Comments on the Environmental Assessment for Resolution Copper Mining Pre-feasibility Activities Plan of Operations by the Arizona Mining Reform Coalition, the Grand Canyon Chapter of the Sierra Club, EARTHWORKS, the Concerned Citizens and Retired Miners Coalition, and the Center for Biological Diversity

April 30, 2009

Resolution Copper Mining Pre-feasibility Proposal
Forest Supervisor's Office
Tonto National Forest
2324 East McDowell Road
Phoenix, Arizona 85006

Dear Team Leader,

Please accept and review the following comments on the Environmental Assessment the Tonto National Forest has prepared for Resolution Copper Mining's Pre-feasibility Activities Plan of Operations. All of the previous comments submitted by the signatore groups, including all members of the Arizona Mining Reform Coalition (and associated individuals) related to Resolution Copper's activities or proposals are hereby incorporated by reference as if fully set forth herein.

We urge to Forest Service to choose the No-Action Alternative and deny this POO. Alternatively, the Forest Service should prepare an EIS to examine in greater detail the problems with this proposal.

The **Arizona Mining Reform Coalition** works in Arizona to improve state and federal laws, rules, and regulations governing hard rock mining to protect communities and the environment. We work to hold mining operations to the highest environmental and social standards to provide for the long term environmental, cultural, and economic health of Arizona. Members of the Coalition include: The Grand Canyon Chapter of the Sierra Club, Earthworks, Save the Scenic Santa Ritas, The Dragoon Conservation Alliance, the Groundwater Awareness League, Concerned Citizens and Retired Miners Association, the Center for Biological Diversity, and the Sky Island Alliance.

The **Sierra Club** is America's oldest, largest and most influential grassroots environmental organization. Inspired by nature, the Sierra Club's 800,000 members—including 14,000 in Arizona—work together to protect our communities and the planet. The Sierra Club's Grand Canyon Chapter is very engaged in public lands management and protection in Arizona and our members have specifically been involved in working to protect this area from mining and other activities. Our members recreate in the area including hiking, wildlife viewing, climbing, and other activities. We have a significant interest in this proposed mine, including in this pre-feasibility proposal and the related exploration activities. We are concerned about the

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significant negative and unmitigable impacts it will have on the air, land, wildlife, and water of the area, as well as the loss of recreational opportunities associated with it.

EARTHWORKS is a non-profit, non-partisan environmental organization dedicated to protecting communities and the environment from the adverse impacts of mineral development. Our national office, based in Washington D.C., provides support to citizens across the country and around the world. Our field office in Montana assists communities throughout the western United States concerned about the impact of mineral development in their backyards. EARTHWORKS works to protect communities and the environment from the impacts of destructive mining, digging, and drilling.

The **Concerned Citizens and Retired Miners Coalition** is a group of citizens who: 1) reside in Superior, Arizona, or do not reside in Superior, Arizona, but are affiliated with relatives who are residents; 2) are retired hard-rock miners who previously worked in the now non-operational mine in Superior, Arizona, and were displaced due to mine closure or personal disability; or 3) are individuals who are concerned that important U.S. public recreational land will be conveyed to a foreign mining company for private use. The Coalition is not opposed to mining. In fact, it strongly supports responsible mining practices in and around its community of Superior, Arizona. However, we oppose the federal land exchange bill S. 409 because it proposes to hand over Oak Flat Campground to Resolution Copper Company without the necessary potential health, water and environmental impacts analysis under the National Environmental Policy Act (NEPA). This is public land, and the public must be heard openly and fairly under the NEPA process.

Center for Biological Diversity ("CBD") is a nonprofit corporation with its primary office in Tucson, Arizona, and with other offices throughout the United States. CBD is actively involved in species and habitat protection issues throughout North America and the World, with over 40,000 members. CBD's members (including its staff) include Arizona residents with biological health, educational, scientific research, moral, spiritual, aesthetic, and recreational interests in the protection of the Oak Flat and Apache Leap area ecosystem.

Background

This proposal was prepared by Resolution Copper Company, a wholly-owned subsidiary of foreign mining giants Rio Tinto and BHP (Henceforth referred to as Rio Tinto/BHP) to move beyond exploration into actual assessment of a major mine proposal. The project would take place in an area that includes portions removed from mineral entry, heavily relied on by other forest service users, and in an area critically important to the cultural and spiritual wellbeing of Native American Tribes.

An EIS Must Be Prepared

Based on the sensitive nature of the ecosystem involved, the presence of the Oak Flat Campground as a 760 acres parcel that was withdrawn from mineral entry and mining activities by Executive Order in 1955, the clear indication by the Forest Service that a mine proposal is a likely outcome of this action, and the clear indication that the entire Oak Flat / Apache Leap Landscape is of critical importance to the religious and cultural survival of Native American Tribes, an Environmental Assessment is not adequate. Instead, the Tonto National Forest must find that an Environmental Impact Statement should be prepared for these activities.

Federal court precedent, as well as Forest Service and NEPA regulations state that if a project "*may* have a significant effect upon the ... environment, an EIS must be prepared." National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001)(emphasis in original). The decision not to prepare an EIS must be accompanied by "a convincing statement of reasons to explain why a project's impacts are insignificant." Id. In addition, as the Forest Service points out in Section 1.5 of the EA, if the Environmental Assessment shows that the proposal is of a unique nature and is clearly precedent setting for the Agency, an EIS must be prepared.

As the federal courts have stated:

> A plaintiff seeking to show that an agency should have prepared an EIS instead of a FONSI "need not demonstrate that significant effects *will* occur," but rather must show only that "there are *substantial questions* whether the project may have a significant effect of [sic] [on] the environment." *Anderson [v. Evans*], 350 F.3d 815, 831 (9th Cir. 2003).

Western Land Exchange Project, 315 F.Supp.2d at 1087 (emphasis in original). "If several actions taken together have a cumulatively significant effect, this must be analyzed in an EIS. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998)." Western Land Exchange Project, 315 F.Supp.2d at 1094. In determining whether the cumulative and other impacts may result in a significant effect to warrant preparation of an EIS:

> The regulations also define "significantly" as involving "considerations of both context and intensity." 40 CFR § 1508.27. In terms of context, "[s]ignificance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend on the effects in the locale rather than in the world as a whole." 40 CFR § 1508.27(a). Both the short-term and long-term effects of an action are relevant to context. *Id*. With respect to intensity, the regulations set forth a number of factors to be considered in evaluating "the severity of the impact," several of which are directly relevant here [among others]: …
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> (3) Unique characteristics of the geographic area **such as proximity to historical or cultural resources, park lands** ….
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. **Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment**. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or **eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources**.

Id. at 1086-87, *quoting* 40 CFR § 1508.27(b) (emphasis added). *See also* 40 CFR § 1508.27(b)(4), noting that "highly controversial" effects signal the need for an EIS; other "intensity" factors listed in § 1508.27(b).

In this case, based on the unique environmental and recreational resources that will be impacted by the project, as well as the significant cultural and religious resources at risk from the project, the issuance of

a FONSI violates NEPA. These impacts are in addition to the EA's failure to fully review the cumulative, direct, and indirect impacts from this and other connected, related, and reasonably foreseeable future actions.

The Oak Flat Withdrawal Area (OFWA) was created by Public Land Order (PLO) 1229 in 1955 and amended by PLO 5132 in 1971 to withdraw the campground from mining. This proposal would allow the withdrawn area be impacted by noise, light and other pollution from drilling locations directly adjacent to the withdrawn area. Truck traffic would occur within the withdrawn area to reach drilling sites adjacent to the OFWA which would require the "improvement" of roads within OFWA that would not be required if this proposal was not allowed. We are not convinced that mitigation measures proposed in the EA to avoid Rio Tinto/BHP's intrusion into the OFWA by directional drilling would be successful. Further, this proposal would allow mining related activity within the OFWA. This is in clear violation of the PLO 1229 and 3152. These impacts must either not be allowed and an EIS must be prepared to look at these impacts in greater detail.

There is a body of documentation about the sensitive nature of the Oak Flat / Apache Leap environs that would be impacted by this proposal that was not cited in this EA that the Tonto National Forest should have known about and included. For example, the Maricopa Audubon Society commissioned a study (attached) called *Vegetation and Wildlife Survey of Devil's Canyon, Tonto National Forest* prepared by: Sky Jacobs and Aaron Flesch that studies the wildlife and vegetation in and around Devil's Canyon. There needs to be more extensive investigation of the environment that would occur if an EIS was prepared.

Comments prepared during the scoping phase of this EA and other documents known to exist by the Forest Service show the critical spiritual and cultural importance of this area to Native American Tribes. The Tonto National Forest has a trust responsibility to exhaustively protect human rights and religious freedom of Indian Tribes that behooves the preparation of more extensive analysis than afforded by this EA.

The Forest Service states in section 1.3 of the EA that, "The purpose of the Pre-feasibility Plan of Operations is to gather and evaluate geologic, geotechnical, and hydrologic data to support pre-feasibility studies being conducted by RCM for their *planned development* of a deep copper ore deposit." (*Emphasis added*.) Again in Section 1.4 the Forest Service states, "The activities considered, all of which are associated with RCM's *ultimate goal of developing* a new underground copper mine…" (*Emphasis added*.) Yet, the Forest Service concludes that any analysis of this planned development itself is not warranted as part of the EA. This is clearly not consistent and an EIS should be prepared that includes an analysis of this planned development, along with all other past, present, and reasonably foreseeable future activities in the area.

At the very least, a public comment period of at least 30 days must be provided before the decision becomes final.

The Forest Service Misapplies Federal Mining and Public Land Law

The Forest Service states in Section 1.3, 1.4, and 1.5 that it must approve this Plan of Operations (POO) according to the 1872 Mining Law. This is not correct. While the 1872 Mining Law makes it very difficult to deny a proper Plan for exploration, when a mine company moves from exploration to mine planning, which by definition Pre-feasibility is the first stage, the Forest Service has an obligation to fully review the impacts from mine development and assure itself and the public that the operation

complies with applicable laws and regulations. For example, for mine development, operations proposed on lands that are not covered by valid mining/millsite claims are not covered by the Mining Law. *See* Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 46-48 (D.D.C. 2003).

In the converse, if the Forest Service believes that pre-feasibility is still exploration, then it is clear that the company is prohibited from entering the withdrawn area for activities related to mineral exploration or development. This is because no activities related to mineral exploration are allowed in the withdrawn area, due to the fact that there are no claims within the withdrawn area that were valid on the date(s) of withdrawal. "In order for the claimant to show that he has a legal right to mine the claim, the evidence must show that a discovery existed within the boundaries of the claims at the time of withdrawal. *United States v. Boucher*, 147 IBLA 236, 242-43 (IBLA 1999)." Ernest K. Lehmann v. Salazar, 2009 WL 659673 at *1 (D.D.C. 2009). *See also* United States v. Gunsight Mining Co., 5 IBLA 62 (1972).

Further, based on the current applicability of the withdrawal, approval of any activities that rely on the removal of the withdrawal (*e.g.*, via the land exchange, etc.) for their eventual justification is not allowed. For example, it appears that the Tunnel Characterization Boreholes are related to future tunnels underneath the OFWA. Since any activities on or under the OFWA are not permissible, these boreholes, and any other project activities that would require the removal of the withdrawal, are not logical at this time. The agency cannot permit activities under the guise of the Mining Law, or any other law, whose utility/usefulness is based on the occurrence of speculative future events.

It appears that the alignment of the two tunnel routes that Rio Tinto/BHP is investigating would place either or both of the tunnels under the withdrawn area. If this is the case, the boreholes cannot be allowed. There is no legal purpose for investigating the location for a tunnel under an area where it would be illegal to place a tunnel. Rio Tinto/BHP must show conclusively that any tunnel testing would not involve a route under the withdrawn area.

The Forest Service Improperly Dismisses/Fails to Review Connected Actions and Fails to Review the Direct, Indirect, and Cumulative Impacts of All Past, Present, and Reasonably Foreseeable Future Actions.

In Section 1.5, the EA lists a series of possible connected actions that the Forest dismisses in each case. Several of these actions are clearly connected, related, or cumulative actions.

Connected action number 2, *No. 9 Shaft Dewatering and Development of a New Shaft*, is clearly a connected action. Rio Tinto/BHP has state numerous times that the purpose of dewatering the No. 9 shaft is to use the shaft to conduct further drilling to delineate the ore body and technical details. If the No. 9 shaft were to exist on public land, de-watering and used of the shaft for testing would clearly be part of this POO. Just because the No. 9 shaft is on land expropriated from the public by patenting under the 1872 Mining Law does not preclude the necessity of the Forest Service taking a closer look at the de-watering for what it is – part of the general pre-feasibility testing plan by Rio Tinto/BHP. Segmenting out part of the pre-feasibility testing plan regarding to land ownership is not acceptable. The Forest Service has the clear duty to look at activities off the public lands that would impact public resources.

NEPA regulations specifically require an analysis of the impact on the environment "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other

actions." 40 CFR § 1508.7. Thus, the fact that some of the activities will occur on private lands does not eliminate NEPA's requirement that the Forest Service analyze the environmental impacts of those private land activities. Indeed, the 9th Circuit Court of Appeals (which includes Arizona) recently decided this issue and squarely held that a federal agency is required to analyze the cumulative and connected impacts occurring on private land, even if that activity does not require federal agency approval. Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 757, 815-815 (9th Cir. 2005). There, the Court specifically held that federal agencies must consider the cumulative impacts associated with off-site and private land activities.

Similarly, item number 3, *MARRCO Pipeline* is a connected action. The only reason that the pipeline exists is for the purpose of disposal of water from the de-watering of the No. 9 shaft. The main reason for the de-watering of the No. 9 shaft is for testing and development of a mine. The only way to de-water the shaft is to dispose of the water. There is a clear cause and effect of all of these actions and a clear need and sequence of events that connect all of these actions to the proposed plan. As we discuss later in these comments, water taken from the No. 9 shaft would be used at several drilling locations proposed in the POO. It defies logic to conclude that taking water from the NO. 9 shaft for drilling and dust control as proposed in the plan does not make the de-watering a connected action.

Items 4 and 5 regarding pre-feasibility and exploration activities on state and private land are also connected actions. Several of these locations are accessed by traveling through public lands (indeed even through the OFWA in some cases) and there will be impacts from accessing these sites during this proposed action. To segment out these plans is improper as there is no question that it would add to the cumulative impact of this proposed POO.

Item 6, *Development of the Deep Copper Ore Body* is also a connected action. As stated by the Forest Service, and noted above, the ultimate goal of this POO is the development of a mine. To deny any connection between these actions is a highly artificial construction that serves no purpose. Indeed it is a violation of the Forest Service's goal of protecting the environment and serving people to deny any connection between this proposed action and a mine. The Forest Service has an obligation to begin to discuss the impacts a mine would have on the Tonto National Forest whether or not Rio Tinto/BHP is forthcoming with details of their mine plan.

For each of these activities, they are either connected, related, or cumulative actions which must be fully analyzed in this NEPA document.

In addition and in the alternative, to comply with NEPA, the Forest Service must consider all direct, indirect, and cumulative environmental ***impacts*** of the proposed action. 40 CFR § 1502.16; 40 CFR § 1508.8; 40 CFR § 1508.25(c). Direct effects are caused by the action and occur at the same time and place as the proposed project. 40 CFR § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR § 1508.8(b). Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. Cumulative effects are defined as the impacts resulting from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions. 40 CFR § 1508.7. Cumulative impacts result from individually minor but collectively significant actions taking place over a period of time. Id.

Here, the cumulative impacts from these activities must be fully analyzed. *See* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971-974 (9th Cir. 2006)(requiring agency to provide "objective quantification

of the impacts" from all "reasonably foreseeable" mining projects in the area.). In this case, since the EA acknowledges that future mine development (and the other projects discussed above) are at least "reasonably foreseeable," the agency must analyze the quantitative impacts from all of these projects in one NEPA document. Thus, even if the agency believes these activities are not "connected actions," or related actions, the agency must review all of the impacts from these activities under its NEPA duties to review all "cumulative impacts."

The Forest Service Improperly Allows Mining Activities Within the Oak Flat Withdrawn Area.

Section 2.1.2 outlines the Forest Service's Proposed Action. The EA outlines numerous intrusions, both direct and indirect, into the Oak Flat Withdrawn Area. As noted above, this violates PLO 1229 and 5132, as well as federal mining and public land law.

For example, on page 37 of the EA, the Forest Service states that Rio Tinto/BHP would continue to maintain the existing roads to access drill site M and an existing drill site on State lands south of the withdrawn boundaries. Maintenance of roads within the withdrawn area for mining activities by a mining company must immediately be halted. In addition, road maintenance cannot be allowed by this Plan. We wonder how a user-created road created by a mining company could possibly exist within an area clearly withdrawn from mining!

The Forest Service must explain how it allowed the illegal drilling of a test well by Rio Tinto/BHP within the withdrawn area. Approval for this illegal activity must be immediately ended and the well completely reclaimed. The drilling and continued use of this well by Rio Tinto/BHP is clearly a violation of PLO 1229 and 5132.

Water Management

The EA would allow Rio Tinto/BHP to use water taken during the dewatering of the No. 9 shaft for dust suppression and drilling. As we discussed earlier in our comments, this clearly makes the dewatering a connected action that should be studies in a comprehensive EIS. Further however, this EA does not examine the polluted character of this water and the potential for contamination of the ecosystem and groundwater by using this source. In addition, the EA should further study the impact of using at least 6,000 gallons per day from the area's water table. There needs to be much more discussion of both water quality and water quantity from the preferred alternative.

Rio Tinto/BHP should remove all cuttings and mud from the Forest as dispose of them in an environmentally responsible manner.

All New Road should be completely Obliterated during Reclamation

The EA calls for new user created roads to be closed simply by constructing an earthen berm at the start of these roads. This is not acceptable. User created roads should be completely obliterated using accepted best practices during reclamation. Care should be taken during the scope of this Plan to make sure that the public does not use these roads and create a pattern of use that will be hard to break.

Access to Dill site PVT-7 would turn a trail into a 4-wheel drive road. The closure procedures outlined for reclamation of this new road is not sufficient to prevent public access to this road. Either the road must not be constructed, or the road needs to be completely obliterated upon reclamation. Further, Rio Tinto/BHP must assure that the public, other than non-motorized traffic, have no access to this road.

Noxious Weed Management

Rio Tinto/BHP need to document at least quarterly the cleaning and inspecting of equipment to make sure they do not transport noxious weeds. Once a year is not enough. The cleaning and inspecting of equipment to avoid the spread of noxious weeds and the resulting documentation should apply to all vehicles used for drilling and testing.

Night Light Effects

Drilling should take place only during daylight hours in areas where night light would be visible to the public from the Oak Flat Withdrawal Area and existing hiking trails and other camping areas. At a minimum, the Plan should specify that dark sky standards be the minimum standard for night operating conditions.

Travel Within the Withdrawn Area

The only travel when conducting mining activities as part of this plan should be on the paved Magma Mine Road. Use of the withdrawn area for mining activities violates PLO 1229 and 5132.

Additional Drill Monitoring Needs to Be Done to Prevent Drill Incursion into the Oak Flat Withdrawn Area

An Annual inspection of Rio Tinto/BHP records is not sufficient to prevent incursion into the OFWA by directional drilling. An independent third party should inspect drilling records weekly at every location near the OFWA and should have the authority to immediately suspend operations if any suspicious activity is found. Rio Tinto/BHP has a pattern of violating the withdrawn area and simply cannot be trusted to provide only annual documentation with no independent on the ground verification.

Helicopter Access to drilling sites improperly Rejected

One of the alternatives rejected in the EA is to access drilling locations that either are proposed on state or private lands and would require road access through the Forest or for drilling locations that would require the building of additional roads. There is no real rationale given for this decision other than it was "impractical." The use of helicopter should be given more credence as it would prevent long term disturbance of the area by the creation of additional new roads that may or may not be adequately reclaimed.

Lack of Consultation with Native American Tribes and Individuals

The Forest Service seems to recognize in Section 3.9 that it has a duty to Consult on a Government to Government to basis under NHPA as part of this process. However, the Forest Service erroneously believes that simply sending letters to Tribal Governments constitutes consultation under NHPA. Such a truncated consultation process violates the NHPA and its implementing regulations.

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as approval of this project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those

properties that may be eligible for listing. *See* Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2). *See also* Pueblo of Sandia, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

Here, the agency failed to properly ascertain the historical, cultural, and religious properties and values of the lands that will be affected by the project and related activities, as well as failing to properly ascertain the impacts (including cumulative impacts) of the project on these resources. The agency also failed to properly consult with the potentially affected Tribes.

Native American Religious Practices

While the Forest Service acknowledges its duty to apply Executive Order 13007 to this action, it rejects out of hand any duties under this order despite comments from the San Carlos Apache Tribe stating that "Oak Flat, Apache Leap, Devil's Canyon and the related canyons, geological formations, and springs in the area of proposed activity are holy, sacred, and consecrated lands." Instead of summarily rejecting this information, the Forest Service should have taken its duty to fully consult seriously and work with effected Tribes to understand more fully the nature of the objections and consequences of this proposal on their religious practices. There is a great deal of work here to be done by the Forest and again points to why further study is needed before approving this POO.

Failure to Comply with Forest Service Regulations and the Organic Act

In addition to the above-noted failures, the EA and proposed action violates the Forest Service's duties to minimize adverse impact to public land resources under the Organic Act of 1897 and its implementing regulations at 36 CFR Part 228. For example, by rejecting alternatives that would reduce the environmental impact (such as alternatives that would not approve/include individual aspects of the project such as activities within the OFWA, the tunnel boreholes, etc.) (see above and previous comments by the groups), the agency has not minimized the project's impacts. Of course, this also violated NEPA's duties to fully analyze all reasonable alternatives.

Even if some subset of activities may be approved under the Mining Law (a much smaller set of activities than argued by the agency and the company), approval of all of the activities violates these mandates.

Sincerely on behalf of the Arizona Mining Reform Coalition, the Grand Canyon Chapter of the Sierra Club, EARTHWORKS, the Concerned Citizens and Retired Miners Coalition, and the Center for Biological Diversity,

Roger Featherstone
Director, Arizona Mining Reform Coalition