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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

Center for Biological Diversity,)
)
Plaintiffs,)
)
v.)
)
U.S. Fish and Wildlife Service, *et al.*)
)
Federal Defendants,)
)
and)
)
Rosemont Copper Company,)
)
Defendant-Intervenor.)
_____)

No. 4:17-cv-00475-TUC-JAS [Lead]
No. 4:17-cv-00576-TUC-JAS (C)
No. 4:18-cv-00189-TUC-JAS (C)

Chief Judge: James A. Soto

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

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INTRODUCTION

Plaintiffs Tohono O’odham Nation, the Pascua Yaqui Tribe, and the Hopi Tribe (collectively, “the Tribes”) move the Court for immediate injunctive relief barring Rosemont Copper Company (“Rosemont”) from commencing the development of a new, mile-wide, open-pit copper mine southwest of Tucson. The project will ultimately disinter ancestral remains, obliterate archeological and cultural sites, and permanently scar the natural beauty of the Santa Rita Mountains. Given the important and unique resources at risk, an injunction pending the Court’s final decision on the merits of this case is necessary and appropriate.

Absent an injunction, Rosemont will begin ground-disturbing activities on the Coronado National Forest at the mine site and the utility corridor leading to the site as early as August 1, 2019.¹ Building on that foundational work, Rosemont would begin excavating archaeological and burial sites in October, ultimately removing every artifact from the mine site within four months. These activities would clear the way for mine construction, including the excavation of a mile-wide mine pit, construction of ore processing and other facilities, and the dumping of over one billion tons of waste rock

¹ Rosemont’s counsel had represented to Plaintiffs’ counsel and to the Court in the initial status conference that Rosemont would begin work at the utility corridor and the mine site as early as late June. Transcript of Status Conference at 11–14 (Apr. 18, 2019) (“Transcript”) (Ex. 1). At the May 14, 2019 status conference, and in response to the Court’s inquiry, Rosemont’s counsel represented that the company would not conduct drilling or roadwork on the mine site or corridor until August 1, 2019.

and tailings on scenic public lands prized for their natural beauty and Native American cultural value.

An injunction halting this work would maintain the status quo while the Court reviews the case on the merits and blunt the “bureaucratic steamroller” effect that occurs when project proponents continue even preliminary work pending the outcome of the case and, where required, additional agency decision making on remand. Based on the Court’s estimated timeframe for deciding the case, this may mean a few months of delay in a years-long permitting process for this complex mine proposal. At the same time, the competing values are significant, unique, and irreplaceable. As the Forest Service acknowledged, the impacts on the Tribes, and the cultural, religious, and historic importance of the site, would be “severe, irreversible, and irretrievable.” SOF ¶87.² The Rosemont Mine “would destroy [the Tribes’] historical and cultural foundation, diminish tribal members’ sense of orientation in the world, and destroy part of their heritage.” SOF ¶86. Halting ground-disturbing activities pending the Court’s review is reasonable in light of the significant values at stake and the serious questions about the legality of the Forest Service’s decision.

BACKGROUND FACTS

A. The Tribes’ Millennia-Long History of Cultural and Spiritual Traditions in the Santa Rita Mountains.

² As discussed in the Mary 14, 2019 status conference, to avoid unnecessary repetition, the Tribes cross-reference facts and arguments made in their Memorandum in Support of the Motion for Summary Judgment (ECF No. 98) (“MSJ Mem.”) and Statement of Facts in Support of Motion for Summary Judgment (ECF No. 99) (“SOF”) herein.

The Santa Rita Mountains, and the mine site in particular, has long been the focal point of a rich and vibrant Native American culture. The water resources, wildlife, native plants, and generally favorable living conditions found there have sustained the Tribes for over 10,000 years. SOF ¶8; Declaration (“Decl.”) of Arthur Wilson ¶5 (ECF No. 98-2); Decl. of Ned Norris ¶4 (ECF No. 98-3); Decl. of Peter Yucupicio ¶4 (EFC No. 98-4); Decl. of Stewart Koyiyumtewa ¶¶2–4 (ECF No. 98-6). This 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 the Tribes’ unique heritage.

The Tribes’ traditional teachings evince a powerful, enduring connection between the Tribes’ ancestors and their present-day descendants. Tribal members connect with their ancestors by, among other activities, visiting their gravesites, which represent the place where ancestors left this world and entered the spirit world. Wilson Decl. ¶6. These gravesites, which exist on and around the mine site, are profoundly sacred to the Tribes, whose teachings prohibit them from disturbing such sites for any reason. Koyiyumtewa Decl. ¶4, 7; Decl. of Daniel Vega ¶16 (Ex. 2). If the ancestral remains are removed from their original resting place, the living communication between tribal members and their ancestors will be forever lost, with severe adverse consequences. Wilson Decl. ¶6; Koyiyumtewa Decl. ¶4; SOF ¶¶11, 13–14. The ancestors’ spirits “still live in the Santa Rita Mountains. We must protect their final resting place; to do otherwise would have severe consequences.” Wilson Decl. ¶6.

Water also plays a central part in the Tribes’ cultural and religious lives. The survival of the first tribal inhabitants, and all the generations that followed, depended on

the presence of rare sources of water—including seeps and springs fed by groundwater—in the watersheds and canyons of the Santa Ritas. Vega Decl. ¶21; Decl. of Austin Nunez ¶¶4, 27 (Ex. 3). These sources of water are sacred and many of the Tribes’ members visit the seeps and springs to pray and honor their ancestors. SOF ¶¶21–22; 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.”); Wilson Decl. ¶4 (stating that “[w]ater is also a living being and must be respected for it is essential to our lives.”); Norris Decl. ¶6 (“We consider these seeps and springs sacred, and offer them blessings.”). Water resources also support lush vegetation and contribute to the natural beauty of the lands in and around the mine site.

The numerous archaeological sites at the mine site are a testament to the way that early O’odham and Yaqui people, supported by abundant wildlife, water, and native vegetation, thrived in village communities at the proposed mine site. SOF ¶¶4–6. Significant artifacts from those earlier eras remain on the site and many are readily visible, including remnants of dwellings and a rare ballcourt that evidence the rich community lives of these early people. SOF ¶¶8, 10. The Hopi Tribe consider the mine site part of their ancestral homelands as well. Koyuyumptewa Decl. ¶3. Early Hopi presence in the area of the mine site is “manifested by the ‘footprints’ of ancient villages, sacred springs, migration routes, pilgrimage trails, artifacts, and the physical remains of buried Hisatsinom, the ‘People of Long Ago.’” *Id.* All of these “mark the land as proof that the Hopi people have fulfilled their Covenant” to serve as stewards of the Earth. *Id.*

The Santa Rita Mountains are home to a diverse variety of native wildlife species that the Tribes both revere and depend upon for food. Wilson Decl. ¶4, 8. Wildlife in and around the mine site are a manifestation of the Creator’s intent; they “were placed on this land by the Creator, and it is their home, too.” Wilson Decl. ¶4. 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, 14. For example, if Tribal members “must enter the home of the jaguar or bear, we ask for their protection as these are sacred animals and must be left alone.” *Id.*; Yucupicio Decl. ¶5 (explaining that the jaguar brings protection and strength to the Yaqui people); Vega Decl. ¶5.

B. Rosemont’s Imminent Activity

With the Forest Service’s approval in hand, and the recently-issued Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (“Corps”),³ there is currently no bar—aside from final approval of minor paperwork—to Rosemont’s pressing forward with construction of the mine. Transcript at 9, 11, 13–14; Notice email from Norman James to Stu Gillespie, *et al.* (May 8, 2019) (providing notice that Rosemont would commence ground-disturbing activities on or after June 7) (Ex. 4); PI Email from Norman James to Stu Gillespie, *et al.* (May 3, 2019) (Ex. 5) (summarizing the ground-disturbing activities Rosemont intended to comment in June 2019). As of

³ In a related case, the Tribes have separately challenged the Clean Water Act permit for the mine, which was issued by the U.S. Army Corps of Engineers on March 8, 2019. *Tohono O’odham Nation, et. al. v. Helmlinger*, No. 4:19-cv-00205-TUC-JAS (D. Ariz.).

August 1, 2019, Rosemont could start road work and ground preparation for the drilling of geotechnical wells at the site. *See supra* n.1; Transcript at 11–12. Rosemont’s approximate schedule includes the excavation of archaeological sites from September 2019 to January 2020. Archaeological schedule email from Norman James, to Stu Gillespie, et al. at 2 (May 3, 2019) (“Archaeological Schedule Email”) (Ex. 6). After August 1, 2019, it could begin construction of the 13-mile long utility corridor and high-voltage power line, the 150-foot tall transmission towers, and a water pipeline from Sahuarita over the crest of the mountains to the mine site. *Id.* at 13–14; Ariz. Corp. Commn., Order Granting Certificate of Environmental Compatibility, No. 73232 (Jun. 12, 2012) (Ex. 7); Hudbay Investor Presentation at 20 (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. 8). While located on mostly private and state lands, the power line would be visible from a distance, including from Huerfano Butte, where the Tribes conduct ceremonial activities. FEIS at 801, 1042, USFSAR0237572, 0237813. In short order, the utility corridor would reach a prehistoric tribal site, which Rosemont plans to excavate. Transcript at 16; Archaeological Schedule Email at 2 (noting schedule for work in utility corridor in September). The drill holes would be located near two prehistoric sites, including a Hohokam habitation site. Transcript at 16.

Additionally, “major” ground-clearing activities at the mine site will begin as early as October. *Id.* at 11, 17. As an initial step, Rosemont would survey and clear archeological sites across the mine site, obliterating ancestral villages and desecrating

ancestral burials. *Id.* at 17. Rosemont plans to systematically clear all Native American artifacts from the area within just the first four months of construction. *See* Archaeological Schedule Email at 2. Within a year of commencing construction (i.e. by fall 2020), Rosemont intends to complete large portions of the mine pit and waste rock area, occupying hundreds of acres of public lands and permanently destroying 9.68 acres of ephemeral streams and washes that are protected under the Clean Water Act. Letter from Katherine Ann Arnold, Dir., Envir., Rosemont Copper Co., to William James, Nat'l Mining Expert, U.S. Army Corps of Eng'rs, and Deanna Cummings, Senior Regulatory Project Manager, U.S. Army Corps of Eng'rs at pdf. 3 tbl.1, pdf. 8 fig.5 (March 23, 2018) (Ex. 9).

Rosemont would continue at this pace until it completes work on the mine pit, which would be one mile wide and a half-mile deep, covering 955 acres, 365 of which would be on public lands. SOF ¶48. The pit and much of the mining would occur on lands that Rosemont's predecessor purchased from the federal government under the patenting provisions of the 1872 Mining Law. However, waste rock excavated from the pit, followed by additional mine tailings deposited during active mining, would spill out beyond Hudbay's private lands and bury 3,653 acres of Forest Service lands, converting them to a wasteland forever unusable for any other purpose. SOF ¶¶52, 56, 63, 85, 131. Toxic chemicals present in the waste rock and tailings would combine with chemicals left in the soil by earlier, smaller mining operations and travel down canyon from the site. Declaration of Julia Fonseca ¶¶25–37 (Ex. 10).

These impacts would also leave permanent physical scars. The mine site itself would never be reclaimed, with 5,431 acres of land denuded of native vegetation and obliterated by a mile-wide pit and a towering pile containing 1.2 billion tons of waste rock and mine tailings. SOF ¶¶47, 52–53, 63, 65. Ground and surface water would also be permanently impacted, including numerous seeps and springs in and around the mine site. SOF ¶¶21–24; Fonseca Decl. ¶¶24–42. Excavation of the mine would penetrate the aquifer, reversing the natural flow of groundwater towards, instead of away from, the pit and requiring continual dewatering efforts. SOF ¶69; Hudbay, Rosemont Project Form 43-101F1 Technical Report (Ex. 11). This flow of groundwater from the aquifer into the mine pit depletes groundwater that would otherwise sustain the sacred seeps, springs and riparian areas in the mine’s vicinity, leaving them depleted or dry. SOF ¶69. Ultimately, groundwater seeping into the pit would combine with surface runoff and create a lake containing toxic chemicals such as cadmium, lead, copper, mercury, selenium and zinc. SOF ¶67. After a 10,000-year history, this ancient place of beauty and history would be transformed beyond recognition.

ARGUMENT

To obtain a preliminary injunction, plaintiffs must demonstrate: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of equities favors an injunction; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In the Ninth Circuit, “‘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). “Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve ‘a fair chance of success on the merits.’” *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quoting *Nat’l Wildlife Fed’n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)). The Tribes meet all four prongs of the preliminary injunction standard; accordingly, the Court should grant their motion.

I. The Tribes have Raised Serious Questions Concerning the Forest Service’s Compliance with NEPA and the NHPA.

The Forest Service’s decision is tainted throughout by a fundamental legal error: its assumption that Rosemont has a right under the 1872 Mining Act, 30 U.S.C. § 22 *et seq.*, to dump waste rock and tailings on its unpatented claims—located on public lands—just because these activities would be incidental to the mining operations. MSJ Mem. at 25–33. To the contrary, the 1872 Mining Act does not necessarily trump all other uses of the public lands. Absent the discovery of a valuable mineral deposit, the Act confers no absolute possessory right to use public lands for mining-related operations. *See United States v. Locke*, 471 U.S. 84, 86 (1985) (explaining that “[d]iscovery’ of a mineral deposit” is a fundamental prerequisite of “the right of exclusive possession of the land for mining purposes”). MSJ Mem. at 22–27.

Here, the Forest Service approved the mine without analyzing whether Rosemont discovered a valuable mineral deposit on its unpatented claims, an enormously

consequential oversight. Without such a deposit, the Forest Service had broad authority under the Organic Administration Act of 1897 to consider protecting the natural beauty and unique cultural values at the site and rejecting or limiting Rosemont's proposal, a viable, lawful option it rejected out of hand. *Id.* at 34–36. Accordingly, the decision should be set aside because it “relied on factors which Congress has not intended it to consider [and] entirely failed to consider an important aspect of the problem. . .” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706 (2)(A) (agency decision may be set aside if not in accordance with the law).

Moreover, the Forest Service compounded its error by failing to consider reasonable alternatives, including the No Action Alternative, that would have limited or precluded the mine's impacts and by downplaying the environmental consequences of the mine. Both omissions violated the National Environmental Policy Act (“NEPA”). Tribes' MSJ at 36–44. The Service's pinched approach to its NEPA review, in turn, led it to constrain the scope of its consultation with the Tribes and reject discussion of alternatives that would protect cultural and archaeological sites from mine-related impacts. *Id.* at 44–47. This violated Section 106 of the National Historic Preservation Act. 54 U.S.C. § 306108. Thus, the Tribes have shown that they are likely to succeed on the merits, or alternatively, that they have raised serious questions on the merits.

II. Plaintiffs Will Suffer Immediate and Irreparable Harm Absent an Injunction.

Courts have recognized that “environmental 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.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007)

(citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)). Additionally, “[d]amage to or destruction of any” cultural or religious sites “easily” meets the irreparable-harm requirement. *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”).

Although some of the work, including the removal of burial and archaeological sites, is not expected to occur until October, Transcript at 17, commencing even initial work on a project creates momentum that can be prejudicial to the agency’s decision making on remand, if necessary. *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (“Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided by the Secretary.”). This irreparable procedural harm is “the primary injury that would result from allowing the proposed activities to proceed, which is the difficulty of stopping ‘a bureaucratic steam roller’ once it is launched.” *Colo. Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007). This “steamroller” effect would occur here, where Rosemont proposes to destroy cultural resources and scar the site’s natural beauty at the outset, unduly prejudicing the Forest Service’s consideration of alternatives on remand and leading the agency to once again impermissibly reject the No Action Alternative. MSJ Mem. at 37–39; *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) (holding that “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.”). Rosemont has already indicated that it will spend over \$100 million dollars in just the next six months to develop the mine, further pressuring the agencies to issue decisions allowing the mine to proceed in the event of a remand. Transcript at 19; Investor Presentation at 35.

The devastating impact of the proposed mine-related work on the Tribes is difficult to overstate. Rosemont will in a matter of months excavate gravesites, ruin the archaeological integrity of other sites, and begin the work that will ultimately transform a place of beauty and deep cultural meaning into an industrial mining complex. The high-voltage powerline from Sahuarita to the mine site would severely and adversely impact the sacred nature of nearby sites, such as Huerfano Butte, which the Tribes use for ceremonial activities, including vision quests. Nunez Decl. ¶¶11–12; FEIS at 1042, USFSAR0237813. The water pipeline running through the utility corridor will also cut through a prehistoric Hohokam habitation site. Transcript at 16; Nunez Decl. ¶14. At the same time, Rosemont would bulldoze 36 well pads and build new access roads at the mine site, clearing the land near two prehistoric sites, including a Hohokam habitation site that likely contains ancestral burials. Nunez Decl. ¶¶16–18. These activities would change the undisturbed nature of the area and damage the spirit of this sacred place. *Id.* ¶¶12–13, 19; Vega Decl. ¶12.

As the Forest Service recognized, these are “severe, irreversible, and permanent” harms. SOF ¶87. Clearing sacred sites and removal of ancestors from their final resting

places would break the Tribes' unbroken connection to their past that resides in this place. Vega Decl. ¶¶15–18; Nunez Decl. ¶¶22–23, 25. The Tribes would not be able to teach future generations about their heritage and traditional way of life in these mountains—a passage of cultural knowledge that is critical to the Tribes' well-being and continued vitality. Nunez Decl. ¶24; Vega Decl. ¶19.

The mine would “severely and irreversibly impact . . . cultural and religious beliefs, including the cultural identity” of the Pascua Yaqui tribe. Yucupicio Decl. ¶10. Mr. Yucupicio explains the harm to the Pascua Yaqui:

The Rosemont Mine will bury this sacred place under one billion tons of waste rock and tailings, forever ruining my Tribe's aboriginal lands and desecrating the burial sites of our ancestors. The mine will disturb many sites containing the remains of our ancestors, destroy additional archaeological sites containing the cultural history of the Tribe, desiccate springs and seeps considered sacred to the Tribe, displace animals and wildlife that inhabit the landscape, including the Jaguar, and turn a beautiful, living mountain into an industrial mining zone.

Id. ¶10; *see also* Vega Decl. ¶19 (describing severe and irreversible impact to cultural and religious beliefs and impairment of ability to pass on Yaqui traditions to younger generations). The proposed mine “would destroy [the Tribes'] historical and cultural foundation, diminish tribal members' sense of orientation in the world, and destroy part of their heritage.” SOF ¶86. Described by a Tohono O'odham leader as “cultural genocide,” Norris Decl. ¶2, “[t]he mine would devastate the spiritual power and cultural significance of *Ce:wi Duag*. Our connection to this area and our ancestors would be lost forever,” *id.* ¶7, 10. This level of cultural destruction “easily” meets the irreparable harm requirement. *Quechan Tribe*, 755 F. Supp. 2d at 1120; *see also Save Our Sonoran, Inc.*

v. Flowers, 408 F.3d 1113, 1124 (9th Cir. 2005) (affirming preliminary injunction because “once the desert is disturbed, it can never be restored”).

Finally, Rosemont’s construction and excavation activities would irreparably harm the Tribes’ right to meaningful consultation and unbiased consideration of the No Action, or other less harmful alternatives. *See Quechan Tribe*, 755 F. Supp. 2d at 1120 (“[I]f the tribe hasn’t been adequately consulted and the project goes ahead anyway, this legally-protected procedural interest would effectively be lost.”).

There can be no doubt that the Tribes will suffer immediate and irreparable harm without an injunction. The mine site includes lands and sites of cultural and religious significance that occur nowhere else; there is simply no replacement for the longstanding cultural and spiritual ties to the lands that would be destroyed by Rosemont’s actions.

III. The Balance of Harms Weighs in Favor of the Tribes.

Where tribal plaintiffs have shown that activities approved by a federal agency would damage archaeological and burial sites, causing the tribes to suffer irreparable cultural and spiritual harm, the balance of hardships tips in the tribes’ favor, even in the face of potential economic loss. *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (finding that balance of harms weighed in favor of injunction where proposed mine would ruin a site of religious significance to plaintiff tribes); *Quechan Tribe*, 755 F. Supp. 2d at 1121 (holding that, despite developer’s multi-million dollar investment, the balance of harms tipped in Tribe’s favor where the project would impact hundreds of prehistoric and other sites); *Comanche Nation v. United States*, 2008 WL 4426621, at * 19 (W.D. Okla. Sept. 23,

2008) (holding that the economic harm to defendant from an injunction “pale[s] in comparison to the prospect of irreparable harm to sacred lands and centuries-old religious traditions which would occur absent injunctive relief”). Here, too, the balance of equities weighs heavily in favor of the Tribes due to what would be a catastrophic loss of a site with such a high degree of rich cultural significance and natural beauty. Rosemont’s economic stake does not tip the scales in its favor.⁴

IV. The Public Interest Weighs in Favor of an Injunction to Preserve Uniquely Important Cultural Sites and Environmental Values

The strong public interest in the preservation of both important cultural sites and the environment, as well as the public interest in the federal agency’s compliance with its legal obligations, tip the balance in favor of the Tribes and support issuance of a preliminary injunction. First, there is a “well-established ‘public interest in preserving nature and avoiding irreparable environmental injury.’” *All. for the Wild Rockies*, 632 F.3d at 1138 (citation omitted). Further, the Ninth Circuit has recognized “the 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.’” *Id.* (quoting *S. Fork Band*, 588 F.3d at 728). Finally, Congress itself determined that the preservation of cultural resources and the right of Indian tribes to consultation concerning these values were in the public interest when it enacted the NHPA. *Quechan Tribe*, 755 F. Supp. 2d at 1122; *Comanche Nation*,

⁴ The Tribes have already suffered at the hands of a mining company that excavated over 90 gravesites at the Rosemont site and then abandoned the mine project. Nunez Decl. ¶15. They should not be put at further risk of harm pending resolution of this case.

2008 WL 4426621 at * 20 (same); *Colo. River Indian Tribes*, 605 F. Supp. at 1440 (recognizing the strong public interest in the preservation of Native American cultural sites). These three considerations all weigh in favor of finding that an injunction would serve the public interest here.

Additionally, the Corps Los Angeles District expressly concluded that granting a Clean Water Act permit to Rosemont was contrary to the public interest due to “adverse effects to cultural resources and traditional cultural properties important to tribes.” Letter from Colonel D. Peter Helmlinger, Commander, South Pacific Division, U.S. Army Corps of Engineers, to Patrick Merrin, Vice President, Hudbay Minerals, Inc. (Dec. 28, 2016) (Ex. 12). While the Corps ultimately granted Rosemont the Clean Water Act permit and reversed the District’s determination, it failed to explain its reversal of the public interest determination.⁵ Pima County also opposes the mine due to a litany of concerns about its adverse environmental impacts. Pima Co. Resolution Opposing the Proposed Rosemont Mine and its Impacts (Apr. 16, 2019) (Ex. 13); County Administrator C.H. Huckelberry Memorandum to Pima Co. Board of Supervisors (April 10, 2019) (Ex. 14) (documenting Hudbay’s failure to adequately mitigate the environmental impacts to sensitive county property downstream of the Rosemont mine and noting that Outstanding Arizona Waters will be degraded).

The Tribes have demonstrated that the public interest weighs in favor of an injunction.

⁵ The Tribes challenge this error in *Tohono O’odham, et al. v. Helmlinger, et al.*, 4:19-cv-00205-TUC-JAS (D. Ariz.).

V. 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). While a plaintiff must generally post a bond “in an amount that the court considers proper,” Fed. R. Civ. P. 65(c), the “court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review,” *Cal. ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir.), *amended on other grounds by* 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 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. 15); Decl. of Raymundo Baltazar (Ex. 16); Decl. of Wilfred Gaseoma (Ex. 17). 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/ Heidi McIntosh

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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/ Heidi McIntosh

CERTIFICATE OF COMPLIANCE

I hereby certify that the above memorandum complies with the 17-page limit set in LR Civ. 7.2(e)(1).

/s/ Heidi McIntosh