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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Save the Scenic Santa Ritas, *et. al*, Plaintiffs, v. U.S. Army Corps of Engineers, *et al.*, Federal Defendants, and Rosemont Copper Company, Defendant-Intervenor.	No. 4:19-cv-00177-TUC-JAS [Lead]) [Related to 4:19-cv-00205-TUC-JAS] **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The Santa Rita Mountains rise as a "sky island" from the desert south of Tucson, Arizona. They are a place of remarkable scenic beauty that contain some of the highest quality streams and wetland ecosystems in the American Southwest. This is also a landscape imbued with cultural significance, whose waters and wildlife have sustained Native American cultural and religious life for over 10,000 years. For the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively the "Tribes"), these mountains are a place of prayer and respect that must be safeguarded for future generations.

For almost eight years, the Tribes, Environmental Protection Agency ("EPA"), Pima County, and the vast majority of the public have vigorously opposed Rosemont Copper Company's request for a Clean Water Act ("CWA") Section 404 permit ("404 Permit") to discharge "fill" material into jurisdictional waters of the United States ("jurisdictional waters" or "WOTUS") to develop an open-pit copper mine in this unique and sacred place. The Tribes documented how the proposed mine would cause severe, irreversible, and permanent harm to cultural resources, and the U.S. Forest Service agreed. EPA demonstrated that the mine would violate the CWA by causing unacceptable adverse impacts on the aquatic environment, and Pima County agreed.

Likewise, the Los Angeles District of the U.S. Army Corps of Engineers ("Corps") identified significant concerns about the mine's impacts and refused to grant a permit for the mine, concluding that it would cause significant degradation to jurisdictional waters, violate state water quality standards, and be contrary to the public

interest. The L.A. District referred its decision to the Corps' South Pacific Division for review.

On March 8, 2019, the South Pacific Division abruptly reversed course and modified the proposed action at the last minute, without public notice, to circumscribe its scope of analysis and avoid the adverse findings of the L.A. District, EPA, Pima County, the Tribes, and the public.[1] It declined to recognize the environmental effects that would result from filling the jurisdictional waters at the mine site with waste rock and mine tailings, together with other secondary impacts that had been under consideration since 2011. Instead, the South Pacific Division instructed Rosemont to prefill all of the washes on the mine site with "native material," reasoning that these "prefilling" activities ("clearing, grubbing, and grading" the site) would eliminate the Corps' jurisdiction under the CWA. Based on this theory, the South Pacific Division refused to consider the impacts caused by the construction of the mine pit and dumping of waste rock in the same exact area, claiming that these adverse impacts would now occur *after* Rosemont had filled the jurisdictional waters, and therefore were outside its scope of analysis.

The Corps' attempt to evade its statutory duties violates the CWA and basic principles of administrative law. As an initial matter, the South Pacific Division did not provide any rational basis for abruptly modifying the permit at the last minute, other than for the impermissible purpose of artificially narrowing its scope of analysis to sidestep

[1] Despite reversing the L.A. District's decision, the Corps refuses to provide this document to the Tribes, hindering their ability to seek judicial review of the South Pacific Division's abrupt reversal.

the adverse findings of EPA and the L.A. District. Further, even if the South Pacific Division could grant a 404 Permit to preemptively fill all of the jurisdictional waters on the site, it still had an obligation to analyze the secondary effects associated with those discharges, including the construction and operation of the proposed mine on the "fast lands" created by the fill material. Yet, the South Pacific Division disregarded these secondary effects and EPA's determination that the project would cause significant degradation in violation of the CWA. Finally, the South Pacific Division impermissibly skewed its analysis of the public interest, touting the benefits of the mine while disregarding the severe environmental harms.

Despite the defective basis for the 404 Permit, Rosemont now plans to press forward with the irreversible destruction of ancient burial sites and ancestral villages that are thousands of years old, as well as the obliteration of 18 miles of jurisdictional waters present on the site. Starting in August, Rosemont will bulldoze 36 new drill pads on the mine site and clear a path for additional access roads. As early as October, Rosemont will commence even more significant ground-clearing activities at the proposed mine site, including the filling of jurisdictional waters and excavation of archaeological sites. Within just four months, Rosemont plans to systematically clear every trace of the Tribes' cultural history from the path of the mine, desecrating burial sites and removing ancient artifacts. Archaeological email from Norman James, to Stu Gillespie, et al. (May 3, 2019) ("Archaeological Schedule Email") (Ex. 1). By September 2020, Rosemont will have cleared hundreds of acres of public lands and permanently filled 9.86 acres of jurisdictional waters. Rosemont will also have constructed a 13-mile long high-voltage

power and water corridor so that it can commence mining operations. As a result of these activities, this ancient place of prayer will be transformed into an industrial mining complex in the proverbial blink of an eye.

The Tribes respectfully request that the Court grant immediate injunctive relief to halt Rosemont's imminent activities and maintain the status quo until the Court can rule on the merits. Because the Tribes have raised serious questions about Federal Defendants' approval of a 404 Permit, and because the balancing factors all weigh in the Tribes' favor, the Court should issue injunctive relief.

LEGAL BACKGROUND

I. The Clean Water Act

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Toward that end, the CWA prohibits the discharge of any pollutant by any person into jurisdictional waters without a permit. *See id*. § 1311(a). While the Corps may grant a permit to discharge fill material into jurisdictional waters, it must first comply with procedural and substantive restrictions set forth in the 404(b)(1) Guidelines. *See* 40 C.F.R. pt. 230; Complaint for Declaratory and Injunctive Relief, ECF No. 1 ¶¶48–62, No. 4:19-cv-00205-TUC-JAS (D. Ariz.) (summarizing CWA requirements).

The 404(b)(1) Guidelines impose three binding requirements that are directly relevant to this motion for a preliminary injunction. First, the Guidelines prohibit the Corps from issuing a 404 permit if the proposed discharge of dredged or fill material

"will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c).

Second, in assessing whether a permit will cause significant degradation to jurisdictional waters, the Corps must consider the direct, secondary, and cumulative effects of the proposed discharge of fill material. Direct effects result from the actual placement of the dredged or fill material into jurisdictional waters, while secondary effects are those effects that "are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." *Id.* § 230.11(h)(1). Information about secondary effects on aquatic ecosystems "shall be considered prior to the time final section 404 action is taken by permitting authorities." *Id.*

Third, the 404(b)(1) Guidelines prohibit the Corps from issuing a 404 permit "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). Adverse effects to aquatic resource functions, whether direct or indirect, must be mitigated. *See* 33 C.F.R. § 320.4(r)(2); 40 C.F.R. § 230.93(a).

In addition to complying with the 404(b)(1) Guidelines, the Corps must ensure that issuing a 404 permit is not contrary to the public interest. 33 C.F.R. § 320.4(a)(1).

II. Administrative Procedure Act

The Administrative Procedure Act ("APA") requires the Court to determine whether an agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for

its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must undertake a "searching and careful" review of the administrative record to determine whether the agency articulated a rational basis for its decision. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

FACTUAL BACKGROUND

The Tribes provided citations and corresponding exhibits for all of the factual allegations in their Complaint. *See* ECF No. 1; *see also* ECF Nos. 9–15-5. The Tribes rely on those factual allegations and exhibits for the purposes of this motion for preliminary injunction. *See* Fed. R. Civ. P. 10(c). The Tribes also provide a brief summary below, citing the relevant portions of the Complaint and any additional exhibits relevant to this motion. All references to "ECF No." are to documents docketed in Case No. 4:19-cv-00205-TUC-JAS (D. Ariz.).

I. The Tribes' Cultural and Religious Ties to the Santa Rita Mountains and Site of the Proposed Mine.

The Santa Rita Mountains, or *Ce:wi Duag* ("Long Mountain" in the O'odham language), is a landscape imbued with cultural significance—a location of sacred sites, ancestral villages and burial sites, and a source of plant and animal resources critical to maintaining traditional O'odham culture. ECF No. 1 ¶92. For thousands of years, tribal members have used these mountains to reflect, pray, and connect with their cultural history. *Id.* ¶93.

Tribal members regularly visit the site of the proposed Rosemont Mine to strengthen their connection to the land and their ancestors, whose spirits still reside in this place. Declaration ("Decl.") of Austin Nunez ¶¶5–6 (Ex. 2); Decl. of Daniel Vega ¶¶6–7 (Ex. 3). Tribal members experience this connection by, among other things, visiting their ancestor's grave sites, which represent the place where they left this world and entered the spirit world. Vega Decl. ¶¶16–19. These gravesites are profoundly sacred to the Tribes, whose teachings prohibit them from disturbing their ancestors' remains for any reason. *Id.* ¶16.

Tribal members also visit the seeps, springs, and desert washes that sustain life throughout these mountains. Nunez Decl. ¶4 (explaining that, "[w]ater has a spirit, like all other living plants and animals. Water in our desert community is such a rare and vital resource that we consider it sacred wherever it occurs."). Tribal members offer blessings for these sources of life. Vega Decl. ¶¶21–22, 27.

The Santa Rita Mountains are also home to a diverse variety of native wildlife species that have sustained the Tribes, spiritually and otherwise, for hundreds of generations. All wildlife that depend on the mine site for habitat are important to the Tribes because they "were placed on this land by the Creator. These mountains are . . . the traditional homeland of the animals too." Nunez Decl. ¶32. Deer, mountain lions, coatimundi, rabbits and other native wildlife species that occupy the site have special significance for the Tribes and are worthy of deep respect. *Id*. ¶¶4–6.

The Tribes believe that they are charged with caring for this land—their ancestral homelands—into perpetuity. Nunez Decl. ¶4; Vega Decl. ¶¶25–26. Any disruption of

the physical world here would cause spiritual harm to the earth and to the people living on it. *See generally* Nunez Decl.; Vega Decl.

II. The Proposed Rosemont Mine.

In disregard of the unique importance of the Santa Rita Mountains, Rosemont plans to excavate a mile-wide, half-mile deep pit to extract copper, a proposal that would spell the permanent devastation of this important center of Native American cultural and religious life. ECF No. 1 ¶211. Over the life of the mine, Rosemont would remove approximately 1.9 billion tons of waste rock and tailings from the mine pit, the vast majority of which would be dumped on adjacent National Forest System Land, inundating Barrel Canyon. *Id.* ¶¶103–04.

Rosemont's proposal, known as the Barrel Alternative, would cause "severe, irreversible, and irretrievable" impacts to the cultural, religious and historical importance of the affected area, according to the U.S. Forest Service. *Id.* ¶214. The Barrel Alternative would impact a total of 82 historic properties, including 39 prehistoric sites that either contain or likely contain human remains. *Id.* ¶212. These sites cannot be reconstructed once disturbed. *Id.* ¶214.

The Forest Service issued a Record of Decision and Final Environmental Impact Statement ("FEIS") authorizing the Barrel Alternative, but stated that it would not approve the final Mining Plan of Operations ("MPO"), nor allow Rosemont to disturb

public land or any cultural sites, until the Corps issued a 404 Permit to discharge dredged or fill material in connection with the mine. *Id.* ¶111.[2]

III. The Corps Identifies the Regulated Fill Activities Needed to Construct the Rosemont Mine.

In 2011, Rosemont submitted a 404 permit application identifying the fill activities "required" to develop the Rosemont Mine, as described in the Barrel Alternative. *Id.* ¶115. These activities include the blasting and discharge of waste rock into jurisdictional waters to construct the mine pit and waste rock storage areas, among other things. *Id.* ¶116. The L.A. District issued a notice identifying these regulated fill activities and requesting comments regarding the impacts from construction of the mine pit and discharge of waste rock into jurisdictional waters. *Id.* ¶120.

In total, Rosemont needs to fill 18 miles of jurisdictional waters in Barrel Canyon. *Id.* ¶79. This intricate network of drainages contains some of the highest quality streams and wetland ecosystems in Arizona. *Id.* Furthermore, these washes provide runoff that sustains the Cienega Creek watershed, an aquatic resource of conservation value exceeding or equal to any other in the American Southwest. *Id.* ¶¶80–81. Recognizing the exceptional value of this area, the State of Arizona designated reaches of both

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[2] The Tribes also challenge the Forest Service's Record of Decision authorizing the Rosemont Mine. *Tohono O'odham Nation v. U.S. Forest Serv.*, No. 4:18-cv-00189-TUC-JAS (D. Ariz.). Their lawsuit was consolidated with two other cases, all of which have been fully briefed on the merits. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 4:17-cv-00475-TUC-JAS (Lead); *Save the Scenic Santa Ritas v. U.S. Forest Serv.*, No. 4:17-cv-00576-TUC-JAS. If the Court rules in the plaintiffs favor in these cases and enjoins the project, the Tribes would be willing to stay briefing on this motion for a preliminary injunction.

Davidson Canyon and Cienega Creek as Outstanding Arizona Waters ("OAW") and prohibited any activities that would impair their value. *Id.* ¶¶84–86.

IV. EPA Concludes that the Impacts Associated with the 404 Permit Would Violate the CWA.

Over the course of almost eight years, EPA submitted extensive comments demonstrating that the 404 Permit for the Rosemont Mine would cause significant degradation of jurisdictional waters in violation of 40 C.F.R. § 230.10(c). *Id.* ¶¶141–77; ECF No. 9 at 8. EPA further concluded that the mitigation measures proposed by Rosemont would not prevent these unacceptable impacts. ECF No. 1 ¶¶141–77; ECF No. 9 at 39.

A. The 404 Permit Would Cause Significant Degradation to Jurisdictional Waters.

EPA undertook a "comprehensive analysis" of the direct and secondary effects associated with the proposed discharge activities, as required by the 404(b)(1) Guidelines. ECF No. 9 at 8. Direct impacts include the permanent fill of 18 miles of streams at the mine site, encompassing approximately 36.50 acres of jurisdictional waters. ECF No. 10-1 at 20. Secondary impacts include the heavy-metal runoff and loss of stormwater flows associated with the discharge of waste rock into jurisdictional waters. ECF No. 1 ¶142–44. EPA also identified groundwater drawdown as a secondary effect "strongly associated" with the fill activities. ECF No. 12-1 at 11.

According to EPA's analysis, secondary impacts "will cause serious degradation or complete destruction of special and regionally unique aquatic resource areas downstream of the project." ECF No. 9 at 44; ECF No. 12-1 at 1. Heavy metal runoff

from the waste rock and tailings piles would degrade water quality in downstream waters, including the OAWs in Davidson Canyon and Cienega Creek. ECF No. 1 ¶¶159–67. At the same time, the waste rock piles, tailings facilities, and stormwater basins would impound runoff from the watershed above the mine site. During the 20–25 years of active mining, EPA calculated that the mine would impound approximately 562 acre-feet annually ("AFA"), which is equivalent to 40% of the runoff from the contributing watershed. *Id.* ¶¶149–50. The loss of these critical surface water flows would reduce the ability of the downstream OAWs to dilute the heavy metal pollution from the mine and would degrade downstream aquatic habitat, especially during the summer months when flows are already precariously low. *Id.* ¶¶151–52, 183; Email from Brian Lindenlaub to Elizabeth Goldmann at pdf. 3–4 & tbl.1 (Aug. 16, 2013) (Ex. 4).

EPA concluded that the Arizona Department of Environmental Quality ("ADEQ") failed to analyze these impacts to downstream waters, despite granting a CWA § 401 Water Quality Certification ("401 Certification") for the Rosemont Mine. ECF No. 1 ¶¶128–30, 178–93. The 401 Certification was premised on the 17.2% reduction in stormwater flows after mine closure, not the much more significant 40% reduction during active mining operations, which ADEQ acknowledged would cause degradation of downstream OAWs. *Id.* ¶187; *see also* Email from Linda Taunt to Marjorie Blain (Feb. 13, 2012) (Ex. 5). As a result, the Certification contains no measures to offset these significant losses in stormwater flows or ensure against degradation of OAWs. ECF No. 1 ¶187.

EPA further explained that groundwater drawdown would exacerbate the impacts to downstream jurisdictional waters, causing or contributing to significant degradation of the aquatic environment. ECF No. 12-1 at 2. The mine pit would puncture the regional aquifer, causing groundwater to drain into the pit and creating a perpetual pit lake (reversing the normal flow from the aquifer to springs and creeks). Rosemont would actively dewater the pit during pre-production and mine operations, withdrawing groundwater at a rate of 650 gallons per minute, totaling between 13,000 to 18,500 acre-feet over the life of the mine. ECF No. 1 ¶108; *see also* Hudbay, Rosemont Project Form 43-101F1 Technical Report (Ex. 6). After mine closure, the pit would gradually fill with water, creating a permanent hydraulic sink that reverses groundwater flows away from—and ultimately dewatering—seeps, springs, and riparian areas throughout the region, including upper Empire Gulch. *Id.* ¶¶110, 155–56. EPA estimated that the drawdown would affect 407 acres of riparian habitat in upper Empire Gulch alone. *Id.* ¶156.

B. Rosemont Fails to Adequately Mitigate the Impacts of Granting a 404 Permit.

Rosemont submitted a Habitat Mitigation and Monitoring Plan ("HMMP") in 2017, claiming that it would compensate for the impacts to jurisdictional waters. The HMMP contains two elements: (1) the removal of four stock tanks, and (2) the proposed destruction of Sonoita Creek to create mitigation credits. EPA concluded that the proposed mitigation measures were inadequate to offset the significant degradation associated with the proposed fill activities. *See* ECF No. 13-7 at 2.

As an initial matter, the HMMP does not offset the loss of jurisdictional waters due to groundwater drawdown, the formation of a toxic pit lake, or heavy metal runoff. ECF No. 1 ¶200.

Furthermore, the proposed removal of the four stock tanks does not offset the loss of stormwater runoff due to the mine, which will fill Wasp Canyon and upper Barrel Canyon with billions of tons of waste rock and tailings. *Id.* ¶204. The Corps never verified the capacity of the stock tanks, despite the evidence that they likely retain much less runoff than assumed by the Corps. *Id.* ¶¶205–06. While the Corps claims that removal of the tanks would provide 7.35 AFA of water, enough to "offset the loss of 2 AFA" of stormwater flows "after mine closure," EPA noted this measure was entirely inadequate because the loss of stormwater flows *during* active mining operations is at least 562 AFA. *Id.* ¶204.

V. The L.A. District Refuses to Grant a 404 Permit Because It Would Violate the CWA.

In a signed decision, the L.A. District refused to grant a 404 permit for the Rosemont Mine due to its determination that Rosemont had not met CWA requirements. *Id.* ¶¶133–38. In particular, the L.A. District identified "key CWA 404(b)(1) factors identified by the District that support a permit denial," such as "determinations that the proposed Rosemont Mine will cause or contribute to violations of state water quality standards and significant degradation of waters of the United States, including shortfalls in the proposed compensatory mitigation." *Id.* ¶137. The District also concluded that implementation of the proposed project would be contrary to the public interest. "Among

the key public interest concerns are adverse effects to cultural resources and traditional cultural properties important to tribes." *Id.* ¶138.

The L.A. District referred its final decision to the Corps' South Pacific Division for review after Arizona's governor expressed his support for the mine despite its harmful impacts. *Id.* ¶135. Even though the Division's decision was based on public interest factors that are "important to tribes," the Corps has refused to provide the decision to the Tribes, claiming that it is a predecisional document. *Id.* ¶136.

VI. The South Pacific Division Abruptly Reverses Course, Clearing the Way for the Rosemont Mine.

Faced with over eight years of opposition from EPA, Pima County, and the Tribes, as well as an adverse decision by the L.A. District, the South Pacific Division abruptly modified the permit and limited the scope of analysis, literally clearing the way for the Rosemont Mine.

Without notice, the South Pacific Division instructed Rosemont to clear, grub, and grade all of the WOTUS with "native material" prior to any construction of the mine pit or waste rock piles. *Id.* ¶235. The South Pacific Division did not provide any explanation for changing the regulated fill activities. *Id.* ¶236. Nor did it provide any public notice for this last-minute modification. *Id.* ¶237.

Instead, the South Pacific Division used these prefilling activities to constrain its scope of analysis. The agency reasoned that the "grading, grubbing, and clearing" activities would simply eliminate all of the jurisdictional waters on the mine site, such that the discharge of waste rock and construction of the mine pit would no longer occur in

jurisdictional waters. *Id.* ¶244–45. Based on this theory, the South Pacific Division refused to consider any of the effects associated with the discharge of waste rock or construction of the mine pit, claiming that they were outside of its "purview" and "scope of analysis." *Id.* ¶245.

The South Pacific Division used this strategy to disregard EPA's concerns about impacts to downstream jurisdictional waters from heavy metal runoff from the waste rock and tailings, the loss of stormwater flows, and the drawdown of the regional aquifer. *Id.* ¶¶246–49.

This was a complete reversal of the 8-year long permitting process, which had consistently focused on the effects associated with discharge of the waste rock and construction of the mine pit. *Id.* ¶236. According to Pima County Administrator C.H. Huckleberry, "[t]his is perhaps the most bizarre rationale I have experienced in my forty plus-year career in public service." *See* Pima County Board of Supervisors Memorandum at 5 (April 16, 2019) (Ex. 7).

The South Pacific Division also constrained its scope of analysis for its public interest review, claiming that it could only consider the discharge of fill material associated with the clearing, grubbing, and grading and construction of facilities. *Id.* ¶258. The agency thus refused to consider the effects caused by operations of the mine, including the irreversible impacts to downstream jurisdictional waters due to groundwater drawdown, the degradation of surface water quality and reduction in surface water quantity, and the visual blight of a massive open-pit copper mine on the landscape, to name just a few. *Id.* ¶¶209–33, 260–61. Yet, the agency then touted the economic

benefits of operating the mine, such as the increase in employment and production of copper resources. *Id.* ¶259.

The South Pacific Division failed to explain why its new approach—covering the jurisdictional washes first with "native material" and abandoning an analysis of the secondary impacts—was in the public interest. *Id.* ¶262. To the contrary, the South Pacific Division's own analysis demonstrates that the grading, grubbing, and clearing activities would result in significant adverse effects to Tribes' cultural interests, contrary to the public interest. *Id.*

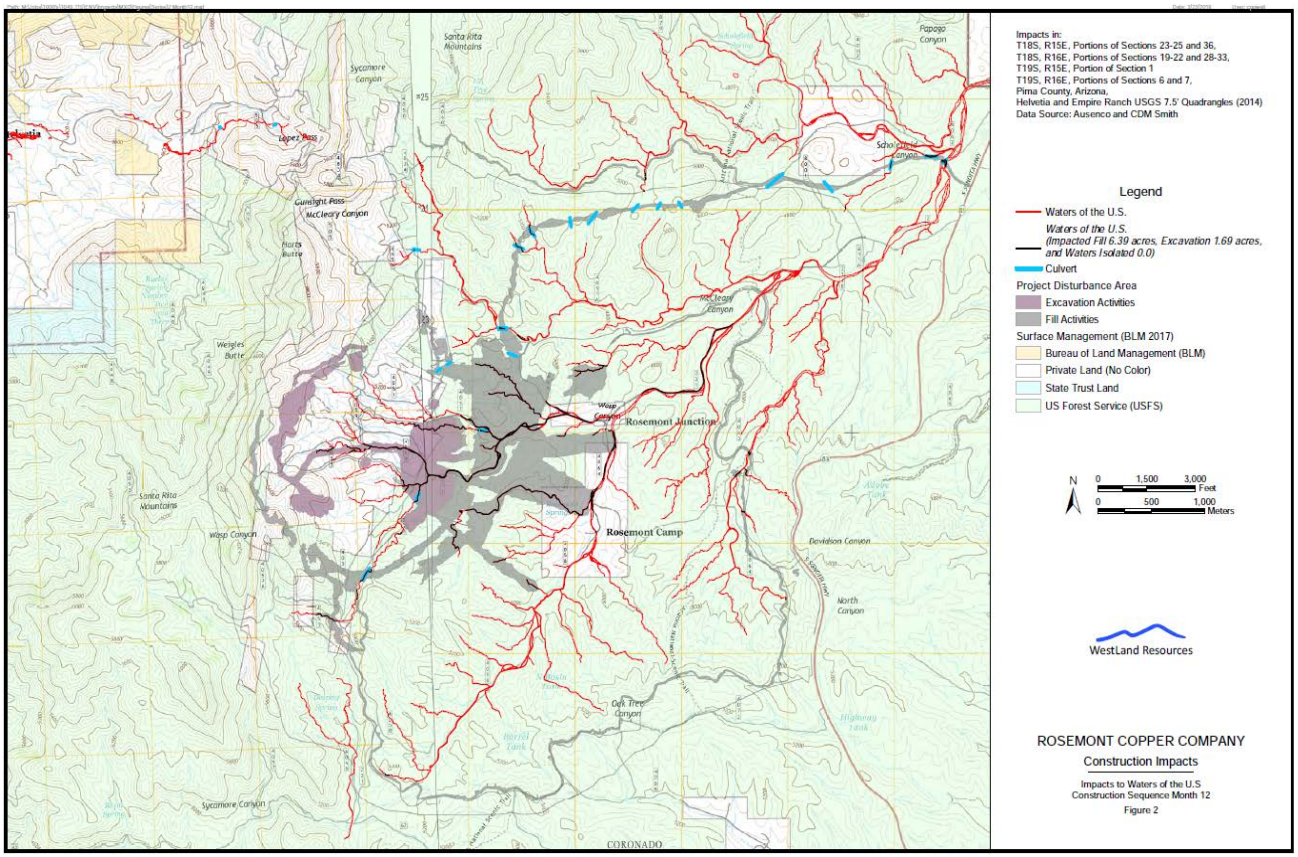
VII. Rosemont's Plans to Clear Ancestral Villages, Desecrate Burial Sites and Fill Jurisdictional Waters.

Within days of receiving the 404 Permit, Rosemont obtained final approval from the U.S. Forest Service to commence construction and operation of the mine. *Id.* ¶263. Rosemont now intends to press forward with the MPO to achieve copper production in 2022. Transcript of Status Conference ("Transcript") at 9 (Apr. 18, 2019) (Ex. 8). Rosemont provided the Tribes with notice of its intent to commence ground-disturbing activities on or after June 7, 2019. Notice email from Norman James to Stu Gillespie, et al. (May 8, 2019) (Ex. 9); PI email from Norman James to Stu Gillespie, et al. (May 3, 2019) (Ex. 10).

Starting in August, Rosemont would clear and grade 36 drill pads throughout the mine site, including sites adjacent to prehistoric habitation sites. Transcript at 16. In "roughly October," Rosemont will commence even more "major" and "serious" ground-disturbing activities at the mine site, clearing the way for the mine pit, waste rock area,

and processing facilities. Transcript at 11, 17. As an initial step, Rosemont would Rosemont would survey and/or clear all archaeological sites from the path of the mine. *Id.* at 17. Rosemont would start by excavating the Gaylor Ranch Prehistoric Site, one of the largest Hohokam sites that almost certainly contains ancestral burials. ECF No. 1 ¶¶266–69. Rosemont would aim to clear all of the Tribes' cultural properties from the mine site within four months. ECF No. 1 ¶270; Archaeological Schedule Email at 2.

Rosemont also provided the Corps with detailed tables and figures outlining its construction schedule. ECF No. 10-7. Within just 12 months, Rosemont would clear large portions of the mine pit and waste rock area, permanently destroying 9.68 acres of jurisdictional waters, as depicted in the figure below.



Rosemont would also construct a 13-mile long, "high voltage" electric transmission line from Sahaurita, over the Santa Rita Mountains, to the mine site in 2020. Transcript at 14; ECF No. 9-8 at 139; Ariz. Corp. Comm'n, Order Granting Certificate of Environmental Compatibility, No. 73232 (Jun. 12, 2012) (Ex. 11). The visually intrusive 150-foot high transmission line towers would have an "adverse and major" impact on the Santa Rita Mountains, ECF No. 9-8 at 139, significantly degrading the landscape and "affecting ceremonial activities such as vision quests." *Id.* at 242.

As explained by Austin Nunez, Chairman of the San Xavier District, "[i]ndividually and collectively, [these] activities will degrade this cultural landscape and its beauty, desecrate this place of prayer, and forever destroy our ancestral heritage. There is no way to undo these harms to the land; there is no way to undo these harms to who the Tohono O'odham are as a people." Nunez Decl. ¶9.

ARGUMENT

To obtain a preliminary injunction, the Tribes must demonstrate: (1) a likelihood of success on the merits; (2) they are likely to suffer irreparable harm in the absence of injunctive relief; (3) the balance of equities favors an injunction; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit has held that "'serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (quotation omitted). Because the Tribes

meet all four prongs of the preliminary injunction test, the Court should grant their motion.

I. The Tribes Have Established Serious Questions Going to the Merits.

At a minimum, the Tribes have established serious questions going to the merits. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) (A "serious question" is one where the movant has "a fair chance of success on the merits."). The Corps violated basic principles of administrative law and the CWA in abruptly modifying and granting a 404 Permit for the Rosemont Mine. It is "significant at the outset to recall" that the EPA—"not the usual suspect[] in opposing the action of a federal agency"—repeatedly disagreed with the Corps and found that the 404 Permit would violate the CWA, underscoring the serious questions on the merits. *See Save Our Sonoran, Inc. ("SOS") v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005).

A. The Corps Failed to Provide a Rational Basis for Modifying the Permit At the Last Minute to Constrain Its Scope of Analysis and Circumvent the CWA.

Under the APA, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quotation omitted). Here though, the Corps did not provide any rational basis, let alone the "cogent explanation" required by the APA, for modifying the permitted fill activity at the last minute to circumvent the requirements of the CWA. *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010).

For almost eight years, the Corps identified the discharge of waste rock and construction of the mine pit as the fill activities subject to the CWA. The Corps issued a public notice explicitly identifying these regulated activities, as required by the regulations. 33 C.F.R. § 325.3(a)(5). In response, the EPA, Tribes, Pima County, and public submitted extensive comments identifying the unacceptable impacts associated with these fill activities, including the loss of stormwater flows, heavy metal runoff, and groundwater drawdown. EPA concluded, in no uncertain terms, that the direct and secondary impacts associated with the discharge of waste rock and construction of the mine pit would violate the CWA.

Without any notice, the South Pacific Division abruptly modified the permit in its Record of Decision issued in March 2019, directing Rosemont to prefill the washes with "native material" so that the Corps would no longer have to analyze the impacts associated with the discharge of waste rock and construction of the mine pit in the same exact area. The Corps did not provide any public notice for this modification, violating its own regulations.[3] Nor did the South Pacific Division provide a rational explanation for this abrupt change. Instead, the South Pacific Division simply assumed, without analysis, that the Barrel Alternative required prefilling all of the jurisdictional washes with native material. This assumption "runs counter to the evidence before the agency"

[3] The Tribes incorporate by reference the Conservation Groups' argument about the lack of public notice regarding this modification. *See* Memo. In Supp. of Joint Mot. for Prelim. Inj. by Save the Scenic Santa Ritas at 19–25.

for at least four reasons, underscoring the arbitrary basis of the South Pacific Division's last-minute modification. *State Farm*, 463 U.S. at 43.

First, prefilling the washes with native material represents an abrupt, unexplained departure from the L.A. District's identification of the regulated fill activities. In the public notice, the L.A. District clearly identified the discharge of thousands of cubic yards of "[e]xcavated waste rock" into jurisdictional waters. ECF No. 1 ¶¶119–20. Furthermore, Rosemont has repeatedly identified the discharge of waste rock as the regulated activity subject to the CWA, submitting mitigation plans to purportedly offset the impacts of these regulated activities. *See* Westland Resources, Inc., Draft Conceptual Habitat Mitigation and Monitoring Plan Summary at 1 (2013) (Ex. 12); ECF No. 13-2. The South Pacific Division provides no rationale for abruptly limiting the regulated fill activity to the prefilling of washes with native material. *See Nat'l Parks Conservation Ass'n ("NPCA") v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious.").

Second, prefilling all of the washes with native material would be inconsistent with the Barrel Alternative and violate the MPO, which *prohibits* Rosemont from burying any cleared or grubbed material under the waste rock piles. ECF No. 1 ¶264; ECF No. 14-5 at 28 ("Cleared and grubbed material will not be buried in the Landform."). Yet, the 404 Permit now instructs Rosemont to fill the washes with cleared and grubbed material, burying this material under the landform. ECF No. 10-1 at 48 ("[T]he fill material would be generated from the proposed clearing and grubbing activities, and

would be redistributed into the waters of the U.S."). Such a clear contradiction is "a hallmark of arbitrary action." *NPCA*, 788 F.3d at 1145.

Third, the South Pacific Division failed to explain how the proposed fill activities would comply with the 401 Certification, which directs Rosemont to *minimize* grubbing, grading, and clearing in jurisdictional washes during development of the Rosemont Mine. ECF No. 1 ¶241. The newly modified permit would, however, *maximize* grubbing, grading, and clearing in jurisdictional washes, in sharp contrast to the Barrel Alternative. The South Pacific Division failed to provide any explanation for this contradiction, let alone the "cogent explanation" required by the APA. *Humane Soc'y*, 626 F.3d at 1054.

Fourth, the proposed modification defies common sense, and thus "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. According to the Barrel Alternative, Rosemont plans to blast the jurisdictional washes within the mine pit and then excavate the rubbilized waste rock. ECF No. 10-6 at11 tbl.1; ECF No. 10-8 at 12 tbl.2. It makes no sense to prefill these same washes in the mine pit with "native material," only to promptly remove that very material to excavate the mine pit.

It is thus apparent that the South Pacific Division authorized Rosemont to prefill the washes with native material not for the purpose of developing the mine, but rather for the impermissible purpose of constraining the Corps' analysis and evading the requirements of the CWA. In fact, the Corps repeatedly relied on the modified fill activities to sidestep EPA's conclusion that the impacts associated with the construction of the mine pit and discharge of waste rock would violate the CWA. For example, the

Corps disregarded EPA's concerns about the toxic runoff from the waste rock, claiming that those impacts were outside its purview because the proposed discharge involved "native material," not waste rock. ECF No. 1 ¶¶245, 248. Likewise, the Corps refused to consider the loss of stormwater runoff due to the waste rock piles, claiming that the waste rock piles would no longer be located within jurisdictional waters because Rosemont would prefill all of the washes with native material. *Id.* ¶¶245, 249. The Corps even refused to consider the effects associated with the mine pit, claiming that these activities would no longer occur in jurisdictional waters because Rosemont would prefill all of the washes with native material. *Id.* ¶¶245, 247.

But the prefilling activities do not alter the impacts of the mine, demonstrating that the modified permit is nothing more than a last minute, legal subterfuge. Rosemont would still discharge waste rock and construct the mine pit *in the same exact area* causing the same unacceptable degradation to the aquatic ecosystem as documented by EPA. The Corps simply sidestepped its obligation to prohibit these activities under the CWA by granting Rosemont a permit to preemptively destroy the jurisdictional washes on the site. This twisted logic defies the CWA, which was not enacted by Congress to *deregulate* fill activities, but rather to *regulate* the discharge of fill material so as "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Allowing the Corps to freely authorize the prefilling of jurisdictional waters, as occurred here, would drive an enormous loophole through the CWA. Every developer would request a permit to quickly grade, grub, and clear the jurisdictional waters on a

proposed site, so that it could then proceed with its proposed project in the same exact place free from the restrictions of the 404(b)(1) Guidelines. The South Pacific Division, however, provided no rational basis for such a permit in this case, and cannot authorize the prefilling of jurisdictional waters for no reason other than to give Rosemont a blank check to construct the mine pit, discharge waste rock, and cause significant degradation to jurisdictional waters. Such a permit is arbitrary, capricious, and contrary to the CWA.

B. The Corps Violated the CWA By Failing to Consider the Secondary Effects Associated with the Discharge of Dredged and Fill Material.

Even if the Corps could grant Rosemont a permit to prefill every wash on the site, it still has an obligation to analyze the secondary effects associated with those discharges, including the construction and operation of the proposed mine in those filled washes. The Corps, however, refused to analyze any effects associated with the construction or operation of the mine, claiming they were outside its scope of analysis because they would occur on top of, but not in, the jurisdictional waters. This tortured logic violates the 404(b)(1) Guidelines and EPA's controlling interpretation. As a result, there is no rational basis for the Corps' refusal to assess the secondary effects of groundwater drawdown or the impacts of the waste rock piles and tailings facility.

i. The Corps Must Consider the Secondary Effects of Mine Construction and Operation on Jurisdictional Waters.

The Corps repeatedly claims that the effects caused by the "construction and operation" of the Rosemont Mine are not within its scope of analysis because Rosemont would prefill all of the washes with native material, creating fast lands that no longer

qualify as WOTUS. ECF No. 1 ¶¶243–47. The Guidelines squarely foreclose the Corps' attempt to constrain its scope of analysis.

The Guidelines require the Corps to analyze the secondary effects "*associated* with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material." 40 C.F.R. § 230.11(h)(1) (emphasis added). Secondary effects include, for example, the downstream impacts "associated with the operation of a dam, septic tank leaching and surface runoff from commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S." *Id.* §230.11(h)(2). As these examples make clear, secondary effects encompass the effects of activities on the "fast land" created by the discharge of fill material.

In fact, the Guidelines foreclose the Corps' attempt to preemptively fill the washes and then turn a blind eye on discharge of waste rock and construction of the mine pit on the fast lands created by the fill material. "[I]n authorizing a discharge which will create fast lands, the permitting authority should consider, in addition to the direct effects of the fill itself, the effects on the aquatic environment of *any reasonably foreseeable activities to be conducted on the fast land*." Guidelines for Specification of Disposal Sites for Dredged and Fill Material, 45 Fed. Reg. 85,336, 85,340–41 (Dec. 24, 1980) (emphasis added). The Guidelines place "further emphasis" on the importance of evaluating secondary effects by requiring the Corps to make factual findings regarding these impacts to ensure compliance with the restrictions set forth in the Guidelines. *Id.* at 85,343.

Indeed, the Guidelines explicitly direct the Corps' to analyze and minimize the impacts of activities occurring on fast lands created by the discharge of fill material. The

Corps must consider impacts to wildlife caused by activities "facilitate[ed]" by the discharge of fill material. *See* 40 C.F.R. § 230.30(b)(3); *see Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1272 n.15 (10th Cir. 2004) (upholding Corps' analysis of "upland aspects" of entire development on bald eagles). Moreover, the Guidelines direct the Corps to minimize the secondary impacts of activities occurring on fill material. For instance, 40 C.F.R. § 230.77(b) explains that in the case of dams built on fill material, the project should design water *releases* to accommodate the needs of fish and wildlife. The Guidelines also require the Corps to "control[] runoff and other discharges from activities to be conducted on the fill." *Id.* § 230.77(a).

In line with these requirements, courts have repeatedly held that the Corps must consider the secondary impacts of activities occurring on fast lands created by fill material. For example, in *Riverside Irrigation District v. Andrews*, the Corps granted a permit authorizing the construction of an earthen dam in jurisdictional waters. 758 F.2d 508, 511–12 (10th Cir. 1985). The Tenth Circuit held that the agency had to consider, not just the direct effects of filling the jurisdictional waters to create the dam, but also the secondary impacts associated with the operation of the dam, including the impoundment of water and resultant depletion of downstream flows. *Id.* at 512. Likewise, in *Fox Bay Partners v. U.S. Corps of Engineers*, the court held that the Corps has an obligation under the 404(b)(1) Guidelines to consider, not just the direct impacts of filling a lake, but also the secondary effects sufficiently connected to the proposed discharge of fill material. 831 F. Supp. 605, 609 (N.D. Ill. 1993). The Corps thus had to consider the impacts of a

boat ramp that would be constructed on fill material, as well as the subsequent use of that ramp for boating activities that would significantly impact the aquatic environment. *Id.*

These cases, combined with the examples from the Guidelines, refute the Corps' argument that it need not analyze any of the impacts caused by the construction and operation of the Rosemont Mine. ECF No. 10-1 at 16–18. To the contrary, these impacts are clearly associated with the discharge of native material as they would occur on the fast lands created by the fill. "To require [the Corps] to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose." *Riverside Irrigation Dist.*, 758 F.2d at 512.

Furthermore, EPA issued a legal opinion underscoring the need to analyze the secondary effects of activities occurring on fill material. *See* U.S. Envtl. Prot. Agency, General Counsel Opinions from the Office of General Counsel ("OGC Memo") 128–29 (1987) (Ex. 13). The opinion recognizes that activities on fill material, such as the operation of a dam, although technically "beyond traditionally navigable waters," can cause or contribute to significant degradation of jurisdictional waters due to "the fact that the effects of pollution move through the aquatic system." *Id.* at 128. Accordingly, agencies must consider these secondary effects depending "on the directness of the causal connection and the predictability of the impacts, interpreted in light of a rule of reason." *Id.* at 129. EPA's interpretation of secondary effects overrides the Corps' categorical refusal to consider the impacts of activities occurring on fill material. *See* 43 Op. Att'y Gen. No. 197 (1979) (providing that EPA is the "ultimate administrative authority" and has "final authority" to construe the CWA) (Ex. 14).

In sum, the Corps cannot eliminate its obligation to analyze secondary impacts merely by filling all of the jurisdictional washes on the site and then turning a blind eye on the subsequent use of those fast lands to construct and operate the Rosemont Mine.

ii. The Corps Arbitrarily Disregarded the Secondary Effects of Groundwater Drawdown on Jurisdictional Waters.

EPA concluded that groundwater drawdown from the mine pit is a secondary effect "strongly associated" with the fill activities, since these operational effects "would not occur in the absence of a § 404 CWA permit." ECF No. 1 ¶145; *see also* ECF No. 10-7 at 10 fig.6 (depicting jurisdictional waters that would be filled within the mine pit). Pima County also concluded that groundwater drawdown was "undoubtedly" a secondary effect associated with the fill activities. ECF No. 1 ¶147. Construction of the mine pit within these jurisdictional waters would impound surface and groundwater flows, requiring continuous pumping to dewater the regional aquifer during the life of the mine. *Id.* The resultant depletion of downstream flows associated with the operation of the mine pit is a secondary effect, much like the depletion of water "associated with operations of a dam." *See* 40 C.F.R. § 230.11(h)(2); *Riverside Irrigation Dist.*, 758 F.2d at 512 ("[T]he depletion of water is an indirect effect of the discharge, in that it results from the increased consumptive use of water facilitated by the discharge.").

Accordingly, EPA thoroughly analyzed the impacts of groundwater drawdown, concluding that it would cause or contribute to significant degradation of jurisdictional waters throughout the Cienega Creek watershed, in violation of the 404(b)(1) Guidelines. ECF No. 1 ¶¶153–58, 167.

Yet, the Corps categorically refused to analyze the secondary impacts of groundwater drawdown for four reasons, none of which have merit. First, the Corps asserts that there would be no jurisdictional waters to impact on the mine site once the grading, grubbing, and clearing activities are complete. ECF No. 10-1 at 48. But prefilling the washes does not give the Corps a free pass to ignore secondary effects. To the contrary, the Guidelines expressly direct the Corps to analyze the effects of activities occurring on "fast lands" created by the filling of the washes. *See* 40 C.F.R. § 230.11(h)(2). As emphasized by EPA, "Congress did not intend to exclude consideration of adverse impacts simply because they were secondary." ECF No. 1 ¶145.

Second, the Corps asserts that it lacks jurisdiction to consider impacts to groundwater, which is not a jurisdictional water. ECF No. 10-1 at 46. The argument misses the point. EPA identified the secondary impacts to downstream *surface* waters due to groundwater drawdown, such as the hundreds of acres of riparian habitat along upper Empire Gulch that qualify as jurisdictional waters. ECF No. 1 ¶¶153–58. The Corps must consider these secondary impacts, notwithstanding the fact that they occur through groundwater. *Cf. Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745–46 & n.2 (9th Cir. 2018) (CWA "liability may attach when a point source discharge is conveyed to a navigable water through groundwater."); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649–51 (4th Cir. 2018) ("As the Ninth Circuit recently held, a discharge that passes from a point source through ground water to navigable waters may support a claim under the CWA.").

Third, the Corps claims that the mine pit is an excavated depression, not the discharge of dredge or fill material. ECF No. 10-1 at 46. The argument is misleading. The L.A. District specifically identified "blasting and excavation" of the mine pit as a regulated fill activity. ECF No. 10-8 at 5. While the Corps modified the Permit to require the grading, grubbing, and clearing of the mine pit, that does not alter the fact that the construction of the mine pit will occur on the fast lands created by those fill activities, and thereby falls within the definition of secondary effects associated with the fill activity.

Fourth, the Corps claims that the effects to mine-related groundwater pumping on downstream jurisdictional waters would constitute "the possible third, fourth, or fifth order effects" of prefilling the washes with native material. ECF No. 10-1 at 46. But the analysis of secondary effects does not turn on general assertions "in the abstract." OGC Memo at 129. It turns on the "directness of the causal connection" and "predictability" of the effects in light of the specific facts. *Id*. As explained by EPA, "[t]he activity of groundwater pumping is reasonably foreseeable since the Rosemont Copper Company has stated that such pumping is necessary for construction and/or operation of the mine." ECF No. 12-1 at 11. Furthermore, EPA used a set of groundwater models to reasonably predict the effects of groundwater drawdown on downstream jurisdictional waters, especially upper Empire Gulch. ECF No. 1 ¶¶155–56. The Corps provides no response to EPA's factual findings, a textbook example of arbitrary and capricious reasoning. *See State Farm*, 463 U.S. at 52 ("The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'").

Ultimately, there is no valid basis for the Corps' refusal to consider the secondary effects of groundwater drawdown as they are undoubtedly associated with the fill activities. The Corps' cannot therefore invoke the rule of reason to shirk its obligation to consider these impacts, which will cause significant degradation to jurisdictional waters, as documented by the EPA.

iii. The Corps Arbitrarily Disregarded the Secondary Effects of Heavy-Metal Runoff and Reduced Stormwater Flows.

Rosemont proposes to discharge waste rock directly on top of the fast lands created by the preliminary fill activities. The waste rock would contain heavy metals that will drain into downstream WOTUS, causing secondary effects just like the "leachate and runoff from a sanitary landfill located in waters of the U.S." *See* 40 C.F.R. § 230.11(h)(2). Furthermore, the waste rock piles, in-stream water basins, and diversion channels will impound surface runoff, causing secondary effects just like "fluctuating water levels in an impoundment and downstream associated with the operation of a dam." *Id.*

The Corps cannot circumvent its obligation to analyze these secondary effects by claiming that they are now outside its scope of analysis because it is only authorizing the initial fill of the washes with native material. This last-minute modification was arbitrary, capricious, and contrary to the CWA, as discussed above. Even if the Corps could preemptively destroy the washes, it still has an obligation to consider the effects of the waste rock material that would be discharged directly on top of those "fast lands." *See id.*

Effectively conceding the point, the Corps argues, in the alternative, that it analyzed the impacts of heavy-metal runoff and lost stormwater flows. ECF No. 10-1 at 39–42. But its analysis was infected by its unduly narrow scope of analysis and wholly failed to respond to EPA's factual determinations, as demonstrated below.

Heavy Metal Runoff. EPA identified the elevated presence of contaminants in the waste rock, such as molybdenum (0.0405 mg/L). ECF No. 1 ¶162. EPA also explained how runoff in arid environments is additive—heavy-metal concentrations increase in downstream waters over time. *Id.* ¶163. EPA thus concluded that the runoff of heavy metals would degrade the water quality in Davidson Canyon for molybdenum (less than 0.01 mg/L), among other toxic metals. *Id.* ¶162.

Yet the Corps failed to address these concerns due to its unduly narrow focus on the discharge of "native material." The Corps asserted that the EPA failed to establish any degradation because the "predicted runoff of molybdenum is 0.0117 mg/L." ECF No. 10-1 at 42. But the 0.0117 mg/L figure relates to contaminants in the "soil cover," not the waste rock which is almost four times greater as demonstrated by the EPA. ECF No. 1 ¶162.

The Corps also mischaracterized EPA's factual findings, claiming that EPA did "not take into account runoff from other areas into Davidson Canyon." ECF No. 10-1 at 42. Not so. EPA explicitly discussed runoff from other areas of Davidson Canyon and rejected the idea that pollution would "attenuate" due to runoff from other areas of the canyon. ECF No. 1 ¶163. EPA identified studies showing how "contaminated runoff would be additive" and explained how the pollution from the Rosemont Mine would be

concentrated by a compliance dam, "exacerbat[ing] the unacceptable downstream water quality impacts." *Id.* ¶¶160, 163. The Corps' failure to respond to EPA's factual determinations was arbitrary and capricious. *See All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 132 (D.D.C. 2009) ("The Corps, however, must demonstrate that it has considered significant comments and criticisms by explaining why it disagrees with them; it may not dismiss them without adequate explanation.").

Reduced Stormwater Flows. EPA concluded that the loss of at least 562 AFA of stormwater flows during the 25–30 years of active mining would cause immediate and irreversible degradation to Davidson Canyon. ECF No. 1 ¶¶150–58. This significant reduction in stormwater flows would degrade Davidson Canyon through a series of effects, including the loss of critical flows, a reduction in sediment delivery, and an increase in pollution levels. ECF No. 9 at 18–21.

The Corps claims to have responded to these concerns because Rosemont would remove four stock tanks to "provide approximately 7.35 AFA . . . to offset the 2 AFA *post-mining* reduction in flow." ECF No. 1 ¶202. But the projected loss of stormwater flows *during* mining operations is not 2 AFA; it is 562 AFA. *Id.* ¶204. The Corps wholly failed to offset these losses or respond to EPA's conclusion that the loss of these flows would cause significant degradation to Davidson Canyon. *See Rock Creek All. v. U.S. Forest Serv.*, 703 F.Supp.2d 1152, 1170–71 (D. Mont. 2010) (concluding the agency acted arbitrarily by providing no explanation for why mine phase with most sediment impacts was to proceed with no mitigation).

Furthermore, the Corps' plan to remove the stock tanks is based on the unverified assumption that the stock tanks would store all of the runoff from the watershed. The Corps relied on this assumption to significantly reduce projected post-mining stormwater losses from 242 AFA to 2 AFA. ECF No. 1 ¶203. The Corps again relied on this assumption to claim that the removal of the four stock tanks would provide 7.35 AFA of surface flows. *Id.* ¶202. But the Corps never undertook the basic step of verifying the capacity of the stock tanks to see how much water they retained, despite repeated concerns raised by EPA and Pima County about how such information was essential to determine the value of the mitigation credits for the tank removals and the basis for the Corps' significant reduction in post-mining stormwater runoff. *Id.* ¶¶205–06. The failure to address these concerns was arbitrary and capricious. *See Save the Mattaponi*, 606 F. Supp. 2d at 133–34 (Corps' failure to address "comments that without more site-specific information it is impossible to determine whether the Mitigation Plan will replace functional values to the point where the Project does not cause or contribute to significant degradation" was arbitrary and capricious). Even giving the Corps full credit for the unverified stock tanks, the amount of stormwater flows lost during mining operations would still be 320 AFA, which far exceeds the 7.35 AFA for the stock tanks. The Corps' failure to address this shortfall was arbitrary and capricious, especially given that "even seeming small statistical changes" in surface flows can significantly degrade Davidson Canyon and Cienega Creek, as documented by the EPA. ECF No. 9 at 18–19.

In sum, the Corps had an obligation to analyze the secondary effects of waste rock contamination and lost stormwater runoff. Yet, it wholly failed to undertake the requisite analysis, overlooking EPA's factual determinations.

C. The Corps Violated the CWA by Granting a 404 Permit that will Cause Significant Degradation to Jurisdictional Waters.

Both the EPA and L.A. District determined that the impacts associated with the discharge of fill material for the Rosemont Mine would cause significant degradation to jurisdictional waters. The Corps disregarded these findings, resulting in an arbitrary and capricious decision to grant the 404 Permit.

The CWA prohibits the Corps from issuing a 404 permit if the proposed discharge of dredged or fill material "will cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. § 230.10(c). To assess whether there will be significant adverse effects to jurisdictional waters, the Corps must analyze the direct, secondary, and cumulative impacts of the fill activity on physical substrate, water circulation/fluctuation, suspended particulates/turbidity, contamination, and aquatic ecosystems and organism. *Id.* § 230.11(a)–(h). The Corps cannot grant a permit unless it "provides sufficient information to make a reasonable judgment" that the proposed project will not cause significant degradation. *Id.* § 230.12(a)(3)(iv).

Here, EPA concluded that the fill activities required for the Rosemont Mine would cause significant degradation of jurisdictional waters, including the unacceptable adverse impacts to some of the highest quality stream and wetland ecosystems in Arizona. ECF No. 1 ¶¶141–77. EPA also explained how the effects of groundwater drawdown would

cause or contribute to significant adverse effects to downstream waters, including the loss of hundreds of acres of potential jurisdictional waters along Upper Empire Gulch—a stronghold for listed species. *Id.* ¶¶153–58.

The Corps disregarded EPA's factual determinations by arbitrarily limiting its analysis to the direct impacts of the grading, grubbing, and clearing activities. Compounding this error, the Corps did not mitigate the effects of groundwater drawdown, heavy-metal runoff, or the loss of stormwater flows during mining operations. "Therefore, the Corps' conclusion that the issuance of the permit will not cause or contribute to significant degradation of the waters of the United States is arbitrary and capricious." *Save the Mattaponi*, 606 F. Supp. 2d at 134; *see also Envtl. Def. v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 69, 83 (D.D.C. 2007) ("The agency cannot reliably conclude that the selected project has minimized adverse impacts on aquatic ecosystems to the extent practicable when its habitat mitigation calculations are infected with an underestimate of the floodplain habitat impacted.").

Furthermore, the Corps provided no rationale for reversing the L.A. District's determination that the discharge of waste rock and construction of the mine pit would cause significant degradation to jurisdictional waters. Instead, the Corps abruptly and arbitrarily modified the Permit to authorize the "clearing, grubbing, and grading" of the site so that it could circumvent the L.A. District's adverse findings. ECF No. 1 ¶235. "No court should allow the use of semantics to succeed in an attempt at glossing over an environmental violation." *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1053 (2d Cir. 1985). The permit decision must be reversed as arbitrary, capricious, and

contrary to the CWA. *Id.* at 1051 ("[W]hen an agency approves a project that the record before a reviewing court reveals will have a significant adverse impact on marine wildlife, the agency determination must be reversed.").

D. The Corps Violated Its Regulations by Failing to Undertake a Comprehensive and Objective Analysis of the Public Interest.

The Corps' public-interest test requires a far-reaching, careful, and objective evaluation of a proposed project to ensure that it is not contrary to the public interest. The Corps violated this requirement by impermissibly constraining its scope of analysis to the pre-mining phase of the Rosemont Mine. The Corps compounded this error by undertaking a skewed analysis that considered the benefits of mine operations but not the costs. Ultimately, the Corps provided no rational basis for concluding that grading, grubbing, and clearing the site is in the public interest.

i. The Corps Impermissibly Constrained its Public Interest Analysis to Pre-Mining Activities.

The Corps cannot issue a permit if "it would be contrary to the public interest." 33 C.F.R. § 320.4(a)(1). The public-interest test requires "a careful weighing" of the "probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." *Id.* The Corps must evaluate the "public and private need for the proposed structure or work" as well as "[t]he extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited." *Id.* § 320.4(a)(2)(i), (iii).

Here, the "proposed activity" is the discharge of fill into jurisdictional washes to construct the Rosemont Mine—the "proposed structure or work" on top of those washes.

Id. § 320.4(a). Accordingly, the public-interest analysis must encompass the "need" for the Rosemont Mine, as well as "[t]he extent and permanence of the beneficial and/or detrimental effects" which the Rosemont Mine would have on "public and private uses." *Id.* § 320.4(a)(2). This analysis necessarily encompasses all phases of the Rosemont Mine, including the impacts of mining on the public interest. *See Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1270 (S.D. Fla. 2009), *aff'd*, 362 F. App'x 100 (11th Cir. 2010) ("The Court must decide whether the Corps considered, as required by the CWA and its implementing regulations, as well as NEPA, the significant adverse effects on municipal water supplies (which were a reasonably foreseeable result of this mining).").

Yet, the Corps severely limited its public-interest review to the grubbing, grading, and clearing of the site, claiming that "operation of the mine is not within the Corps' jurisdiction." ECF No. 1 ¶258. This constrained analysis violates the regulations for three reasons. First, the public-interest test does not begin and end with the proposed fill activity; it also includes consideration of the "proposed structure or work" that would be located on top of that fill material. 33 C.F.R. § 320.4(a)(2). Furthermore, the regulations require the Corps to consider the "extent and permanence" of effects caused by the proposed structure—an analysis that plainly contemplates the long-term impacts beyond the initial fill activity. *Id.* § 320.4(a)(2)(iii). Third, it is inaccurate for the Corps to claim that it does not have "control and responsibility" over the subsequent operation of the mine. ECF No. 10-1 at 16. Rosemont cannot proceed with the mine without a 404 Permit due to the distribution of jurisdictional waters throughout the project site. ECF No. 1 ¶114. Accordingly, the Corps has control and responsibility over the construction

and operation of the mine, and must consider the associated impacts. *See SOS*, 408 F.3d at 1123 ("Because the district court found that any development by Lone Mountain would impact jurisdictional waters, the whole of the property falls under the Corps' permitting authority and the court's authority to enjoin development.").

By limiting its scope of analysis to pre-mining operations, the Corps failed to consider the impacts on the public interest of granting a 404 Permit for the Rosemont Mine, violating its regulations.

ii. The Corps Arbitrarily Skewed its Public Interest Analysis.

The Corps' public interest test also requires the agency to balance the "benefits which reasonably may be expected to accrue from the proposal … against its reasonably foreseeable detriments." 33 C.F.R. § 320.4(a)(1). To ensure an objective analysis, the Corps must use the same scope of analysis for costs and benefits. *See, e.g.*, 33 C.F.R. pt. 325, App. B § 7(b)(3) (admonishing Corps to use the "same scope of analysis" for evaluating both benefits and impacts under NEPA).

Here, though, the Corps undertook a skewed analysis of the Rosemont Mine, considering the long-term benefits of the mine while refusing to consider the associated costs. The Corps claimed that the proposed action was in the public interest due to the need to "produce resources such as copper, molybdenum, and silver." ECF No. 1 ¶259. The Corps also highlighted "the economic benefits associated with the development of the proposed action," including jobs and revenue "as a result of the proposed construction and operations of the mine." *Id.* These benefits—the "need" to develop and remove

minerals—ultimately led the Corps to conclude that "the permit is not contrary to the public interest." ECF No. 10-1 at 72.

Despite relying on the purported economic benefits from operation of the mine, and the resulting increase in copper supplies, the Corps categorically refused to consider the negative effects from the construction and operation of the Rosemont Mine on the public interest, including the economic costs of the mine on local property owners and recreation based tourism, which could far outweigh the payroll of the entire mine. ECF No. 1 ¶261. The Corps also refused to consider significant impacts to Las Cienegas National Conservation Area, the loss of hundreds of acres of wetlands at Upper Empire Gulch, and special aquatic sites entitled to special protection under the 404(b)(1) Guidelines. *Id.* ¶¶218–19, 261. The Corps refused to consider impacts to OAWs and potential contamination of municipal water supplies for Tucson. *Id.* ¶¶224, 248, 261. The Corps even turned a blind eye on the half-mile wide deep pit and towering waste rock piles, which would leave a permanent blight on the Santa Rita Mountains visible from scenic State Road 83. *Id.* ¶¶ 231, 261.

By ignoring the significant detrimental impacts of mining operations, despite claiming the benefits of these operations, the Corps failed to undertake an objective analysis of the costs and benefits of the Permit, resulting in an arbitrary and capricious decision.

iii. Grading, Grubbing, and Clearing the Site is Contrary to the Public Interest.

Assuming the Corps' public interest analysis was limited to pre-mining operations, the 404 Permit is clearly contrary to the public interest. Pre-mining activities would cause severe, irreversible, and irretrievable impacts to cultural resources. *Id.* ¶214. During this timeframe, Rosemont would impact or eliminate a total of 82 historic properties, 39 of which are prehistoric sites that either contain or likely contain human remains. *Id.* ¶212. For the Tribes, the destruction of ancestral villages and removal of burial sites "would destroy [the Tribes'] historical and cultural foundation, diminish tribal members' sense of orientation in the world, and destroy part of their heritage." ECF No. 9-8 at 237. Their ancestors' resting places, the entire cultural landscape of this portion of the Santa Rita Mountains, would be no more. ECF No. 1 ¶215. The District thus denied the permit, citing as a "key public interest concern[]," the adverse effects to cultural resources and traditional cultural properties important to tribes. *Id.* ¶138.

The Corps has not identified any benefits that would outweigh these significant adverse impacts to the tribal resources. Indeed, the only way the Corps justified the Permit was by relying on the purported benefits of mining and removing copper minerals. But those benefits cannot be considered, if the scope of analysis is limited to pre-mining operations. The Corps has thus failed to provide any rational basis for reversing the L.A. District's determination that the Permit is contrary to the public interest.

E. The Corps Impermissibly Refuses to Provide the Tribes with the L.A. District's Decision Recommending Denial of the 404 Permit

The Corps' refusal to provide the Tribes with the L.A. District's decision violates basic principles of judicial review and the agency's own regulations. An injunction is warranted to ensure the Tribes and the Court have an opportunity to review this critical document prior to the irreversible destruction of cultural sites and WOTUS.

The administrative record must include "all documents and materials directly or indirectly considered by agency decision-makers." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis and quotation omitted). Here, the South Pacific Division reviewed the L.A. District's decision recommending denial of the 404 Permit. The L.A. District's decision is thus part of the administrative record for this case, and a crucial document in assessing whether the South Pacific Division's abrupt reversal was arbitrary and capricious. *See, e.g.*, *Save the Mattaponi*, 606 F. Supp. 2d at 133–34 (finding that Corps arbitrarily reversed a district office's decision recommending denial of a permit).

Indeed, the Corps' own regulations state that a district office's decision is part of the record. The regulations provide that the district office's "ROD shall be dated, signed, and *included in the record* prior to final action on the application." 33 C.F.R. § 325.2(a)(6) (emphasis added). Here, Colonel Gibbs signed the L.A. District's ROD recommending denial of the permit. ECF No. 1 ¶134. The decision must be included in the record now that there is a final action on the permit application. 33 C.F.R. § 325.2(a)(6).

In fact, the Corps' regulations "encourage[]" the disclosure of the L.A. District's decision to the public, even during the South Pacific Division's review process. *Id.* Furthermore, the regulations instructed the L.A. District to forward its ROD recommending denial in a "report" for the higher official (here, the South Pacific Division). *Id*. That "report will serve as the SOF or ROD" for the ultimate decision on the permit application. *Id*. The L.A. District's decision is therefore an essential part of the South Pacific Division's decision, must be disclosed to the public, and must be provided to this Court as part of the whole Administrative Record. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) ("An incomplete record must be viewed as a fictional account of the actual decisionmaking process." (quotation omitted)). A preliminary injunction is necessary so that the Court can obtain this document and undertake a searching and careful review of the South Pacific Division's reversal.

II. The Tribes Will Suffer Irreparable Harm Absent an Injunction.

To obtain preliminary injunctive relief, the Tribes must show they are likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20. Here, Rosemont intends to press forward with the Rosemont Mine, causing irreparable harm to the Tribes' cultural, environmental, and procedural interests before the Court can issue a ruling on the merits of this complex case.

A. The Imminent Destruction of the Santa Rita Mountains Would Cause Irreparable Harm to the Tribes' Cultural and Environmental Interests.

Courts have consistently recognized that "[d]amage to or destruction of any" cultural or religious sites "easily" meets the irreparable-harm requirement. *See Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010); *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (finding irreparable harm where a proposed development would "threaten the integrity of the cultural and archeological resources"). Moreover, the Supreme Court has recognized that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

There is no doubt that the Tribes will suffer immediate and irreparable harm due to the speed with which Rosemont would transform the mine site from a place of prayer into an industrial mine site, absent an injunction from the Court. Starting in August, Rosemont would clear 36 well pads and access roads throughout the proposed mine site, scraping away the land adjacent to prehistoric sites and degrading this ancient place of prayer and solitude. Transcript at 11–12. As early as October, Rosemont would commence even more significant ground-disturbing activities, including the clearing and excavation of ancestral villages and burial sites from the path of the mine. *Id.* at 11, 17; *see also* Archaeological Schedule Email at 2. Rosemont would excavate any and all human remains from the Gaylor Ranch site—one of the largest Hohokam sites in the

area—within just two months (i.e. by December of 2019). Rosemont would clear all of the remaining sites that contain burials within just four months (i.e. by February of 2019). There is no way to undo these harms to cultural resources and the landscape—they are "severe, irreversible, and irretrievable," in the words of the Forest Service. ECF No. 1 ¶214. "If Rosemont is allowed to clear the land, excavating ancestral villages and desecrating burial sites, we would no longer be able to connect with the land and our cultural heritage. We would lose a part of who we are as a people." Vega Decl. ¶18.

In addition, Rosemont would commence construction of a 138-kv power transmission line and pipeline to bring power and water from Sahuarita to the mine site. Hudbay, Investor Presentation at 29 (April 2019) ("Investor Presentation") (stating that Hudbay is "positioned to commence early works project construction in H2 2019 to bring power and water" to the Rosemont Mine site) (Ex. 15). The visually intrusive towers would inhibit the Tribe's use of Huerfano Butte and the mine site for religious and cultural ceremonies. Nunez Decl. ¶¶11–12. The utility corridor would also cut across a prehistoric Hohokam habitation site that may contain ancestral burials. *Id.* ¶¶14–15.

In addition to erasing the Tribes' cultural history from the land, Rosemont would destroy this fragile desert ecosystem, clearing upland habitat, permanently filling jurisdictional washes, and fundamentally altering the hydrology of the site. *See* Fonseca Decl. (Ex. 16) ¶¶10–42. Rosemont would clear and grub the native vegetation on the mine site, destroying a wide array of plant and animal communities. *Id.* ¶¶20–24. The company would then grade this "native material," including contaminated topsoil, directly into the jurisdictional washes, polluting these watercourses with toxic metals and

permanently altering the hydrology of the downstream waters. *Id.* ¶29. Within the first year of construction alone, Rosemont would permanently fill 9.68 acres of jurisdictional waters and grade hundreds of acres of upland habitat. *See* ECF No. 10-7 at 2 tbl.1, fig.2.

There is no way to reverse the loss of these critical desert washes and upland habitat. Fonseca Decl. ¶¶18–24, 37; *See SOS*, 408 F.3d at 1124 ("[O]nce the desert is disturbed, it can never be restored."). "[G]one would be the critical stormwater flows that maintain this living and breathing landscape. Instead, these sources of life would become sources of toxic runoff, forever degrading this special place." Vega Decl. ¶29. The loss of these critical watercourses would permanently impair the Tribes' use of this undisturbed site for cultural, religious, and recreational purposes, Vega Decl. ¶¶23–24, 28; Nunez Decl. ¶27, further underscoring the need for an injunction to maintain the status quo. *See All. for the Wild Rockies*, 632 F.3d at 1135 (injunction appropriate based on evidence that logging project would harm the plaintiff's interest in hunting, fishing, hiking and other outdoor pursuits in a natural, undisturbed environment).

These irreparable harms to the Tribes' cultural, religious, and environmental interests would occur before the Court can issue a ruling on the merits of this complex case. As an initial matter, the Court will have to determine whether the Corps must include the L.A. District's decision in the Administrative Record for this case. The Court will then have to undertake a "searching and careful" inquiry of the record to determine whether the Corps provided a reasoned basis for reversing the L.A. District's decision. *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 416. The Court may not reach a

decision until the end of next year, which is approximately the same length of time it will take the Court to rule on the Tribes' case challenging the Forest Service's decision.

Rather than affording this Court time to rule on the merits of this case, Rosemont intends to press forward with serious ground-clearing activities, destroying jurisdictional waters and sacred cultural sites in short order. Courts have expressed grave concerns about the danger inherent in precisely this fact pattern where the "developer will rush to fill the wetlands and commence construction, disrupting the wetlands, mooting the controversy, and rendering any judicial relief impractical if not impossible." *Sierra Club v. U.S. Army Corps of Eng'rs*, 277 F. App'x 170, 174 (3d Cir. 2008) (Rendell, J., concurring). A preliminary injunction is essential to safeguard against such an impermissible outcome that "nullifies the very essence of the statute and regulations designed to protect our environment." *Id.*

B. The Imminent Construction of the Mine Would Irreparably Harm the Tribes' Procedural Interests.

Courts have consistently recognized the irreparable harm of allowing a company to undertake any construction activities to implement a decision, before the required analysis is complete. "If construction goes forward on Phase I, or indeed if any construction is permitted on the Project before the environmental analysis is complete, a serious risk arises that the analysis . . . will be skewed toward completion of the entire Project." *Davis v. Mineta*, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988) ("Bureaucratic

rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided by the Secretary.").

Courts have thus recognized that the irreparable harm to a plaintiff is "not simply whatever ground-disturbing activities are conducted in the relatively short interim before this action is decided," but the longer-term harm to plaintiffs from a skewed analyses and decision approving an entire project. *Colo. Wild, Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007). Given what is at stake, courts have enjoined companies from undertaking any preconstruction activities to advance a project until the Court can rule on the merits. *Id.*; *see also Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29-GF-BMM, 2018 WL 7352955, at *4 (D. Mont. Dec. 7, 2018) (enjoining any preconstruction activities for the Keystone Pipeline because they "raise the risk of the 'bureaucratic momentum' recognized by the district court in *Colorado Wild*.").

Here, Rosemont would invest over a hundred million dollars in the next six months to implement the Corps' faulty decision and advance the Rosemont Mine. Transcript at 19; *see also* Investor Presentation at 35. Among other things, Rosemont would construct essential infrastructure, excavate cultural sites, and permanently fill desert washes, transforming this place of worship into an industrial mine site. These activities would unleash precisely the type of "bureaucratic steam roller" feared by the courts, skewing any future analysis and decision in favor of the mine, even with a favorable ruling from the Court. *See Colo. Wild*, 523 F. Supp. 2d at 1221; *Indigenous Envtl. Network*, 2018 WL 7352955 at *4.

Thus, the irreparable injury threatened here is not simply Rosemont's initial construction activities, which would cause irreversible harms in their own right; it is the risk that, even if the Tribes prevail, the bureaucratic momentum created by Rosemont in the interim would skew the analysis and decision-making of the Corps towards its non-CWA compliant decision and approval of the Rosemont Mine. If constructed, the Rosemont Mine would cause "severe, irreversible, andirretrievable" harm to tribal cultural resources. ECF No. 1 ¶214. It would also cause unacceptable adverse impacts to the aquatic ecosystem in violation of the CWA, as documented by EPA.

A preliminary injunction is therefore essential to prevent irreparable harm from occurring until the Court has issued a ruling on the merits. Given that the 404 Permit is a prerequisite of any ground disturbing activities, *id.* ¶¶111, 114, the Court should any construction until it can reach a decision on the merits. *See SOS*, 408 F.3d at 1124 ("Because no development could occur without impacting jurisdictional waters, the whole property can be covered by the injunction.").

III. The Public Interest and Balance of Harms Weigh Heavily In Favor of A Preliminary Injunction To Preserve Cultural, Religious, and Environmental Resources.

The *Winter* analysis also requires the Court to consider whether the public interest and balance of harms favor a preliminary injunction. 555 U.S. at 20. Here, the likely irreparable harm to cultural and environmental resources weighs heavily in favor of a preliminary injunction, as made clear by Congress.

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," recognizing the critical importance of these

resources as a source of drinking water and wildlife habitat. *See* 33 U.S.C. § 1251(a). There is thus a strong public interest in the preservation of jurisdictional waters. *See SOS*, 408 F.3d at 1125. Given the sensitive nature of desert washes, there is also a strong public interest in "careful consideration of environmental impacts before major federal projects go forward, and that suspending such projects until that consideration occurs 'comports with the public interest.'" *All. for the Wild Rockies*, 632 F.3d at 1138 (quoting *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)).

Courts have also recognized an equally strong public interest in the preservation of Native American cultural sites, which "represent a means by which to better understand the history and culture of the American Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians." *Colo. River Indian Tribes*, 605 F. Supp. at 1440; *see also Quechan Tribe*, 755 F. Supp. 2d at 1122. The Corps' own regulations require a "[f]ull evaluation" and "due consideration" of any effects associated with a 404 permit on "archeological resources, including Indian religious or cultural sites." 33 C.F.R. § 320.4(e).

Here, the proposed construction of the Rosemont Mine would result in the irreversible loss of jurisdictional waters and permanent destruction of cultural resources, neither of which was adequately analyzed by the South Pacific Division. These irretrievable losses weigh heavily in the balance of the hardships. Indeed, the L.A. District refused to grant Rosemont a 404 Permit on the grounds that it was contrary to the public interest due to the significant impacts to cultural resources, among other things.

Likewise, Pima County opposes the mine due to a litany of concerns about its adverse environmental impacts. Pima Co. Bd. Supervisors & Pima Co. Regional Flood Control Dist. Bd. Dirs., Resolution Opposing the Proposed Rosemont Mine and its Impacts (Apr. 16, 2019) (Ex. 17).

Furthermore, an injunction is essential to prevent a repeat of history and the needless destruction of cultural resources, including ancestral burial sites. During the 1980s, the prior mining company, ANAMAX, excavated 193 human remains to construct a copper mine. ECF No. 1 ¶¶95–96. The company then filed for bankruptcy, leaving a path of needless cultural destruction. *Id.* ¶95. A preliminary injunction is essential to prevent a repeat of this tragedy and safeguard the public interest while the Court determines whether the Corps complied with the law in authorizing this highly destructive mine in a place of great cultural and environmental importance.

The strong public interest in the preservation of cultural sites and protection of jurisdictional waters far outweigh any temporary economic loss to Rosemont. *See S. Fork Band Council*, 588 F.3d at 728 (affirming injunction under the APA where environmental effects of mining were not adequately studied and mitigation measures not adequately considered, and the principal hardship to the project developer was "economic" and "may for the most part be temporary"); *see also SOS*, 408 F.3d at 1125 ("when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment") (citations and internal quotation marks omitted). The balance of harms thus tips heavily in favor of an injunction.

IV. The Court Should Impose No Bond or a Nominal Bond

If this Court enters a preliminary injunction, the Tribes respectfully request that the Court waive the bond requirement, or impose no bond or a nominal bond under the public interest exception to Rule 65(c).

Under Rule 65(c) of the Federal Rules of Civil Procedure, a plaintiff must generally post a bond "in such sum as the court deems proper." However, the "court has discretion to dispense with the security requirement, or to request a mere nominal security, where requiring security would effectively deny access to judicial review." *California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir.), amended on other grounds 775 F.2d 998 (9th Cir. 1985). Courts have consistently waived the bond requirement or imposed a nominal bond where the plaintiffs, like the Tribes here, seek a preliminary injunction to protect the public interest. *See id.* (no bond); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) ($1,000 bond).

The Tribes brought this case under the CWA and APA to protect cultural resources and jurisdictional waters. They have no pecuniary interest in the lawsuit, and a requirement of more than a nominal bond would chill the Tribes' right to seek judicial review. Decl. of Ryan Claw (Ex. 18); Decl. of Raymundo Baltazar (Ex. 19); Decl. of Wilfred Gaseoma (Ex. 20). Furthermore, the Tribes have raised serious questions on the merits, which "tips in favor of a minimal bond or no bond at all." *Van De Kamp*, 766 F.2d at 1326.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request that the Court grant the motion for a preliminary injunction.

Respectfully submitted this 15th day of May, 2019,

/s/ Draft
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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I electronically transmitted the foregoing and all attachments to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

/s/ *Stuart Gillespie*

CERTIFICATE OF COMPLIANCE

I hereby certify that the above memorandum complies with the 14,000-word limit set in this Court's Order of May 10, 2019 (Doc. #38 in 19-CV-00177-JAS).

/s/ *Stuart Gillespie*