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**File Code:** 1570  
**Date:** DEC 21 2017

Honorable Terry Rambler  
Chairman  
San Carlos Apache Tribe  
P.O. Box 0  
San Carlos, AZ 85550

Dear Chairman Rambler:

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, 18-03-00-0004-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 with Attorney General for the San Carlos Apache Tribe, Alex Ritchie, and his Assistant, Bob Clark, for an objection resolution meeting on December 7, 2017. During our meeting we discussed the Tribe's concerns related to public notification and involvement, National Environmental Policy Act procedures, and cumulative effects in the ALSMA. I also noted that it was my intention to issue a final written



objection response within the next month. We tried to hold a follow-up meeting with Chairman Rambler in this timeframe but scheduling attempts were unsuccessful. This letter is my written response to your objections.

## **OBJECTION RESPONSES**

**ISSUE 1:** The draft decision does not fulfill mandates required by the National Environmental Policy Act (NEPA).

**Contention 1a:** The objector contends the Forest did not ensure meaningful public participation and timely information and analysis in the NEPA process. The Tribe has stated that the Forest provided inadequate public notice for this project of national import (see 40 CFR 1506.6). Under NEPA the Forest “must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken” (40 CFR 1500.1). And, in preparing an EA, “the agency shall involve environmental agencies, applicants, and the public, to the extent practicable” (40 CFR 1501.4(b)). The Forest did not mail notice to individuals, organizations and federal, state and local agencies as it has for past projects associated with the Resolution Mine Project, thereby failing to engage in “diligent efforts to involve the public in preparing and implementing [its] NEPA procedures” for the Apache Leap Special Management Area (ALSMA) Management Plan (40 CFR 1506.6(a)). The deficiencies in information sharing included insufficient information in the scoping letter and during early meetings, documentation in the scoping postcard and publication, the initial draft of the Management Plan, and it was unclear why modifications were made to the Management Plan and what information they were based on. The lack of meaningful public engagement went beyond merely noticing this project. Throughout this NEPA process, the Forest failed to provide the Tribe and public with adequate timely environmental information ranging from responses to comments to the distribution of the Final EA, Find of No Significant Impact (FONSI), and Draft DN. No draft of the EA or FONSI was made available to the public; the public was only made aware of this project at the distribution of the Final EA [Objection, pp. 3-5].

**Response:** The Forest met NEPA regulations at 40 CFR 1506.6(a), 40 CFR 1500.1, and 40 CFR 1501.4(b), providing multiple opportunities for involvement in the NEPA process, and documenting these opportunities through legal notices, mail, and email. Public involvement resulted in input that was used to develop direction to be included in the ALSMA Management Plan, and was thus analyzed in the EA, consistent with NEPA regulations. The Forest held an October 2016 planning workshop, March 2017 scoping letter, April 2017 public scoping open house, and 30-day Notice and Comment Period on the proposed management plan. The mailing list was expanded during the life of the project, from 22,900 to 26,000 people [PR 0001799, pp. 8-9]. Notes taken during the October 2016 public planning workshop for the ALSMA reflect the Forest’s efforts to capture the essence of the public workshop discussions. Formal written comments were requested to be received from October 5, 2016 through November 21, 2016 in order to best incorporate the comments in the ALSMA proposed management plan [PR 0001801, p. 9]. Additionally, the Forest conducted government-to-government consultations with Native American Tribes, including the San Carlos Apache Tribe [PR 0001799, p. 9]. The Tribal Consultation section of the EA reflects meetings between the Forest and the San Carlos Apache Tribe on December 14, 2016 and April 27, 2017 [PR 0001801, p. 6].

The objector made numerous scoping comments on the ALSMA Proposed Management Plan, including a comment on a lack of meaningful public participation. Appendix C of the EA contains Forest responses to these comments, the majority of which describe modifications or additions to the management plan, as well as the specific comment regarding public participation [PR 0001801, pp. 7, 8, 11, 12, 20-25, 56, 63-65, 69, 84, 92-95, 97].

The Forest provided an opportunity for public comment, from July 1, 2017 to July 31, 2017, on the proposed amendment to the Tonto National Forest Land and Resource Management Plan to adopt the ALSMA. A revised management plan for the ALSMA was released to the public for comment during this time period [PR 0001801, p. D-3]. In a letter to the San Carlos Apache Tribe [PR 0001485, pp. 1-2] dated June 30, 2017, the Project Manager requested comments on the ALSMA and explained that the project team would consider comments received during July 2017, before finalizing and publishing the ALSMA management plan, EA, and draft DN.

Appendix D of the EA, Forest Plan Amendment Notice Public Comment Response, addresses compliance with 36 CFR 219, stating that the Forest recognizes that the Tribe has rights to object under 36 CFR 219 and will continue to work with the tribes through formal government-to-government consultation to address issues of tribal concern [PR 0001801, p. D-52].

**Contention 1b:** The public was only made aware of this project's cumulative effects with the distribution of the Final EA. The cumulative impacts analysis in the Final EA mentions the subsidence crater expected to result from Resolution's proposed block-caving mining operations thereby acknowledging its effect on some aspects of the Management Plan. The EA acknowledges that there could be reduced access because of future Resolution Copper mining activities. The late disclosure of this specific cumulative effect has not allowed the Tribe or its members to present other cumulative effects which would result from Resolution Copper's future mining activities and their effect on the Tribe, its members, or upon the rights of the Tribe and its members guaranteed under the American Indian Religious Freedom Act (AIRFA) and the Religious Freedom Restoration Act (RFRA). Reduced access is not the only cumulative effect to the Tribe and its members. The Final EA completely misses the Apache spiritual impact and resulting physical harm in its myopic cumulative impacts analysis [Objection, pp. 5-6].

**Response:** The draft DN describes the reasons for the decision: that it meets the purpose of the project, which is to prepare a management plan for managing future activities in the ALSMA. The management plan was modified to respond to tribal interests and cultural resources, to preserve natural character of the area, and to allow access and recreation. The decision rationale also addresses future impacts on the ALSMA from the proposed Resolution Copper Project and Land Exchange, stating that the Proposed Action includes plan components that are responsive to concerns about protecting resources and the existing natural character of ALSMA from future adjacent mining activities. The Proposed Action includes developing a seismic monitoring strategy to evaluate effects of adjacent mining if the Resolution Copper Project is approved [PR 0001799, pp. 3-8].

The Management Plan acknowledges that adjacent mining would result in subsidence within the mine permit area, adjacent to ALSMA. The eastern boundary of the ALSMA was established in part to be beyond the expected limit of subsidence effects [PR 0001801, p. 11].

Regarding access, the Management Plan contains a guideline that states “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 should work with landowners and other pertinent agencies to allow tribes reasonable access while protecting the natural character and cultural values of the Apache Leap SMA” [PR 0001801, p. 21].

**Contention 1c:** The objector contends that the Final EA failed to fully analyze all direct, indirect, and cumulative impacts. Under the NEPA, the Forest must fully review the impacts from all “past, present, and reasonably foreseeable future actions” (see 40 CFR 1502.16; 40 CFR 1508.8; 40 CFR 1508.25(c)). Until the Final EA, the Forest had failed to make available to the Tribe or the public any of its considerations, rationales or reasoning regarding cumulative effects. The Forest’s cumulative impacts analysis in the Final EA is deficient. The failure to conduct a thorough and legal cumulative impacts analysis has resulted in a violation, not only of NEPA, but of AIRFA and RFRA and possibly other federal laws. [Objection, pp. 7-8]

**Response:** The EA analyzes direct, indirect, and cumulative effects for all resources considered, including natural character and scenery, tribes, cultural and historic resources, access, recreation, minerals, wildlife, vegetation, grazing, and fire [PR 0001801, pp. 31, 35, 41, 45, 52, 54, 61, 66, 69, 72]. Appendix B of the EA, Project, Activities, and Factors Considered in Cumulative Effects, contains a comprehensive list of actions and places the actions in a table [PR 0001801, p. B-1 - B-8].

The FONSI explains that the Forest does not consider the ALSMA Management Plan and Resolution Copper Project and Land Exchange connected because the ALSMA is a statutorily designated area that came into existence through enactment of the NDAA. Land exchange activities are not required for the ALSMA to exist. The proposed action for the ALSMA Management Plan does not involve the land exchange decision or the extraction of minerals [PR 0001801, p. 75]. The ALSMA is being established regardless of what happens with Resolution Copper or any other project in the future, and the current 1985 Tonto National Forest Plan is being amended to provide plan guidance for the ALSMA.

The American Indian Religious Freedom Act establishes the policy “to protect and preserve for American Indians their inherent right of freedom, to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiians, including, but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonials and traditional rites.” The Religious Freedom Restoration Act reiterated that governments should not substantially burden religious exercise without compelling justification; and attempted to provide a claim or defense to persons whose religious exercise is substantially burdened by Government.

The Forest must comply with all executive orders, legislation, regulations and other statutory authorities including the AIRFA and the RFRA. The Forest acknowledges the importance of the Apache Leap area for many tribes. The Forest adequately considered the effects to AIRFA and RFRA [PR 0001800, pp. 33, 38]. The Forest added Section 3.2 Tribal to the ALSMA Management Plan based on comments. The Tribal section includes desired conditions, guidelines, standards, and management approaches specific to tribal resources and concerns [PR 0001800, pp. 20-21]. The Apache Leap SMA does not preclude federally recognized tribes from practicing their religion.

**Contention 1d:** The Forest should enlist the support of the U.S. Geological Survey personnel for the seismic monitoring program [Objection, p. 8].

**Response:** The objector has previously suggested in comments that the Forest use the USGS to assist with scientific data gathering and review. This has been stated in the context of involving independent analysis:

“...so that baseline information can be developed by TNF, third party contractors involved in the analysis of the MPO and independent geologists or the United States Geological Survey (USGS).”

Seismic monitoring language in the ALSMA Management Plan consists only of the mandate in the Act and the management approach “to develop a seismic monitoring strategy.” Any seismic monitoring program will have independent review. Any Forest use of information, whether collected by Resolution Copper or another party, requires independent assessment of the information by the Forest as specified under 42 CFR 1506.5(a): “If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy.”

The USGS determines which projects they will accept and has declined multiple requests to participate in the Resolution Copper Project environmental review, including assistance with seismic monitoring associated with the Apache Leap SMA (documentation contained in Resolution Copper Project files).

**Contention 1e:** The Forest should identify “laws and regulations” throughout the Management Plan and identify to the fullest extent possible in the Final EA those laws and regulations which may have application. The Forest’s refusal to do this evidences a lack of transparency [Objection, p. 8].

**Response:** The draft DN contains a section of Findings Required by Other Laws and Regulations, identifying several laws with which the decision is consistent [PR 0001799, p. 10]. The EA also contains several references to laws and regulations [PR 0001801, pp. 33, 37, 55, 56].

There is no requirement to list all pertinent laws and regulations, particularly in an EA. Appendix C of the EA, Public Scoping Comment Response, and Appendix D of the EA, Forest Plan Amendment Notice Public Comment Response, address the contention, acknowledging that there are many pertinent laws and regulations that control mining-related disturbance on National Forest System lands that would need consideration, depending on the future site-specific circumstances and context. Therefore, an exhaustive list was not provided [PR 0001801, p. C-97, D-9].

**Contention 1f:** The Forest's addition of the language "Subsidence associated with any future mining adjacent to the area does not impair the special characteristics for which it was designated" to the modified plan and the decision to add this language was the subject of commentary and response which was first revealed in the Final EA. The reasons for this addition remain puzzling and fail to consider the impact on Apache spiritual values and is wholly inconsistent with the visual and scenic guidance utilized by the Forest. This is another example of information coming too late resulting in the Tribe and the public's inability to make their views known on the subsidence feature [Objection, p. 8].

**Response:** The Proposed Management Plan, dated March 2017, does not mention subsidence at all [PR 0001379]. Over the course of its development, the Management Plan acknowledges that mining would result in subsidence within the mine permit area adjacent to the ALSMA. The eastern boundary of the ALSMA was established in part to be beyond the expected limit of subsidence effects [PR 0001800, p. 11]. The June 2017 Modified ALSMA Management Plan contains this acknowledgement as well [PR 0001493, p. 9]. The language was added as a *Desired Condition*, which is defined in the Management Plan as "a description of specific social, economic, and/or ecological characteristics of the plan area, or a portion of the plan area, toward which management of the land and resources should be directed" [PR 0001800, p. 17].

**ISSUE 2:** The draft decision does not comply with 36 CFR Part 219, Subpart A.

**Contention 2a:** The ALSMA does not constitute a plan amendment to the 1985 Tonto National Forest Land and Resource Management Plan which allows the Forest Supervisor to exercise his discretion. The Forest failed to follow the procedures set forth in Subpart A [Objection, p. 6].

**Response:** The objector contends that the ALSMA does not constitute a Forest Plan amendment, in that it does not follow the requirements of 36 CFR 219 Subpart A (otherwise known as the 2012 Planning Rule). It goes on to further state that their objection incorporates by reference the concerns they raised in their May 1, 2017 scoping response letter [PR 0001688]. That May 1<sup>st</sup> letter raised the following issues related to applying the 2012 Planning Rule (36 CFR 219) [PR 0001688, p. 5]:

1. The objector alleges that the ALSMA does not identify which portions of the 1985 (current) Plan are being amended, nor explain how the plan is being amended.

2. The objector alleges that the proposed changes constitute a Plan Revision, not a Plan Amendment, since the ALSMA represents an entirely new land designation not currently found in the 1985 (current) Forest Plan.
3. The objector alleges that a plan assessment should have been performed.
4. The objector alleges that if it is a revision, then an EIS must be the level of NEPA analysis.

The ALSMA plan was released for a 30-day public review and comment period on July 1, 2017, and on July 31<sup>st</sup> the objector submitted a letter reiterating their concerns [PR 0001689, p. 3], referring to their concerns expressed in the May 1<sup>st</sup> letter.

The Tonto has clearly identified that they would be amending their 1985 (current) plan by adding a Management Area to that plan for the ALSMA, and that in adding that Management Area, they are also adding associated Plan Components (Desired Conditions, Objectives, Standards, Guidelines, Suitability) to help guide future management of that new Management Area [PR 0001801, pp. 1, 2, 10, 12-23].

The objector contends that the action should have involved a plan revision, rather than a plan amendment. Plan revisions are comprehensive adjustments to Forest Plans, where all current planning direction (all Plan Components) Forest Plan-wide are evaluated as to their effectiveness, and adjusted where there is an indication there is a need to change that direction to more effectively apply in future projects. The addition of a single Management Area (and associated Plan Components) to a Forest Plan does not meet that level of comprehensiveness, and thus a plan amendment is the more appropriate level of plan adjustment. A plan amendment is not an indication that the adjustment to the current plan is not important; all plan adjustments are; it is just a recognition that the necessary adjustments to the 1985 (current) Tonto Forest Plan for the ALSMA do not rise to the level of comprehensiveness involved in a plan revision. The Tonto has correctly applied the 2012 Planning Rule (36 CFR 219) in making this amendment to their current Forest Plan.

Plan assessments are only required for plan revisions. They may be conducted for plan amendments, limited in scope to the issues/resource areas covered by the amendment, but only if an assessment is determined to be necessary at the discretion of the Forest Supervisor, per section 219.6(c) of the 2012 Planning Rule. The fact that the Forest Supervisor did not deem an assessment necessary for the amendment is consistent with 36 CFR 219 [PR 0001716-A].

Finally, as to the level of NEPA required in association with the Forest Planning action, the objector is correct that an EIS would be required if the planning action were a plan revision. However, since it is a plan amendment, the level of NEPA (EIS, EA or CE) is commensurate with the scope and scale of the amendment and its likely effects, per sections 219.5(a)(2)(ii) and 219.13(b)(3) of the 2012 Planning Rule. Since the degree of effects in the project documentation (EA/FONSI) did not rise to the level of significance to require an EIS, conducting/documenting the analyses within an EA/FONSI was appropriate.

The Tonto followed all appropriate 2012 Planning Rule (36 CFR 219) requirements in conducting the evaluation and amendment of their current Forest Plan, in amending the ALSMA (and associated Plan Components) to that current Plan.

## CONCLUSION

My review finds that the project is in compliance with all applicable laws and the Tonto National Forest Plan.

As noted above, the Forest met with Tribal Representatives on December 7, 2017, to discuss their objection. In an effort to be responsive to the questions Attorney General for the San Carlos Apache Tribe, Alex Ritchie, brought forward we addressed them here:

1. The ALSMA is of national import. Did the Forest give the public the same type of notice for ALSMA as the Resolution Copper Project?
  - No, they are different projects requiring different levels of NEPA.
2. What was the rationale for the difference in notifications?
  - The notification requirements differ between the EA and EIS processes.
3. How does the Forest explain not releasing the EA until the objection period?
  - See response to 1a (objection responses).
4. What is the rationale for the Management Plan moving forward when the inventory of cultural resources is incomplete?
  - The unsurveyed acreage represents 6 percent of the total acreage of the Apache Leap SMA. Enough information has been gathered from previous surveys of 761 of the total 839 acres to characterize the impacts of the proposed action. A Heritage Resources Report [PR 0001802] was prepared as part of environmental assessment. The report states, “Approximately 94 percent of the Apache Leap SMA has been surveyed for archaeological resources—including all private parcels (142 acres or 17%) and 651 acres of the 697 acres Forest Service lands (77%). The remaining 46 acres (6%) of National Forest System land was either surveyed more than 30 years ago, prior to modern methods of site recordation, or remains unsurveyed. The unsurveyed acreage is located adjacent to the private land parcels surveyed by WestLand Resources (Daughtrey, 2016). Overland access to several cattle tanks was surveyed within this portion of Forest Service land in 1983; no sites were recorded (Flanigan, 1983).”
5. It is unclear what the exact location of the tunnel is related to the ALSMA.



- Schematics showing the approximate location of a future Conveyor/Infrastructure Tunnel were provided by Resolution Copper as part of their submitted General Plan of Operations documents (Figure 1.5-2f). According to the latest information, the proposed tunnel would be constructed outside of and directly adjacent to the northern ALSMA boundary.
6. What is the discretion of the Forest for a separate analysis for the mine and ALSMA (i.e. claiming they are not connected actions)?
- Connected actions are *interdependent* actions that must be analyzed in the same NEPA document. In this case, both the ALSMA Plan and the Resolution Mine Project can move forward without the other. Therefore, they are *independent* projects in the same geographical area and not projects that depend on the other to occur.
7. What is the difference between a plan amendment, used in this process, and a plan revision?
- See response to 2a (objection responses).
8. Why can the Management Plan not be phased?
- We are unsure what the intent of this might be. As the ALSMA Plan is implemented and activities related to the Resolution Copper project solidify and begin to occur, the ALSMA plan can be updated as needed to provide for additional actions or mitigations. This would be accomplished through the NEPA process with public involvement.
9. The Management Plan is ambiguous. Explain why laws, regulations, and policies aren't more thoroughly listed.
- See response to 1e (objection responses).
10. It appears that this is a Section 106 matter. Was SHPO notified/consulted on the ALSMA project?
- The State Historic Preservation Officer (SHPO) was notified about this project. The Forest received a response that further consultation did not need to occur as this project does not authorize any ground-disturbing activity. The Forest continues to comply with the R3 Programmatic Agreement as well.
11. How did the Forest consider impacts to the San Carlos Apache's spirituality?

- The Forest has recognized this area as spiritually and culturally important to western Apache tribes. The Forest will work to protect this area through mitigations where possible.

12. The Forest defers the hard look at impacts to the Resolution Copper Project EIS.

- Both projects have or will take a hard look as appropriate and consistent with the level of activity proposed.

13. Subsidence impacts should be addressed.

- Subsidence effects are considered in cumulative effects on the ALSMA EA. However, complete actions and effects of the mine are not known at this point. It would be inappropriate for the EA to speculate on a full account of effects associated with the mine when that decision has not yet been made.

The Forest Supervisor, Neil Bosworth, may now sign the Decision Notice and the final plan. 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].

Sincerely,



JIM UPCHURCH  
Deputy Regional Forester

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