

**File Code:** 1570

**Date:** DEC 18 2017

Roger Featherstone  
Director  
Arizona Mining Reform Coalition  
P.O. Box 43565  
Tucson, AZ 85733-3565

Dear Mr. Featherstone:

On behalf of the Tonto National Forest, I would like to thank you for your involvement in the Apache Leap Special Management Area (ALSMA) Project. This letter is in response to the objection you filed on the Final Environmental Assessment (EA) and Draft Decision Notice (DN). I have read your objection and reviewed the project record and Final EA, including the environmental effects. My review of your objection was conducted in accordance with the administrative review procedures found at 36 CFR 219, Subpart B.

## **PROJECT OVERVIEW**

The Forest Service is proposing to revise the current management of the ALSMA on the Globe Ranger District, Tonto National Forest. In December 2014, Congress set forth the establishment of the ALSMA through the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015. Section 3003(g)(5)(a) of the NDAA directed the Forest Service to prepare a special management plan for the ALSMA in consultation with affected Native American tribes, the Town of Superior, Resolution Copper Mining, LLC (Resolution Copper), and interested members of the public.

The Proposed Action is to: (1) prepare and adopt a programmatic management plan for the approximately 839-acre ALSMA; and (2) amend the 1985 Tonto National Forest Land and Resource Management Plan to address the newly designated ALSMA.

## **ADMINISTRATIVE REVIEW PROCESS**

The legal notice for the objection filing period was published on August 25, 2017. Your timely objection, 18-03-00-0002-O219, was received on October 10, 2017. The regulations at 36 CFR 219, Subpart B, provide for a pre-decisional administrative review process in which the objector provides sufficient narrative description of the project, specific issues related to the project, and suggested remedies that would resolve the objections (36 CFR 219.54). The regulations also allow for parties to meet in order to resolve issues. We met for an objection resolution meeting on December 7, 2017. We discussed your concerns related to protections for the ALSMA. I also noted that it was my intent to issue a final written objection response within the next month. This letter, including instructions to the Responsible Official, is my written response to your objections.



## OBJECTION RESPONSES

**ISSUE 1:** The draft decision does not fulfill the mandate required by Congress in the National Defense Authorization Act of 2014 (NDAA).

**Contention 1a:** The objector contends that, based on the response to comments, the Forest Service does not plan on fulfilling its Congressional mandate to: *Preserve the natural character of Apache Leap; Allow for traditional uses of the area by Native American people; and Protect and conserve the cultural and archaeological resources of the area.*

While the Forest says it will fulfill these three mandates from the NDAA, it clearly also states that the Forest is unable to enforce actions that would protect the Apache Leap Special Management Area (ALSMA) from threats that would destroy the natural character of Apache Leap, prohibit traditional uses of the areas, and protect and conserve the cultural and archaeological resources of Apache Leap. Section 3003(g)(6) cannot be used as an excuse to not act to protect the ALSMA from adjacent mining threats. The Management Plan must be rewritten to provide Management Approaches that would allow for enforcement actions to protect ALSMA.

Section 3003(g)(6) clearly does not abrogate the Forest's ability to impose restrictions on mining activities on private land under Federal laws, rules, and regulations. The Forest has regulations allowing it to protect SMAs from impacts from adjacent private lands that could be implemented to protect ALSMA from negative impacts. [Objection, p. 3]

**Response:** The objectors seem to tie the establishment of the ALSMA to the Resolution Copper project or other mining projects; in other words that they are a connected action. The ALSMA is being established regardless of what happens with Resolution Copper or any other project in the future, and the current 1985 Tonto Forest Plan is being amended to provide plan guidance for the ALSMA. In establishing the ALSMA, the Forest has established a reasonable set of Forest Plan Components (Desired Conditions, Objectives, Standards, Guidelines, Suitability) for the management of the ALSMA to which future projects must apply. Forest Plans are adaptable; they can be amended as needed and as conditions that might have an impact on the ALSMA change.

Adjustments/amendments occur as projects are proposed and evaluated. If during future project analysis it is determined that Forest Plan direction within any Management Area is not adequate, then the Forest Plan may be adjusted/amended to provide additional Forest Plan Components (plan protections) as needed.

It is at the time of those future project evaluations (like Resolution Copper) that the Forest Plan direction for an area is evaluated in light of what is being proposed in a project and a determination is made as to whether additional or adjusted Forest Plan Components may be needed. One cannot assume that projects that have yet to initiate, are going to have a certain set of effects until those project evaluations are underway.

For the establishment of the ALSMA, the Tonto has added a reasonable set of Forest Plan Components for protection of the ALSMA, and thus is consistent with the requirements of NFMA.

The Forest Service does not have the legal ability to take enforcement actions on mining operations conducted on private land. The federal regulations at 36 CFR 228 subpart A, apply only to surface resources of the National Forest System. Section 3003(g)(6) of the NDAA reads that the Act will “not impose further restrictions beyond those otherwise applicable to mining activities on privately owned land under Federal, State, and local laws, rules and regulations otherwise applicable.”

**Contention 1b:** Since Rio Tinto estimates it would take 10 years for construction of their proposed mine, and that the Management Plan requires that seismic monitoring begin 2 or 3 years after a mining plan is approved that would give 7 years of baseline data. However, this reasoning is fatally flawed because Rio Tinto would begin construction (one would assume) immediately after permits were granted at the completion of the NEPA process. This would mean that construction would begin well before the 2 or 3 years the Forest requires in the Management Plan. Construction would create seismic activity that would negate the meaningful collection of baseline data. As we stated in our comments, baseline seismic data must be collected before any construction would take place. [Objection, p. 4]

**Response:** The management approach included at Section 3.1.4 of the Management Plan, states “implementation of the monitoring strategy should occur as soon as practicable, and before the commencement of any mine-related activities authorized under the mine plan of operations and related documents.” The intent of the monitoring strategy is to: “Provide an adequate period before pre-mine construction and development in which to collect baseline seismic and other monitoring information prior to initiation of block-caving operations. [PR 0001800, p. 19]

Resolution Copper has submitted a “General Plan of Operations” to the Forest that includes proposed block caving mining methods that would occur beneath Oak Flat, east of, but adjacent to, Apache Leap. It is acknowledged in the Plan that mineral production by block caving would cause subsidence in the Oak Flat area, and similarly acknowledged that there could be seismic impacts to Apache Leap [PR 0001800, p. 11]. The NDAA identifies seismic monitoring as an authorized activity within the Apache Leap SMA. In response, the intent of the ALSMA Plan is to provide for an adequate period of baseline seismic monitoring prior to the start of block caving operations on adjacent lands. On-going seismic baseline monitoring has been conducted since 2010 and continues to the present 2017 [PR 0001510-0001516]. Based on comments received during the scoping comment period, language was added to subsequent versions of the management plan Section 3.1.4, “Management Approaches,” for Natural Character and Scenery to elaborate on the expectations and intent of the monitoring plan (including seismic monitoring) to be prepared during the Resolution Copper NEPA process [PR 0001800, p. 19].

The Forest acknowledges that further clarification regarding the intent of the seismic monitoring program is warranted and moving the description to the Guidelines section, instead of Management Approaches, would provide for stronger protections for the values and resources of the SMA.

**ISSUE 2:** The draft decision does not fulfill the mandate required by the National Environmental Policy Act (NEPA).

**Contention 2a:** The Forest has clarified in 3.6 of the Management Plan that the ALSMA is withdrawn from mining activities, but does not address the impacts that non-commercial mining activities from the tunnel adjacent to ALSMA or other possible non-commercial underground activities, excepting seismic monitoring, that the NDAA allows could have on the ALSMA. The issue and impacts of allowable (or even what exactly is allowed) non-commercial mining activity must be addressed before the Management Plan can be approved. [Objection, pp. 4-5]

**Response:** The objector contends that the Forest must identify what are allowable non-commercial mining activities and must address the impacts of such activities, particularly the impacts from the tunnel adjacent to ALSMA.

By withdrawing Apache Leap from mining activities, the NDAA has provided permanent protection from mining: (c)1(f) WITHDRAWAL – “Subject to valid existing rights, Apache Leap and any land acquired by the United States under this section are withdrawn from all forms of: ... (2) location, entry, and patent under the mining laws; i.e., appropriation of any rights to minerals accessed under the 1872 Mining Law, as amended, and (3) disposition under the mineral leasing, mineral materials, and geothermal leasing laws, i.e., leasing for oil, gas, geothermal, etc., and the sale of common mineral materials. The NDAA identifies that Resolution Copper will convey all right and title to mining claims, patented or unpatented or any other mining right on the federal lands to be conveyed. [PR 0001800, pp. Appendix A]

Mining of any kind, including associated workings, is not allowed within the ALSMA, itself. Forest Service regulations do not identify “commercial versus non-commercial mining” operations. Regulations at 36 CFR 228 Subpart A, “Operations” include “[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims.” However, adjacent mining cannot be limited through management actions in the Apache Leap SMA.

The regulations at 36 CFR 228, Subpart A, apply only to surface resources of the National Forest System and have no effect on private land. The tunnel is authorized in the NDAA with associated workings, as described in the Resolution mine plan of operations. Impacts from adjacent mining operations are being analyzed appropriately through the NEPA process (Resolution Copper Project and Land Exchange EIS) required under Section 3003(c)(9) of the NDAA.

The Forest outlined anticipated adjacent mining activities in the ALSMA Plan [PR 0001800] and the EA [PR 0001801] to include those activities in the cumulative impacts analyses within the EA (see discussion and references below). The Forest also explained that this project is programmatic and that “individual projects proposed for the ALSMA would be analyzed for

potential site-specific environmental impacts and for compliance with desired conditions and management standards established in this plan” [PR 0001800, p. 8]. Analysis for actions proposed under individual projects would therefore be completed under those individual projects when they are proposed. See response to Contention 1a.

The Forest explained in Section 1.4 of the ALSMA Plan [PR 0001800, p. 6], that allowable activities are outlined in the NDAA: “The NDAA outlines the primary purposes, authorized activities, and additional considerations for the management of the Apache Leap SMA (NDAA, Section 3003(g)(2)).” In that same section the Forest also referenced Section 3003(g)(4)(B) of the NDAA for allowable activities for the proposed adjacent mining operation specifically identifying “operation of an underground tunnel and associated workings,” as an authorized activity “as described in the Resolution Copper Mine ‘General Plan of Operations,’ subject to any terms and conditions the Secretary of Agriculture may reasonably require” [PR 0001800, p. 6]. The Forest also explained other specific activities as authorized under the NDAA [PR0001800, pp. 6-7]. Appendix B of the EA provides details of the projects, activities, and factors considered in the cumulative effects analysis for the proposed management plan including the activities authorized in the SMA for the Resolution Copper project [PR 0001801, p. 18]. As stated in Appendix B, these activities considered in the cumulative effects analysis include more than seismic monitoring and include operation of an underground tunnel and “installation of fences, signs, or other measures necessary to protect the health and safety of the public” [PR 0001801, B-6]. Cumulative impacts analyzed in the EA reference and consider those specific activities authorized by NDAA as outlined in Appendix B for various resources [PR 0001801, p. 31 footnote 6, p. 35 footnote 7, p. 41 footnote 9, p. 45 footnote 10, p. 52 footnote 11, p. 54 footnote 12, p. 61 footnote 14]. Section 3003 of the NDAA containing authorized activities in the SMA was attached to the EA [PR 0001800, Appendix A], and the draft DN also identifies and discusses the authorized activities in the SMA [PR 0001799, p. 8].

**Contention 2b:** The Forest failed to address our concerns that dewatering, noise, and fog plumes and other weather conditions, could seriously negatively impact the Natural Character of ALSMA that the Management Plan is supposed to protect. While the Management Plan addresses the seismic monitoring, it does not address these impacts that Rio Tinto’s current mining plan would create. As under the discussion of seismic monitoring, the Forest has the obligation and the ability to protect the ALSMA from these impacts. The Management Plan must be revised to outline and propose desired conditions and management approaches that would protect ALSMA from these negative impacts. [Objection, p. 5]

**Response:** The objector contends the Forest did not address their concerns regarding dewatering, noise, fog plumes, and other conditions that could occur under the Resolution Copper Project.

The ALSMA management plan is a planning-level document that provides a programmatic approach for managing resources and uses in the Apache Leap SMA. This approach provides a flexible framework for making future decisions, considering site-specific conditions and information developed in NEPA analysis. Forest Service planning regulations (36 CFR 219.13) provide that management plans may be amended as needed, to include new information or changed conditions, or the results of monitoring.

The Forest explained in their response to comments that “the EA discusses the cumulative effects from the Resolution Copper Project and Land Exchange on the resources analyzed” [PR 0001801, p.105] and that “a full analysis of impacts from the Resolution Copper Project and Land Exchange on the Apache Leap SMA, along with potential mitigation measures, will be addressed in the Resolution Copper Project and Land Exchange EIS” [PR 0001801 p. 105]. In the Management Plan the Forest clearly explains the different levels of planning and that this project is programmatic, meaning that “individual projects proposed for the Apache Leap SMA would be analyzed for potential site-specific environmental impacts and for compliance with desired conditions and management standards established in this plan” [PR 0001800, p. 8]. See responses to Contentions 1a and 2c, for further details on cumulative effects analyses.

It is true that while the Management Plan addresses the seismic monitoring, it does not address (the) impacts that Rio Tinto’s current mining plan would create. The ALSMA Plan is not a document involving analysis, as is a NEPA document. The seismic monitoring was authorized in the NDAA along with the creation of the ALSMA. The EA for the ALSMA Plan discusses the cumulative effects from the Resolution Copper Project and Land Exchange on the resources analyzed. However, a full analysis of impacts from the Resolution Copper Project and Land Exchange on the ALSMA, along with potential mitigation measures, will be addressed in the Resolution Copper Project and Land Exchange EIS required under Section 3003(c)(9) of the NDAA. The Forest is exercising its discretion, as allowed in the NDAA Section 3003(c)(9)(d). The subsection states: “Nothing in this paragraph precludes the Secretary from using separate environmental review documents prepared in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or other applicable laws for exploration or other activities not involving:

- i. the land exchange; or
- ii. the extraction of minerals in commercial quantities by Resolution Copper on or under the Federal land.”

**Contention 2c:** The Forest did not fully address our concerns raised in our May 1, 2017 comments regarding: Access for traditional cultural activities; Access for recreational activities; Wildlife connectivity; and impacts to the native vegetation. [Objection, p. 5]

**Response:** The objector contends the Forest did not fully address their concerns in the May 1, 2017 letter, particularly impacts to access for traditional cultural activities; access for recreational activities; wildlife connectivity; and impacts to the native vegetation.

The Forest reviewed and responded to the comments received in the May 1, 2017 letter; impacts to the referenced resources were considered and are reflected in the cumulative effects sections of the EA [PR 0001801, pp. 31, 35-36, 41, 45-46, 52-53, 54-55, 61-62, 66, 69, and 72], as explained below.

The letter referenced is included in the project record [PR 0001608], and Appendix C of the EA identifies all commenters including the objector by name; provides each commenter a number for comment response purposes, identifying the objector as #68; and provides the comments received and responses from the Forest to each of those comments, including comments received in the referenced letter [PR 0001801, p. C-3]. Comments received on the above various concerns

and responses from the Forest to those comments were provided organized by topic in Appendix C of the EA as follows: tribal: pp. C-13 and C-14, cultural resources: p. C-21, access: pp. C-39 and C-40, mineral resources: pp. C-60 – C-63 and C-72, wildlife: pp. C-76 – C-77, vegetation: p. C-81, livestock grazing: p. C-84, wildland fire: p. C-86, NEPA: p. C-91, and other: pp. C-104 – C-105 [PR 0001801].

The Forest responded to the objector's comments of concern about access for traditional cultural activities and recreation by adding management approaches to the ALSMA Plan to encourage the "Forest Service to work with interested parties in the future to facilitate continued access to the Apache Leap SMA" [PR 0001801, p. C-39; 0001800, pp. 20-22]. In the response to comments in Appendix C of the EA, the Forest explained that they analyzed cumulative effects on access from the Resolution Copper Project and Land Exchange Project in the section titled "Access" [PR 0001801, pp. C-39, 41-46]. The Forest also explained that a full analysis of access impacts from "the Resolution Copper Project and Land Exchange on the east side of the Apache Leap SMA, along with potential mitigation measures, will be addressed in the Resolution Copper Project and Land Exchange EIS" [PR 0001801, p. C-39] as appropriate. For access for traditional use by tribal members, the Forest explained in the response to comments and outlined in Section 3.2.3 of the management plan that "when access to traditional use areas by tribal members is hampered by land exchanges, road decommissioning, or other actions outside and adjacent to the Apache Leap SMA, the responsible line officer will work with tribes, landowners, and other pertinent agencies to allow reasonable access while protecting the natural character and values of the Apache Leap SMA" [PR 0001801, p. C-39; 0001800, p. 21]. Plan components designed to address tribal access concerns are also explained in the draft DN [PR 0001799, p. 4]. For recreational access, the Forest explained that in responding to comments, the Forest changed the designation of the recreation opportunity spectrum in the management plan in Section 3.5.3, "Guidelines," for Recreation resources to semi-primitive motorized for a 500-foot buffer around the existing FR2440 within the ALSMA to provide opportunities for future motorized route designation [PR 0001801, p. C-40; 0001800, p. 24]. The draft decision also identifies several of the plan components intended to address concerns regarding public access and recreation [PR 0001799, pp. 6-7].

The cumulative effects of expected mining activities on wildlife and wildlife connectivity were considered in the environmental analysis [PR 0001801, pp. 61-62]. A "full analysis of impacts from the Resolution Copper Project and Land Exchange, along with potential mitigation measures, will be addressed in the Resolution Copper Project and Land Exchange EIS" [PR 0001801, p. C-77]. This was also explained in the wildlife section for cumulative effects [PR 0001801, p. 62]. Regarding vegetation, cumulative effects for mining operations were considered in the EA as referenced in the response to comments [PR 0001801, pp. 66, C-81]. Wildlife and wildlife connectivity on a larger scale, beyond the ALSMA, are better considered and addressed in the Tonto National Forest Land and Resource Management Plan.

As explained in Contention 1a, effects of a project like the Resolution Copper Project on a special management area such as the ALSMA are evaluated when that project is initiated. To attempt to evaluate a project not yet underway that does not have specific actions yet fully determined for its effects on the ALSMA with this analysis that proposes to amend the forest plan and establish the SMA would be projectionary and not provide a true meaningful or

accurate evaluation. However, analysis of cumulative effects of identified authorized actions on resources in the SMA from the Resolution Copper Project was completed. See Contention 1a for further response.

## CONCLUSION

My review finds that the project is in compliance with all applicable laws and the Tonto National Forest Plan. However, I am issuing an instruction to the Forest Supervisor to clarify a point in the Management Plan and EA.

## Instructions

Based on feedback and concerns received in your objection letter and clarified during the resolution meeting, I have decided to issue the following instruction:

1. Clarify language regarding the timing and intent of the seismic monitoring program and move points defining the program from the Management Approaches section to the Guidelines section.

The Forest Supervisor, Neil Bosworth, may sign the Decision Notice for this project once this instruction has been addressed. My review constitutes the final administrative determination of the Department of Agriculture; no further review from any other Forest Service or Department of Agriculture official of my written response to your objection is available [36 CFR 219.57(b)(3)].

Sincerely,



JIM UPCHURCH  
Deputy Regional Forester

cc: Neil Bosworth; Tom Torres; Mary Rasmussen; Lee Ann Atkinson; Marianne Thomas; Roxanne Turley; Matt Turner; Cat Luna