists of what is to be included in these documents are useful bases for consultations with the parties but cannot substitute for the required consultations and procedural stipulations.</p> <p>2) <u>Schemes for actions</u> by USFS, the Applicant, and various non-consulting parties:</p> <ul style="list-style-type: none"> a) Increase size of Apache Leap Special Management Area by 32 acres (IX.A.4)(to 839 acres) b) Resource Salvage within the Land Exchange, the tailings storage facility footprint, and the pipeline corridor to “the extent practicable” (IX.A.5) (no further specifications, standards, criteria, or parameters provided; Applicant and USFS appear to be contemplating the further transfer of public land resources to private parties) c) The Emory Oak Collaborative Tribal Restoration Initiative (IX.A.6) (“multi-year restorative fieldwork program for Emory oak groves . . . [by] installation of select fencing to exclude cattle and large herbivores, invasive species control, shrub canopy thinning, prescribed burns, mastication, and reseeded through seed transplantation to increase recruitment of juvenile oaks”) d) Tribal Cultural Heritage Fund (IX.A.7) (“managed by an appropriate governance structure to permit the implementation of the funding”) e) Foundation(s) for Long-term Funding (IX.A.8) (for “continuation of the Tribal Monitor Program, long-term maintenance and monitoring of the Emory Oak Collaborative Tribal Restoration Initiative, and development of a Tribal Youth Program”) f) Tribal Youth Program (IX.A.8, line 21) (no additional details) g) Community Development Fund (IX.A.9) (tribes apparently excluded) h) Archaeological Database Funds (IX.A.10) (“Resolution Copper will transfer no less than \$2 million into a restricted fund to provide for State’s use”; no clear benefits to tribes) i) Access to Oak Flat (IX.A.11) (“access to the Oak Flat campground to Tribes as long as safety allows”) j) Castleberry Campground (IX.A.12) (“an alternative campground site. . . to mitigate the loss of Oak Flat Campground”)
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			<p>k) A program of cultural and archaeological sensitivity training for construction personnel (IX.D.2) (benefits to tribes not considered)</p> <p>l) A public education program (IX.F) (benefits to tribes not considered)</p> <p>Comments on schemes: Virtually everything presented in this section of the PA is vague, incomplete, and/or procedurally incomprehensible. USFS and the Applicant have, six years since obtaining legislative endorsement, failed to identify, per NEPA, NHPA, and NDAA Section 3003(c)(3), measures to “(i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities.”</p> <p>With the possible exception of the Emory Oak Initiative, none of the 12 schemes listed above are either: (a) explicitly attentive to the tribal concerns relating to the proposed mining and related activities; (b) sufficiently “fleshed out” and subjected to consultation; or (c) authorized to proceed without the separate required NEPA and NHPA analyses. Each of those three deficiencies, at a minimum, should be addressed, and the relevance of all provisions to the resolution of adverse effects to historic properties made explicitly clear, before these measures can be included in the PA, much less initiated on the ground.</p> <p>Although all 12 of the schemes are part of the Undertaking, none were adequately described or analyzed in the draft EIS, as required by NEPA. Even though the initiative is part of the Undertaking, the Emory Oak Collaborative Tribal Restoration Initiative has, without USFS explanation, been subjected to NEPA scoping by Coconino National Forest (https://www.fs.usda.gov/detail/coconino/news-events/?cid=FSEPRD644065)</p> <p>3) <u>Efficacy Claims</u>: some of the schemes may “mitigate impacts on cultural and tribal values” (IX.A.4), or “(i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper.”</p> <p>Comments on Efficacy Claims: They are meager, generally substantiated by documentary or consultation records or reports, and generally unconnected in procedural or substantive terms to the resolution of the Undertaking’s adverse effects to historic properties.</p> <p>See below for additional comments on some of the specific schemes</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	15	38–39	“Implementation of the Oak Flat HPTP may begin prior to the formal transfer of the Oak Flat Federal Parcel”: Signatories are again advised that excavations and other treatments often constitute adverse effects to historic properties, significant environmental impacts, and unacceptable impositions on Native American religious beliefs and practices. Despite foreknowledge and consistent tribal opposition to any alteration within or adjacent to the Chi’chil Bıldagoteel National Register Historic District and religious place and sacred site, this provision in the PA requests signatory endorsement to initiate profoundly harmful adverse effects and significant impacts to historic properties and environmental elements still under direct USFS control and prior to the issuance of the ROD. For these reasons, the proposal should be abandoned. If it is not, then USFS will have breached its trust responsibility for tribes and its duty to refrain from allowing significant environmental effects and religious practice and belief encumbrances prior to the completion of the NDAA, NEPA, and NHPA processes.
	15	34	“prepared an archaeological HPTP”: Section IX.A.2 and other provisions in this PA (as well as the <i>Secretary’s Standards and Guidelines for Identification</i> and standard ethical practice for archaeologists—see Tribe’s comment on p. 15, lines 41–43, below) make clear that Research Design is required for the GPO HPTP. Given this, why is it permissible for the Oak Flat HPTP to proceed without a prerequisite research design or comparable contextual guidance? Per the Tribe’s comments above and below, archaeological investigation requires a research design or concerted attention to historic context statements.
SCA Tribe	15	41–43	<i>The Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation</i> and professional ethics dictate that archaeological investigation requires a research design or other concerted attention to historic context statements. The “overall archaeological Research Design for the GPO” should have been drafted to guide the historic property identification efforts. That design should have been the subject of detailed consultations with the interested public and affected tribes. That design should then have been updated and refined on the basis of the results of the historic property identification efforts and consultations, and only then “prepared to guide mitigations such as archaeological data recovery, avoidance, and monitoring.” The signatories are directed to the <i>Secretary’s Standards and Guidelines for Identification</i> , including the affirmation that, “Within a comprehensive planning process, identification is normally undertaken to acquire property-specific information needed to refine a particular historic context or to develop any new historic contexts” (see https://www.nps.gov/history/local-law/arch_stnds_2.htm). A research design could and should have been prepared years ago, and still can and should be. The proposed attempt to delay the presentation of the draft Research Design for the GPO until as much as three months following the PA execution, especially while proceeding with the implementation of the Oak Flat HPTP without the benefit of a research design, is unacceptable on procedural, ethical, and legal grounds. Review and comment by consulting parties is required for any and all draft research designs, reports, other Section 106 documents.
SCA Tribe	16	2	“after the Agreement is executed”: Provide deadlines for completion of all documents and steps in relation to the execution of the PA and to the mandatory and substantive consultations with all consulting parties.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	16	9	"implementation of the Treatment Plans within 6 months of the issuance of the final ROD": Any and all PA sections and prescriptions for preparation of HPTPs must include provisions for tribal consultations
SCA Tribe	16	19, et seq.	<p>"Resolution Copper will provide 32 acres of privately owned land." PA should, at a minimum, address the following questions:</p> <ol style="list-style-type: none"> 1) Why or how does this measure assist in the resolution of adverse effects? 2) What are the values of and in this parcel? 3) Will the proposed transfer allow the Applicant to claim a tax benefit? 4) When and how will required NEPA analysis be initiated and completed? 5) Given that the parcel is or was in a mining district, what are the contaminant and safety issues?
SCA Tribe	16	35-46	Prescribe safeguards, assurances, standards, and commitment levels for use in determining whether this scheme will assist in the resolution of adverse effects.
SCA Tribe	16-17	47 et seq.	<p>Prescribe safeguards, assurances, standards, and commitment levels for use in determining whether this scheme will assist in the resolution of adverse effects.</p> <p>Although promoted by the Applicant for at least 4 years, this scheme has yet to attract meaningful support from many affected tribes. Applicant's claims of willingness to spend money on self-proclaimed measures for mitigating adverse effects do not, of course, mitigate adverse effects. Indeed, they may exacerbate and augment the adverse effects.</p>
SCA Tribe	17	18-25 & 26-41	<p>For both schemes, PA should prescribe safeguards, assurances, standards, and commitment levels for use in determining whether the scheme will assist in the resolution of adverse effects. Nothing has prevented the Applicant from completing the plan and initiating the implementation of this or similar schemes as means to demonstrate good faith commitments to the resolution of adverse effects.</p> <p>Schemes not accompanied by explicit temporal, spatial, content, and financial specificity are unacceptable bases for any agreement document, especially one that has the primary purpose of providing for the resolution of irrevocably adverse effects to hundreds of historic properties.</p>
SCA Tribe	17	42-47	<p>Provide safeguards to avoid the substantial conflicts of interest associated with a \$2M donation to state programs under the substantial control of Arizona State agreement signatories.</p> <p>Nothing prevented the Applicant at any time since passage of the NDAA Section 3003 from establishing a transparent relationship with the AZSITE Consortium Board, the public entity charged with the management of Arizona's statewide inventory system. An open, public-private partnership to improve to processes and products involved in the identification of historic priorities and resolutions of adverse effects associated with this Undertaking could have proved useful. It is unclear how an Applicant donation to the State of Arizona can, especially at this late date, (1) avoid or fend off allegations of interest conflicts, or (2) contribute to the resolution of adverse effects for this Undertaking.</p>

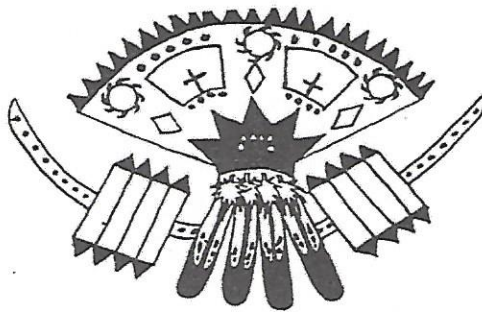
Commenter	Page	Line	Comment/Change Requested
SCA Tribe	18	1-6	PA should provide the clear and explicit rationale for the claim that Applicant willingness to afford land access to the original owners and continuing stewards—territory indistinguishable from our bodies, minds, spirits, and beliefs—while the Applicant is in the process of dismembering, consuming, and banking profits from that desecrated land, assists in the resolution of adverse effects to historic properties, especially religious places and sacred sites.
SCA Tribe	18	7-11	PA should describe and explain—perhaps through inclusion of facts about the size, capacity, location, attributes, amenities, and other attributes—how the creation of a privately owned, and presumably privately controlled campground qualifies as a means for resolving adverse effects from the proposed Undertaking to historic properties, religious places, sacred sites, and public land resources.
SCA Tribe	18	14–17→ & 38–39→ & 43→	<p>“Research Design for the GPO which will . . . apply to all areas of the GPO, tailings location alternatives, and Section 404 mitigation parcels (if needed). [then] The Forest Service shall prepare Treatment Plans detailing the plan of work for each GPO project component area or Section 404 mitigation parcels under the umbrella document”</p> <p>“GPO Treatment Plans shall also include measures to resolve adverse effects with methods other than data recovery, such as avoidance or burial in place”</p> <p>“GPO Treatment Plans shall include a plan for NRHP-eligibility testing of unevaluated sites which may be adversely affected by the Undertaking if they are determined eligible for the NRHP”</p> <p>Research Design and treatment plans are integral to the conduct and completion of the Section 106 process. The <i>Secretary’s Standards</i>, professional standards and ethics all indicate that a full first draft of a Research Design should have been built upon the findings of the 2015 Ethnohistoric Study and results from other pertinent background research and initial tribal consultations and public involvements to guide the historic property identification efforts and initial determinations of eligibility. Full drafts of these critical documents should be completed in conjunction with tribal consultations and public involvements prior to PA execution.</p>
SCA Tribe	19	18–45	PA appears to ignore the importance of the massive and still-accumulating data sets resulting from the tribal consultations and historic property identification efforts. Here and elsewhere the PA should provide explicit and consistent mandates for integration of the results of the tribal consultations, prior research, and Undertaking-specific historic property identification efforts into research designs, HPTPs, and related plans and actions. See <i>Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation</i>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	20	17–20	<p>“Forest Service shall ensure a separate Monitoring and Discovery Plan after the signing of the final ROD . . . with procedures for monitoring, evaluating, and treating discoveries of unexpected or newly identified nonhuman remains and archaeological resources during implementation of the Undertaking”:</p> <p>Word(s) missing from line 17: “preparation of” (?).</p> <p>Provide explicit rationale for delay of this crucial document and forbid implementation of any HPTP until this Plan has been finalized in consultation with affected tribes.</p> <p>This Plan or another developed in consultation with tribes and other consulting parties and incorporated by reference here must provide for monitoring, discovery, enforcement, and remediation for the Undertaking. Completion of this Plan is integral to the PA. The PA should not be executed without this essential Plan.</p>
	27	29–30	
SCA Tribe	20	35–38	<p>“Forest Service shall prepare NAGPRA Plans of Action for TNF lands and ASM Burial Agreements for State and private lands in accordance with Stipulation X and include them as appendices in all documents discussing Section 106 compliance, including the Oak Flat HPTP and the GPO Research Design and Treatment Plans”: PA should reflect that the POA has already been drafted and circulated for comment. Also, per the Tribe’s comments on pages 4, 9, and 24 of this PA. Furthermore, the PA and the NAGPRA POA must recognize NAGPRA applications to all land jurisdictions and affected <i>cultural items</i>, as defined in NAGPRA because (1) USFS remains in substantial control of Undertaking activities on non-federal lands, and (2) the Arizona State Museum is a recipient of federal funds,.</p> <p>Also, the documents referenced in this section should be given authority by being incorporated by reference, not merely included as appendices, which is a simple matter of convenience.</p> <p>Finally, the PA should make explicit how a USFS regulatory duty (in this case to implement NAGPRA) constitutes a measure to resolve adverse effects to historic properties, the subject of PA Section IX.</p>
SCA Tribe	21	1	<p>“Forest Service shall develop a strategy for a public education program per ACHP guidelines”: This is another underdeveloped, incomplete, and vague to the point of meaningless provision. There is no basis for faith by the consulting parties that including this claim in the PA will prompt USFS to do what it should have been doing all along but has not: involve the public in the consideration of historic properties and, more specifically, in avoiding, minimizing, and mitigating adverse effects to historic properties affected by the Undertaking. PA should either provide details, including levels of contribution, performance standards, and specific links to the resolution of adverse effects for this Undertaking, along with required consultative steps, or delete this apparently disingenuous provision.</p>
SCA Tribe	21	11–34	<p>These lines are redundant with provisions made earlier in Section IX. Repetition is counterproductive in agreement documents, especially when different terms are used to refer to similar prescriptions or to satisfy regulatory requirements, as is the case here in reference to provisions in PA Sections IX.A.1-2 and IX.B.2-3. PA should confine itself to single iterations of procedural prescriptions, followed by consistent and rigorous internal referencing, as required for readers and users of the PA to keep track of and understand relationships among all key steps, procedures, time frames, duties, and recourses.</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	21	35	"If in-field modifications of the Oak Flat HPTP or GPO Treatment Plans are necessary": "necessary" according to whom? PA should provide criteria, standards, guidelines, and consultative procedures to determine necessity of proposed modifications and enable subsequent steps.
SCA Tribe	22	6–7	"Preliminary Treatment Report is intended to provide a brief overview": Intentions are immaterial here and elsewhere in agreement document stipulations. PA must provide explicit substantive and procedural specifications and performance measures and standards, carefully and consistently attuned to obligatory time frames, for the creation, submission, review, and revision of all documents pertinent to the Section 106 process. USFS and other signatories are advised to use, follow, and explicitly incorporate by reference all applicable parts of the <i>Secretary's Standards and Guidelines</i> .
SCA Tribe	23	34–36	"The Forest Service shall treat human remains, associated funerary objects, sacred objects, objects of cultural patrimony discovered on Federal land in compliance with NAGPRA, ARPA, and the Forest Service Region 3 policy": Incorporate into the PA the Region 3 Policy implicated here by providing a complete citation for it, describing action-oriented provisions in that Policy, and including it as an appendix.
SCA Tribe	23	41	"Two NAGPRA Plans of Action shall be developed": The POA for the Oak Flat Parcel has already been developed and circulated. PA should reflect the most current status of essential project components.
SCA Tribe	24 8	1–3 17	"regarding the treatment and disposition of any human remains, funerary objects, sacred objects, objects of cultural patrimony, objects of tribal patrimony, or formal non-human burials discovered on Federal land": Either provide a rationale for this list and explicitly and rigorously define all pertinent terms, or employ the NAGPRA cover term, " <i>cultural items</i> ". This PA and the NAGPRA POA must recognize the applicability of NAGPRA and its attendant regulations to all land jurisdictions and affected <i>cultural items</i> , as defined in NAGPRA, because (1) USFS remains in substantial control of Undertaking activities on non-federal lands, and (2) the Arizona State Museum is a recipient of federal funds,
SCA Tribe	24 8	3–4 17	Clarify here and elsewhere that affected tribes will be invited to sign any NAGPRA Plan of Action or provide rationale for excluding tribes from participation as signatories.
SCA Tribe	24	16–27	Retract these provisions or modify them to make it explicit that they do not apply the to "Oak Flat Parcel," all of which is a NRHP-listed historic district and Native American religious place and sacred site.

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	24 – 25	p. 24, l. 24 – p. 25, l. 28	<p>Entire page requires modification to provide due consideration to historic properties with traditional religious and cultural significance. Signatories are again advised of guidance from tribes and mandates from federal authorities that require federal agency sensitivity to these types of historic properties and to sacred sites.</p> <p>If the signatories proceed to authorize ground disturbance that affects or may affect historic properties with traditional religious, cultural, and sacred significance then the PA should provide an explicit rationale for insistence upon similar treatment for historic properties with clearly different types or levels of significance.</p> <p>This procedural proposal is an example of the consequences for USFS failure to consult with tribes in due course, and as needed, on its determinations of effect and significance for historic properties. The USFS failures to consult on those essential steps in the Section 106 process and to fail to consult about and make assumptions regarding actions and inactions that may avoid, minimize, or mitigate adverse effects will continue to complicate and confound this PA. Signatories are advised to insist upon the proper conduct—stepwise and consultative—of the Section 106 process as the basis for upgrades and clarifications to the PA. Continued insistence on attempted procedural omissions and shortcuts will continue to hamper progress toward the resolution of adverse effects.</p>
SCA Tribe	27	29–30	<p>“Forest Service will ensure that procedures regarding post-review discoveries are included as provisions of Resolution Copper’s GPO”: What provisions, specifically? Where and how will these be included in the GPO, specifically? Either provide these procedures for review and consultation here or, better yet:</p> <ol style="list-style-type: none"> 1) Cease the unexplained and apparently unjustified delays and deferrals of laying essential foundations for the resolution of adverse effects; and 2) Consult with the tribes on this matter of interest and importance to tribes; and 3) Produce the Monitoring, Discovery, Enforcement, and Remediation Plan; and 4) Provide for the incorporation by reference of that Plan and this PA, the ROD, and the GPO.
SCA Tribe	29	41	<p>“This Agreement shall be in effect for 20 years”: Either provide a rationale for this apparently arbitrary termination or make explicit the duration of the PA for the life of the Undertaking. Make explicit the legal requirement that no ground disturbing activities are permitted unless the PA is in effect.</p>
SCA Tribe	A-1	All	<p>Purpose and value of appendix is unclear. This separate presentation of APEs, in addition to and not in harmony with those presented in the PA text, is distracting and confusing. As noted above, the PA and all other Section 106 procedural and guidance documents require explicit “grounding” in a single set of spatial terms of reference, all consistently accompanied by cadastral descriptions and detailed maps.</p>
SCA Tribe	A-1	n.p.	<p>“only the APE of the selected alternative will be considered further”: This is not consistent with other parts of the PA, which mention Undertaking options that <u>do not</u> include BLM.</p>

Commenter	Page	Line	Comment/Change Requested
SCA Tribe	A-2	n.p.	"Mitigation measures to reduce impacts are under consideration at this time. As they are further developed their footprints will be included in the Programmatic Agreement": Move all stipulations regarding mitigation to the apt section of the PA. These provisions imply that only areal mitigation measures are under consideration. That suggestion is inconsistent with other parts of the PA and with regulatory requirements for USFS to consider measures for effects avoidance and minimization, not merely mitigation.
SCA Tribe	A-3, A-4	All	Delete or provide explicit rationale for inclusion of a table that lists alternatives no longer under consideration. As presented the table appears to function solely as a reminder that, in pursuit of Alternative 6, the signatories seek to maximize adverse effects to historic properties and significant environmental impacts to public lands and tribal values and religious places.
SCA Tribe	C-1 thru C-5	General	As noted on page 2 of these comments, this list needlessly (1) provides definitions of terms already defined in statutes or regulations, (2) includes defined terms that do not appear in the PA, and (3) excludes definitions for multiple keyword terms used but not defined in the PA.
SCA Tribe	C-1		Clarify that tribes are and remain non-signatory consulting parties or provide the legal bases for the exclusion of tribes from status as consulting parties.
SCA Tribe	C-4 Also: 8 24	n.p. 17 1-3	Because (1) USFS remains in substantial control of Undertaking activities on non-federal lands, and (2) the Arizona State Museum is a recipient of federal funds, this PA and the NAGPRA POA must recognize NAGPRA applications to all land jurisdictions and affected <i>cultural items</i> , as defined in NAGPRA. AZ Burial Act ALSO applies on private/state land.
SCA Tribe	F-1	n.p.	<p>"Make a good-faith effort to consult meaningfully with tribal officials early in the process of approving/ finalizing the proposed project": It is profoundly disrespectful, legally incorrect, and simply unacceptable for the signatories to propose that consultation, as part of this or any other Federal Government matter affecting tribal health, welfare, sovereignty, religious practices and beliefs, sacred sites, or other interests is for the purposes of "approving/ finalizing" a project.</p> <p>This Plan should be retracted, redrafted, and presented for legitimate consultation in its proper context as part of the Section 106 process, the goal of which at this stage is to resolve adverse effects to historic properties through avoidance, minimization, and mitigation plans and actions.</p>
SCA Tribe	F-2	n.p.	<p>"Annual tribal consultation reports will be produced by the Tonto National Forest and will be shared as appropriate": Where are the examples from prior years?</p> <p>On what basis of past performance by USFS and the Applicant should tribes trust that these reports will be produced in the future if they have not already been produced and presented as faithful records of past consultations, or at least communications? Provide a schedule and set of standards and content specifications for future releases.</p>



September 11, 2020

To the Arizona Tribal Leaders Affected by the Proposed Resolution Copper Mine:

I am responding due to a letter by Neil Bosworth, Forest Supervisor, Tonto National Forest (dated August 28, 2020, File Code: 1560) to the White Mountain Apache Chairwoman, Gwendena Lee-Gatewood regarding the Southeast Arizona Land Exchange with Oak Flat to Resolution Copper.

First, I represent myself here as an Apache elder. I am almost 80 years old and have spent most of my life and career working to maintain, and pass down to our younger generations, our greatest birthright—our Apache language and cultural knowledge. Second, I am a White Mountain Apache Tribal official. I serve as the Tribe's Cultural Resource Director/NAGPRA Representative, Chair of the Cultural Advisory Board, and on other local Boards.

I am opposed to the proposed Resolution Copper Mine. I think it is time for our Pima, Tohono O'odham, Yavapai, and Apache Nations, our great leaders, and our esteemed cultural representatives to suspend all involvement in making plans for the proposed Resolution Copper Mine that will result in the destruction and desecration of Chich'il Bil Dagot'eel, our holy site.

We have had supposed "consultations" and submitted many statements describing the sacredness and cultural areas and our opposition to the plans by the Resolution Copper Mine corporation. The majority owner is Rio Tinto, the Australian company responsible, just four months ago, for obliterating the sacred Juukan Gorge rock shelters in Western Australia without properly notifying the Aboriginal traditional owners. Rio Tinto is working hard to do the same thing here. Their plan is to damage 35,000 acres (more than 50 square miles) of our beautiful ancestral lands and to make a toxic soup out of billions of gallons of precious clean water. Our homelands will never be the same....

These "consultations" are wrongheaded. In the old days, if somebody killed one of our relatives, if retaliation in-kind was not swift, then they did the next honorable thing: the relatives of the murderer came to the victim's family to provide a just and fair compensation for the loss. They provided the loved one's family with food, horses, and other goods. Amends were made and life went on.

Nobody would ever think about having a discussion with murderers before their foul and evil deed. But I see in that August 28, 2020 letter that Resolution Copper wants to close the deal to get the Tribes to participate in receiving funds for "Tribal Monitors" and "Cultural Programs." This is Resolution Copper's way to try to get tribes' help to legitimize and legalize killing our land and impeding our religious and cultural beliefs and spiritual traditions. Why would we ever agree to this?


I know we all need funding to support language and culture programs, of course, but let's not take this blood money now. Let's stand together and fight these foreign corporate invaders! Let's support the San Carlos Apache Tribe to stop the Resolution Copper Mine and protect our sacred ancestral land as our ancestors did for centuries.

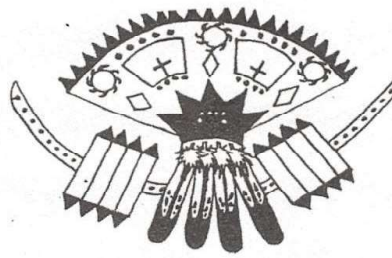
Tonto National Forest and Resolution Copper officials think they have the laws on their side, but those laws all passed without knowledge, consultation, or support from Native People. AZ congressional members underhandedly submitted the attachment to a bill without our knowledge years ago. The land they want to destroy—the waters they want to poison and dry up, the plants and animals they want to kill, the sacred and holy resting places they want to desecrate—are Indigenous land. It is up to Tribal People to defend and protect it.

It is wrong for our People to be involved in planning to destroy sacred land that made us who we are. I am asking for all Native People to stop working with, and helping Tonto National Forest and Resolution Copper officials get approval for their mine.

Let's resist the divide-and-conquer strategy that made it even possible for this terrible idea for mining one of our most sacred places to have made it this far. Please join me and **just say NO to the proposed Resolution Copper Mine.**

Respectfully,


Ramon Riley, Cultural Resource Director/
NAGPRA Representative
Nohwike' Bagowah Culture Center
White Mountain Apache Tribe



November 9, 2020

Subject: Proposed Resolution Copper Mine and Land Exchange Impacts on First Amendment and Human Rights to Religious Freedom, Exercise and Beliefs

To Our U.S. Federal Government Trustees and Tribal Leaders:

I am an elder and culture bearer for the Apache people and it is my duty to tell the truth and defend our Apache lands, culture, language, and lifeways. I have tried for the last two decades to explain to the Federal Government, to various mining company officials, and to others of the clear duty to protect the Chi'chil Bildagoteel (Oak Flat). Most have listened, but too few have heard my message and learned, so I am writing it down.

I want to be clear that this is not an issue of "access" and that neither Chi'chil Bildagoteel, the powers resident there, nor our religious activities that pray to and through these powers can be "relocated." It is painful to experience the continued dismissal by Tonto Forest officials of our rights to exercise our religion at a place uniquely endowed with holiness and medicine. The lands proposed for destruction by the proposed mine cannot be replaced and prompt action is needed to protect Chi'chil Bildagoteel.

Chi'chil Bildagoteel, including all 4,309 acres of public lands managed by the Tonto National Forest as the Chi'chil Bildagoteel National Register Historic District, requires protection for many reasons, especially because it is a place:

- Respected and protected for many centuries for religious use, beliefs, and practice by the ancestors of today's O'odham, Hopi, Zuni, Yavapai, and Apache Tribes, as well as by Spanish, Mexican, and early Anglo residents. All who get to know the Chi'chil Bildagoteel come to realize, honor, and celebrate its deep and universal sacredness.
- Recognized for the holy beings and powers as inscribed on cliffs and boulders.
- Visited for respectful and sustainable harvest of sacred medicine plants, animals, and minerals essential to our Apache Holy Ground ceremonies and other religious and cultural ceremonies.
- Revered and used for the sacred spring waters that flows from the earth with healing powers not present elsewhere. Chi'chil Bildagoteel is a place of perpetual prayer and the location for eternal ceremonies that must take place there to benefit from and demonstrate religious obligation, responsibility, and respect for the powers at and of Chi'chil Bildagoteel.
- Honored for the warriors who sacrificed their lives to protect their lands and families. Apaches and other Native and non-Native peoples recognize battlefields and burial places, much like

Arlington Cemetery, as sacred and protected lands. Why does the Federal Government deny protection for the Apaches who died at and near Chi'chil Bildagoteel and the Apache Leap?

- Valued as one of the most important sources of our favorite and best acorns, a principal source of Ndee (Western Apache) cultural identity, historical orientation, and good food. We Western Apache are an Acorn Nation. We rely on and nurture oak groves through our ceremonies, prayers, and lifeways. These are our actual Trees of Life.

It is my understanding that the land exchanges authorized in Section 3003 of the FY 2015 National Defense Authorization Act cannot proceed unless and until the Federal Government, the trustee for the welfare of myself, my tribe (White Mountain Apache), the Ndee (Western Apache Nation), and all other federally recognized tribes and their members and citizens does at least four things:

1. Complies with the legal requirements of the National Historic Preservation Act through the execution of a programmatic agreement for the protection of historic properties, including our places of religious and cultural importance, threatened with irreparable damage and destruction by the proposed Resolution Copper Mine.
2. Certifies bona fide appraisals of the lands to be exchanged to enable the proposed Resolution Copper Mine, including the heartless giveaway of the Chi'chil Bildagoteel, the multi-tribal holy site, sacred place, ceremonial area, and U.S. National Register Historic District previously protected by the Federal Government from mining.
3. Publishes the final environmental impact statement for the proposed Resolution Copper Mine.
4. Defends Federal Government actions and decisions against lawsuits.

The point here is that there is plenty of time for Federal Government officials and the cultural and elected leaders of tribes across Arizona, New Mexico, and beyond, to awaken to moral and legal mandates to protect Chi'chil Bildagoteel. Let's work together to save this natural and cultural wonderland!

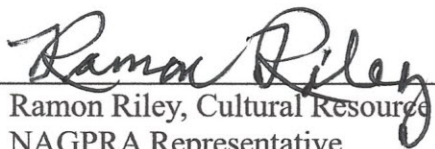
I urge careful attention to the religious and cultural significance of Chi'chil Bildagoteel in the National Historic Preservation Act Section 106 compliance process underway on the part of the Tonto National Forest. I am asking for our Federal Government Trustee to give focused attention to a key problem with the Tonto Forest Land Exchange and proposed Resolution Copper Mine Project that has been either neglected or deliberately disregarded by our Trustee and other responsible federal and state officials.

The Section 106 process and Programmatic Agreement has given lip service to minimizing and mitigating the adverse effects of the proposed mine and land exchange. The key problem is that both Federal and Arizona State government representatives have avoided the mandatory and fundamental step of identifying and evaluating the adverse effects that the proposed mine and land exchange will have on Apache free exercise of our traditional religion and Apache religious beliefs. The Federal Government is pretending to comply with NHPA while avoiding any identification and evaluation of Apaches' deeply rooted First Amendment religious rights to and relationships with Chi'chil Bildagoteel. This is made clear in the Forest Service's draft NHPA programmatic agreements, and especially in lack of any attempt to avoid impacts to Chi'chil Bildagoteel and in the sudden appearance of the Salt River Project as a signatory and regulatory beneficiary—much to our detriment.

Tonto Forest representatives have yet to consider and properly document how to avoid, minimize and mitigate the adverse effects on our religious rights of free exercise and beliefs in consultation with us, and with our prior informed written consent. This is, of course, required by the United Nations Declaration of the Rights of Indigenous Peoples and by the Golden Rule of doing to others only what you would have them do to you.

Tonto National Forest and Resolution Copper officials think they have the laws on their side, but none of those are greater than the universal laws of respect for land, life, and religious freedom. Please join me in recognizing that religious and cultural freedom and perpetuation are far more important than money and copper. Please do this, specifically and per my previous letter and request of September 11, 2020, by suspending all planning for mitigation efforts unless and until (1) the options for impact and adverse effect avoidance and reduction have been exhausted and (2) the four Federal Government actions listed above have been completed.

Respectfully,

A handwritten signature in dark ink, reading "Ramon Riley", is written over a horizontal line.

Ramon Riley, Cultural Resource Director/
NAGPRA Representative
Nohwike' Bagowah Culture Center
White Mountain Apache Tribe

APACHE STRONGHOLD

POB 766 SAN CARLOS, AZ 85550



November 13, 2020

John Fowler, Executive Director
The President's Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001
via email to jfowler@achp.gov

RE: Council NHPA §106 Compliance Review Pursuant to 36 C.F.R. §800.9(a) for the Proposed Resolution Copper Mine and Southeast Arizona Land Exchange Undertakings

Dear Executive Director Fowler:

As the co-founder and spokesperson of the Apache Stronghold, and as an enrolled member and former Chairman of the San Carlos Apache Tribe ("Tribe"), I write to request that this letter be given due consideration and be made a part of the administrative record in the National Historic Preservation Act ("NHPA") Section 106 process in the proposed Resolution Copper Mine and Southeast Arizona Land Exchange (the "Undertakings").

We hereby acknowledge and incorporate by reference the words of advice and warning offered to you and other federal and state historic preservation officials and responsible parties by the respected Apache elder, White Mountain Apache Tribe Cultural Resource Director, Ramon Riley, in his November 9, 2020 open letter to U.S. Federal Government Trustees and Tribal Leaders, "Subject: Proposed Resolution Copper Mine and Land Exchange Impacts on First Amendment and Human Rights to Religious Freedom, Exercise and Beliefs." Further, we reference Director Riley's letter of September 11, 2020 and request that Director Riley's letters be made part of the administrative record in the Undertakings' NHPA Section 106 process. Copies of Director Riley's letter are attached.

This correspondence and the Council's ongoing agency compliance review pursuant to 36 C.F.R. § 800.9(a) comes at an ideal time. It is apparent that the U.S. Forest Service ("USFS") seeks to execute a flawed programmatic agreement ("PA") ("version 8" of July 27, 2020) to conclude the NHPA Section 106 process for the proposed above-referenced Undertakings.

It is also apparent that USFS does not intend to consult with tribes, the Apache Stronghold, the public, or other consulting parties on any sort of consistent or transparent basis. Indeed, USFS appears unable or unwilling to establish required measures to avoid and minimize adverse effects to historic properties adversely affected by the Undertakings. USFS has thus far dodged its duties and legal obligations to consider our human rights and constitutional rights to the free exercise of our Apache religion and our religious beliefs within our traditional land, especially our *Chi'chil Bidadogoteel* ("Oak Flat") religious place and National Register District, all of which is targeted for deliberate and forewarned destruction by the proposed mining.

We also want to be sure that the Council understands that the Tribe's detailed review of that July 27, 2020 "version 8" of the PA, and the Tribe's September 3, 2020 letter by Chairman Terry Rambler to Tonto National Forest Supervisor Neil Bosworth, were both produced under an unnecessary and suddenly short deadline set on us by USFS after eight months of undue and unexplained USFS delays. The Tribe's official review of the PA has made clear to our Tribe's

17,000 members that our USFS federal trustee appears unwilling to properly consult with affected tribes, our organization, other consulting parties, and the public regarding necessary remedial changes to the version 8 draft PA.

We note with appreciation, the Council's perspective regarding the fundamental inadequacies of PA version 8, as expressed in the September 15, 2020 comments on that PA draft, to Supervisor Bosworth. We especially appreciate Dr. McCulloch's reminder to Supervisor Bosworth of the Council's July 23, 2020 Guidance, "Section 106 and Coronavirus Impacts."¹ We strongly support the Council's recommendation in the September 15, 2020 letter concerning the Forest Service's lack of a transparent Section 106 schedule and framework:

"...we recommend the TNF now move rapidly to clarify its remaining schedule and framework moving forward to conclude the Section 106 process as it addresses the concerns noted below and the comments provided by other consulting parties. This summation should include milestones for any future consultation meetings and for providing responses to existing comments."

The USFS' misconduct of the Section 106 process to date spotlights lack of transparency and disregard of core responsibilities under the Section 106 regulations at 36 CFR Part 800. Given our experiences with the USFS—especially mistreatments of our other sacred traditional cultural properties, most particularly Dził Nchaa Si'an ("Big Seated Mountain" aka "Mount Graham") and Dził Cho (San Francisco Peaks)—this systemic misconduct has continued to proceed despite our attempted corrections, for decades.

USFS officials now attempt, once again, to ignore their lawful obligations to consider the integrity, the cultural and religious significance of affected Apache and regionally shared Native American historic and traditional cultural properties. The USFS' failures include dereliction of legal requirements to develop and evaluate feasible alternatives or modifications to the Undertakings—such as alternative methods of mining, earth surface conservation, and disposal of mine wastes—that could avoid, minimize, or mitigate adverse effects to our historic and traditional cultural properties and corresponding effects the Undertakings to our cultures and sacred places.

USFS has most especially failed to meet its obligations to consider the Chi'chil Bįldagoteel National Historic District ("Oak Flat"), the complex of sacred sites targeted by and already suffering adverse effects from, these disrespectful, controversial and harmful Undertakings. Given that the elected method of copper mining enabled by the proposed land exchange would obliterate Chi'chil Bįldagoteel via massive, landscape-scale earth surface subsidence and dewatering, the Council and other signatories stand on the verge of complicity in deception—by USFS the Undertakings' Resolution Copper proponent, the joint venture of Rio Tinto and Broken Hill Properties ("BHP")—to accept the fallacy of "the continued access to Oak Flat" as a "mitigation initiative."

¹ One pertinent excerpt from that July 23, 2020 Guidance:

Extraordinary circumstances in the current situation warrant case by case adjustments to this process. Specifically, the Section 106 deadlines for the response of State and Tribal Historic Preservation Officers, and Indian tribes and Native Hawaiian organizations (NHOs) that attach religious and cultural significance to historic properties affected by the undertaking, regardless of its location (collectively, states/tribes/NHOs), will be considered paused while, due to the COVID-19 outbreak, an office is closed or work conditions are such that the states/tribes/NHOs are unable to carry out their Section 106 duties or statutory rights to consultation in a timely fashion (e.g., staff unavailability due to health reasons; restricted access to records; state or tribal laws requiring hard copy records; lack of Internet access or telework capabilities). The clock will resume once the conditions are no longer in effect.

That temporary offering is both short-lived and cruel because it would give us access to nothing but the reality of aggravated and compounded cumulative transgenerational pain and trauma, eternal reminders of profound disrespect and abuse by our “trustee,” to be entombed in a massive and agonizing crater of desecration where Chi’chil Bıldagoteel had existed, since time immemorial as a place of peace.

This is no different than Resolution Copper’s co-parent corporation Rio Tinto’s deliberate destruction of the Puutu Kuntj Kurrama and Pinikura (“PKKP”) peoples’ sacred place and heritage site, Jukkan, in present-day Western Australia’s Pilbara region earlier this year. That human rights abuse and deliberate desecration caused an “investor revolt” within Rio Tinto, forcing the resignation of multiple Rio Tinto executives, including CEO Jean-Sebastien Jacques. In the aftermath, Rio Tinto’s Board Chairman, Simon Thompson, declared:

“What happened at Juukan was wrong. We are determined to ensure the destruction of a heritage site of such exceptional archaeological and cultural significance never occurs again at a Rio Tinto operation.”²

Jacques’ pledge seems to us dubious, at best. Just more empty words from strange people who would do anything to get what they want here. Rio Tinto gives every indication that it will continue, in defiance of its own policies and international law, to deny and stomp on essential human and Indigenous peoples’ rights to the land Resolution has targeted.

USFS has avoided compliance with the Section 106 regulations despite multiple requests, including last year’s letters to USFS from the Arizona State Historic Preservation Office (“SHPO”) and the Council. To assure that the Council and other consulting parties are informed regarding the views of Apache Stronghold, we supplement the San Carlos Tribe’s comments on PA version 8 with our review of concerns with the USFS’ attempted exercise of the Section 106 process so far.

Our comments on procedural and content deficiencies in the Section 106 process for the Undertakings make clear that USFS has seriously compromised the process. The significance of Chi’chil Bıldagoteel, and Apaches’ long-running, highly publicized and internationally-reported defense of our sacred traditional cultural property on our aboriginal land, was well-known to both Rio Tinto and BHP, as well as the USFS, long before they successfully lobbied Senator John McCain, Representative Ann Kirkpatrick, and our other “trustees” to insert an 11th hour rider into the “must pass” Defense appropriations bill on the eve of a looming government shutdown in December 2014.

We urge and advise that the Section 106 process be re-initiated with a transparent and detailed agenda, then conducted in proper conformance with regulations at 36 CFR §800, applicable USFS agreements and policies, and relevant memoranda and guidance documents of the Council and the U.S. Department of the Interior National Park Service.

² “Rio Tinto CEO, top executives resign amid cave blast crisis,” by Nick Toscano and Hamish Hastie, Sydney Morning Herald (September 11, 2020)(“Mr. Jacques, Mr. Salisbury and Ms. Niven - whose department oversees community relations - were last month stripped of \$7 million of their 2020 bonuses after a board-led review found they had to bear some responsibility.”), <https://www.smh.com.au/business/companies/rio-tinto-ceo-top-executives-resign-amid-cave-blast-crisis-20200910-p55uf8.html> .

And see, e.g., “Grieving after Rio Tinto blast, Aboriginal owners fear Fortescue plans,” by Nick Toscano, Sydney Morning Herald (October 12, 2020) <https://www.smh.com.au/business/companies/grieving-after-rio-tinto-blast-aboriginal-owners-fear-fortescue-plans-20201012-p564az.html> .

Unless this is done, the Council may find that termination must be considered per 36 CFR §800.7, to preserve semblances of integrity in NHPA administration and oversight, to demonstrate fidelity to Federal Government Indian and public trust responsibilities, and to avoid further prejudices, undue burdens and harms to us, and violations of the legal, constitutional, and human rights of Apache people and other affected Native American tribal members.

Defects In The Section 106 Process For The Undertakings

The San Carlos Apache Tribe, on behalf of its members such as those of us who have assembled as Apache Stronghold, and most other consulting parties have been dutiful participants in the various Section 106 process attempts for the Undertakings since 2015. Our Tribe has allocated limited staff resources in efforts to protect Chi'chil Bıldagoteel and to assist USFS in meeting its statutory and regulatory obligations without infringing on our legal and human rights.

Our Tribe sent many of our most respected elders to collaborate in the Ethnographic and Ethnohistoric Study of the Superior Area, a study mostly ignored by USFS. We participated in at least fifteen (15) USFS-sponsored meetings regarding the Undertakings. We submitted at least seven (7) substantive sets of comments on prior drafts of the PA and on documents prepared pursuant to the National Environmental Policy Act ("NEPA").

Other tribes, the Arizona SHPO, and the Council have been similarly diligent in assisting USFS in the proper conduct of the Section 106 process. The primary product of collective diligence on the part of the consulting parties, version 8 of the PA, combines failures to meet basic regulatory requirements with unorthodox attempts to use the PA to advance various corporate interests and other purposes not contemplated under the NHPA or its implementing regulations.

The substantial investments by our Tribe and other parties, including the Council, in assuring legitimacy and improving the USFS' faithless performance of its Section 106 duties, have yet to translate into adequate USFS performance. In particular, despite information and advice from consulting parties, USFS has failed to develop and evaluate alternatives or modifications to the Undertakings that could avoid or minimize adverse effects on historic properties. Neither has USFS explained its rationales for ignoring or discarding the information and advice that has been forthcoming from the consulting parties. USFS has yet to simply identify, describe, and evaluate the functions, attributes, and values of our historic properties, especially including Chi'chil Bıldagoteel. USFS has yet to explicitly consider our properties' religious functions, attributes, and values. These steps are prerequisite to USFS completion of mandatory USFS considerations of the adverse effects that the Undertakings will have on these and all other historic properties.

USFS failures to administer the Section 106 process transparently and in accord with the NHPA and the regulations at 36 CFR Part 800 are adding disrespectful insults to the injuries that Apaches and other traditional religious practitioners are experiencing with the industrial damage, alteration, and destruction of Chi'chil Bıldagoteel.

USFS failures fall into four overarching and aggregating categories of defects. Defects One and Two are procedural. Defects Three and Four are substantive, content-specific failures stemming from USFS derelictions in its Indian trust responsibilities, in its government-to-government consultation duties, in its obligations to analyze and disclose adverse effects on historic properties, and in its mandates to seek to avoid, minimize, or mitigate adverse effects.

What follows here below is a review of those four fundamental defects, intended to assist the Council with its compliance review and to guide USFS in the necessary reboot of the Section 106 process. We think that reboot should include an admission of errors in fulfilling of fiduciary

responsibility and should initiate a truthful reconciliation with the Native nations, tribes, and tribal members and citizens and harmed and disrespected by USFS and Rio Tinto-BHP conduct to date.

Defect One: Bifurcation of the 106 Process and Exclusion of Consulting Parties

In a manner inconsistent with both 36 CFR Part 800 and authoritative advice provided by consulting parties, USFS has excluded tribal consulting parties from its communications with government agency consulting parties, and vice versa. The regulations at 36 CFR Part 800 do not allow agencies to make unilateral selections of which consulting parties to communicate with. The regulations do not enable agencies to select which agency determinations to disclose to different subsets of consulting parties, or to presume to speak on behalf of sovereign Indian tribes to others, especially without prior informed written consent and without the presence of the tribes' official representatives. SHPO's September 19, 2019 letter to USFS spotlights that defect: "tribal consultation under Section 106 and the provisions outlined in 36 CFR Part 800 . . . has not proceeded apace of other federal authorities guiding consultation with Native American tribes."

Inconsistent and apparently biased and selective USFS attention to its consultative duties is also seen in USFS failures—despite the Undertakings' complexity, controversial nature, and massive and unmitigated adverse effects on historic properties—to involve the public pursuant to 36 CFR §800.2(d). A conscientious non-governmental organization brought this deficiency to USFS attention a year ago (Arizona Mining Reform Coalition letter to USFS Supervisor Bosworth, November 4, 2019). Despite that appeal, USFS continues to exclude the public from participation in the Section 106 process (other than commentary on the PA), to discount and disregard most values linked to historic properties other than the scientific values associated with National Register Criterion D, and to enable plans for the destruction of hundreds of historic properties despite good options for effect avoidance and minimization. The result of USFS conduct and decision making in the course of this alleged NHPA Section 106 process has been prejudicial and detrimental to the tribal parties' interests, and particularly to our interests and rights to the free exercise of our traditional religion and the protection of our traditional sacred places within and related to the Chi'chil Bıldagoteel sacred property and National Historic District.

Defect Two: Failure to Conduct the Section 106 Consultations Stepwise

The NHPA Section 106 regulations at 36 CFR Part 800 prescribe a protocol for a multi-phased sequence of communications involving disclosures of federal agency plans and proposed determinations intended as a basis for seeking informative comments from consulting parties and the public. While it is understood that the Section 106 regulations are to be flexibly applied, it is not permissible to distort or omit key steps—whether intentionally in bad faith, or negligently as the result of a failure to exercise due care. Earlier phase consultations are, of course, intended to serve as rational bases for procedural and substantive improvements in subsequent phases. Instead of making use of the stepwise method, as prescribed, USFS has ignored NHPA in both letter and spirit by excluding tribal consulting parties from participation in critical steps of the Section 106 process. The San Carlos Apache Tribe's letters of July 10 and September 30, 2019 advised USFS of this chronic defect.

On a parallel track, the SHPO's letter of September 19, 2019 expressed concerns with USFS' management of the process and its substance:

"This letter is a follow up to and memorialization of the August 29, 2019 meeting between TNF and SHPO staff regarding the Resolution Copper Mine Programmatic Agreement (PA) and ongoing Section 106 Consultation. At our meeting, SHPO reiterated our continuing concerns with the tribal consultation process, which has not been accomplished in concert with the process laid out in 36 CFR Part 800."

The Council's October 25, 2019 letter to USFS Supervisor Bosworth likewise expresses concerns with "the lack of clarity on how the TNF has provided tribes with a reasonable opportunity to identify concerns about historic properties; advise on the identification and evaluation of properties of traditional religious and cultural importance to them; articulate their views on the undertaking's effects on such properties; and participate in the resolution of adverse effects." (See at p.1, "Consultation with Indian Tribes"). The reason why it is unclear to the Council, to the SHPO, and to the tribal parties is obvious and has nothing to do with the particular challenges of these Undertakings: the USFS' conduct is unrecognizable when compared with the standard required practices and regulatory requirements.

The USFS December 5, 2019 response to the Tribe feigns innocence and ignorance:

"It is not clear from [sic] your letter, which 'specific procedural requirements' you are referring to. The very purpose of the PA is to ensure the Forest is following the legal requirements for section 106."

As the Council is aware, and as the Tribe and other parties have repeatedly advised USFS, even as consultations are essential foundations for PA preparation, any procedures set forth in an agreement document cannot substitute for specific procedural requirements to consult with the Tribe and other consulting parties regarding proposed methods to be used: to identify historic properties, per 36 CFR §800.4(b); to make evaluations of significance and determinations of eligibility, per §800.4(c); to provide assessments of adverse effect, per §800.5; and, to compose reasonable resolutions of adverse effect, per §800.6.

PA version 8 reveals that USFS has begun taking some of these required steps, but this has not been done in consultation with the tribal consulting parties. The attempt in PA version 8 to exclude tribes from the list of consulting parties is as emblematic of unreliable USFS performance of its duties as it is harmful to the special relationship with tribes that USFS officials are sworn and otherwise legally bound to uphold.

Defect Three: Violations of Government-to-Government Duties and Protocols, and Infringements on Tribal Sovereignities

The Section 106 regulations and other rules that define lawful USFS conduct also prohibit USFS actions that harm or diminish tribal sovereignty. USFS has defied these rules and notifications from our Tribe that we have not been properly consulted about the USFS "Tribal Monitor Program." This "Program" has been co-conceived and fostered by USFS and the Undertakings' proponent and administered by a contractor guided by USFS officials and financially controlled by Rio Tinto-BHP through Resolution Copper.

The "Tribal Monitor Program" must be disclosed and analyzed for what it is: a USFS-sponsored corporate industrial operation to recruit and employ individual tribal member-citizens to provide USFS and Rio Tinto-BHP-Resolution Copper with sensitive cultural information that is privileged and collectively owned by the affected tribes, all in the absence of prior, fully informed, written consent from tribal governing bodies. The San Carlos Apache Tribe's letters of July 10 and September 30, 2019 advised USFS to suspend this "Program" and all other attempts to convert invaluable, tribal cultural, historical, and geographical knowledge into a "currency" for USFS and the Undertakings proponent to "purchase" compliance with NHPA, NEPA, and the Southeast Arizona Land Exchange and Conservation Act.

Instead of initiating non-discretionary, government-to-government consultations regarding the "Tribal Monitor Program," USFS Supervisor Bosworth's December 5, 2019 letter attempted to dodge concerns, claiming that "the Tribal Monitor Program is not part of government-to-

government consultation.” USFS continues to champion that operation and to advocate for its commercial collaborators’ unauthorized intrusion into the Tribes’ sovereign affairs. Despite requests from multiple parties, USFS has failed to clarify, specify, and consult within the Section 106 and NEPA processes about the roles of the “Tribal Monitor Program.” Ongoing implementation of that “Program” has corrupted various phases of an already complex and mismanaged Section 106 process, one sorely lacking in demonstrated good faith by USFS.

We once again invoke the Council’s trust responsibilities for tribal welfare and assistance in suspending the “Tribal Monitor Program” pending proper completion of the required government-to-government consultations with our Tribe and other affected tribes. In light of USFS resistance to such consultations, Apache Stronghold now must insist on binding and legally enforceable assurances that any and all collectively owned Western Apache traditional knowledge already captured by USFS and the various third-party contractor(s) without proper authorization and prior informed written consent cannot and will not be used for any purpose, including NHPA and NEPA compliances, without the prior informed written consent of the tribal owners.

The Council appears to also be aware that Section IX of PA version 8 includes USFS schemes, only recently announced to tribal officials using means other than government-to-government consultations, regarding “tribal programs” supported by “four financial trusts that would provide 40 years of funding for a variety of programs to meet a number of specific purposes” linked to the mitigation of the Undertakings (USFS Supervisor Bosworth July 24, 2020 letter to San Carlos Apache Tribe Chairman Rambler). This apparent further attempt to co-opt tribal government prerogatives and transfer duties for the avoidance, minimization, and mitigation of adverse effects from the USFS to private third parties, even if permissible, is subject to public disclosures and tribal consultations pursuant to NHPA, NEPA, and other federal laws and rules.

USFS is not meeting these essential fundamental mandates. Instead, USFS is attempting to authorize or legitimize these still-vague schemes through very late insertion in a “final draft” PA, along with the sudden introduction of a new private commercial signatory party and intended PA beneficiary (more about this trickery is presented in Defect Four here below). Those daring and provocative stunts are patently unacceptable in any legitimate Section 106 process, especially because the USFS subsequently informed Apache tribal officials that the USFS is not providing for any tribal consultation about it, only accepting written comments— thereby effectively terminating the Section 106 process on the Undertakings.

We urge the Council to assist USFS in consulting with tribal governments in good faith about the precise roles in the Section 106 process of both its proposed “Tribal Monitor Program” and the proposals outlined in the July 24, 2020 USFS letter and PA Section IX. We Apaches are under no obligation, with or without the overdue government-to-government consultation, to further assist USFS or the proponent of the Undertakings in superficially satisfying their legal obligations or enabling their bad faith and self-serving endeavors to manipulate the Tribe and its members, and the other tribes and their members, with such schemes.

Defect Four: Inattention to Adverse Effects to Historic Properties and Impediments to Free Exercise of Religion and Undue Burdens on Religious Beliefs

Neither the Section 106 process nor the NEPA process for these Undertakings have contributed materially to any plans other than to do no more than generally and casually note just some of the adverse and cumulative effects of the Undertakings on the *Chi’chil Bildagoteel* Historic District and multi-tribal sacred place. Hundreds of other historic properties, the vast majority of which were created and are cared for by American Indians, are also being targeted for imminent alteration or complete obliteration. USFS failure to analyze feasible alternate mining methods, or to disclose and consult with the Tribe about the substantive results and treatment

options emerging from those analyses, indicates that the Undertakings will violate and destroy *Chí'chil Bildagoteel* and the many values and historic properties there and nearby.

Indeed, actions by USFS and Rio Tinto-BHP-Resolution Copper already have been inhibiting and unduly burdening the free exercise and beliefs of members of American Indian religions. They certainly are unjustly encumbering and unduly burdening our religious beliefs and violating our senses of place, vitality, security, identity, health and wellness.

USFS has also failed to analyze and consider the adverse effects of prior undertakings in relation to values other than scientific values or National Register criteria other than Criterion D. These prior and ongoing undertakings include the many drilling sites, road “improvements,” and other surface and subsurface alterations, including many actions the Tribe sees as adverse and cumulative effects within and around the boundaries of *Chí'chil Bildagoteel*. Neither the individual USFS permits issued with “no adverse effect” determinations for those subsidiary undertakings, nor the proposed land exchange’s Draft Environmental Impact Statement (“DEIS”), nor any of the eight (8) draft PAs, account for (much less analyze or resolve) the adverse effects and impacts those actions have had and are continuing to have.

As the Tribe has previously informed USFS, these significant environmental impacts and adverse effects specifically include impacts, effects, and undue impositions on the free exercise and beliefs of Apache religion and on the ability of myself and other Apache people to avail ourselves of the unique, place-based spiritual and emotional benefits of exercising our religious beliefs without the encumbrances of drilling sites, wells, roads, and other industrial intrusions. Neither the draft PA versions 1-8 nor the DEIS contain either general planning approaches or specific protocols for avoiding or reducing adverse effects to historic properties, except through the additional and compounding adverse effects of rote archaeological testing and data recovery.

USFS has also failed to fulfill its binding legal duties to analyze and consider the Undertakings—pursuant to NEPA, NHPA, the First Amendment’s Free Exercise Clause, the Religious Freedom Restoration Act (“RFRA”), as amended, and other legal requirements—in terms of cumulative effects. Neither the DEIS nor the Section 106 process has heretofore disclosed, considered, or analyzed quantitative or qualitative dimensions of current, reasonably foreseeable, and cumulative adverse effects to the cultural and religious values and uses directly and indirectly linked to the historic properties on the verge of destruction.

It bears particular mention that the USFS DEIS selected the preferred action alternative for the Undertakings, an option that ensures the greatest number and magnitude of adverse effects to historic properties. In the course of planning and evaluating these Undertakings and other recent undertakings, USFS has overseen and is failing to regulate, avoid, minimize, or mitigate the ongoing and cumulative transformation of our Pinal Mountain Apache cultural landscape into an industrial wasteland. Apache Stronghold asks the Council to assist USFS in providing due consideration, per NEPA, NHPA, 36 CFR § 800.5(a)(1), and our Constitutional and statutory rights, of these and other cumulative effects.

The most recent example of a detail of the compounding defects we review here is the unheralded and late-hour appearance of the Salt River Project (“SRP”) as a signatory party in version 8 of the draft PA. SRP has a history of working against tribal rights and interests. The surprise introduction of SRP as a signatory party to the “final draft” PA introduces another realm of adverse effects to our historic properties and sacred places. This abrupt addition also implicates facets of environmental equity and environmental justice. SRP involvements, plans, and attendant issues require bona fide and good faith consultation—which has been, so far, non-existent—in accordance with NHPA Section 106, NEPA, and other applicable laws and executive orders.

For the in-progress Section 106 process, such consultation should be grounded in adequate prior USFS disclosures of SRP involvements in the undertakings and SRP contributions to the resolution of adverse effects. The apparent USFS attempt to add SRP into a final draft PA and to provide coverage for undisclosed and distinct SRP undertakings further violates basic tenets of good faith consultation per NHPA Section 106. We hope the Council will be effective in advising USFS of its duties in leading consultative negotiations. Because this particular Section 106 process involves treaties, tribal sovereignty, religious freedom, basic human rights, and hundreds of Register-eligible historic properties it deserves and requires utmost good faith which has been sorely lacking so far on the part of USFS, SRP, and Rio Tinto-BHP-Resolution Copper.

Concluding Comments, Recommendations, and Requests

We are grateful in anticipation of the Council's thorough exercise of its federal oversight authority to assist and advise USFS in this matter. We hope to see real progress toward the setting of reasonable and enforceable limits to any further alteration to our ancestral lands, and to our religious and cultural relationships to our imperiled ancestral lands.

We urge the Council's attention to the 2015 "Ethnographic and Ethnohistoric Study of the Superior Area, Arizona," which is part of the administrative records in these NHPA and NEPA processes. That study describes much of the historical depth, cultural breadth, and religious potency of connections among individual historic properties and tribal member-citizens and communities. The ninety-four (94) tribal representatives involved in that Ethnohistoric Study affirmed that the Undertakings would cause direct, indirect, and cumulative adverse effects to historic properties and to the individuals and communities that rely upon these properties for health, vitality, identity, orientation, and other aspects of wellness, peace, and security. Although USFS has recently given nominal attention to that study, it continues to ignore and omit "community health" and "tribal health" place-based relationships in its Section 106 and NEPA plans and analyses for the Undertakings.

Each and all of the four categories of defects discussed above could have been avoided or remedied if USFS had consulted properly and acted accordingly in the attempted Section 106 process. Whatever USFS has and has not done—through negligence, incompetence, or lack of good faith—however great the limitations on USFS discretion and however vigorous and costly its bureaucratic machinations for the Undertakings, the USFS has not administered a "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising" as required by the NHPA and the Council's implementing regulations.

Instead, USFS has chronically disregarded its fiduciary responsibility to federally recognized tribes. USFS has subverted government-to-government protocols, unlawfully distorted the Section 106 process and most harmfully, prioritized special discretionary service to the corporate entity created by two transnational corporations and presented as the proponent of the Undertakings. And now the USFS shamelessly seeks to also provide special rapid NHPA-bypass service to SRP.

USFS failures and miscarriages could and should have been averted or remedied on the basis of either the prior communications from consulting parties, or the lessons USFS should have learned over several decades from similar careless blunders and deliberate insults to tribes and our sacred and holy places—*Dził Nchaa Si'an* (Mount Graham), *Dził Cho* (San Francisco Peaks), *Ba Whyea* (Taos Pueblo's Blue Lake), the Mountain Badger-Two Medicine Traditional Cultural District, etc., etc. Instead, USFS now stubbornly proceeds to fast-track the destruction of *Chí'chil Bìldagoteel* with presumed impunity, posing behind the façade of a defect-ridden pseudo-Section 106 process.

In addition to its great cultural and religious importance to other tribes, *Chí'chil Bildagoteel* is profoundly central to the cultural and religious beliefs and practices of the San Carlos, White Mountain, Cibecue, and Tonto Apaches. The *Chí'chil Bildagoteel* National Register Historic District unmistakably deserves and requires thorough and imminently respectful consideration in terms of its manifold values and the many options available to avoid and reduce adverse effects to those values. The adverse effects and significant impacts from the proposed Undertakings would be a massive undue burden on our Constitutional, religious, and basic human rights. These effects and impacts would all but eliminate our Tribe's ability to practice and transmit to future generations the religious ceremonies, values, beliefs, and practices necessary to sustain our cultural existence.

Apache Stronghold declares that the time has come to expose USFS' attempted unlawful manipulations of the Section 106 process for the Undertakings and to reestablish the legitimacy of these essential proceedings in accordance with the law. We gratefully anticipate Council's thorough review of our concerns and the concerns expressed by our Tribal government officials. We particularly anticipate robust oversight and the responsible Federal Government officials' reassertion of their Indian fiduciary duties and re-establishment of lawful, meaningful, and timely government-to-government consultations regarding all matters related to the proposed Undertakings.

In closing, we would like to acknowledge your recently announced and upcoming retirement as the Executive Director and express our appreciation for your accomplishments in the field of historic preservation and cultural heritage protection, particularly your influence and leadership in providing for better understanding and respect for Native American traditional culture and heritage, the preservation of our sacred places, and protection of our religious freedom and human rights.

Sincerely,



Wendsler Nosie, Sr. Ph.D.
APACHE STRONGHOLD
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Attachments (2) (White Mountain Apache Tribe Cultural Resources Director Ramon Riley's letters of September 11, 2020 and November 9, 2020).

cc (2-page list, as follows):

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