

Nos. 19-17585 and 19-17586

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs/ Appellees,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendants/ Appellants,

and

ROSEMONT COPPER COMPANY,

Intervenor-Defendant/ Appellant.

Appeal from the United States District Court for the District of Arizona
Nos. 4:17-cv-00475, 4:17-cv-00576, and 4:18-cv-00189
(Hon. James A. Soto)

**AMICI CURIAE BRIEF OF THE NATIONAL CONGRESS OF
AMERICAN INDIANS, INTER-TRIBAL ASSOCIATION OF ARIZONA,
ASSOCIATION OF AMERICAN INDIAN AFFAIRS, AND TWO
FEDERALLY RECOGNIZED TRIBAL NATIONS IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1(a), Amici Curiae National Congress of American Indians (“NCAI”), Inter-Tribal Association of Arizona (“ITAA”), Association on American Indian Affairs (“AAIA”) state that they are independent non-profit organizations, with no parent corporation or publicly held companies that own 10% or more stock in the organizations.

Date: September 18, 2020

NATIVE AMERICAN RIGHTS FUND

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INTERESTS OF AMICI CURIAE¹

The National Congress of American Indians (“NCAI”), Inter-Tribal Association of Arizona (“ITAA”), Association on American Indian Affairs (“AAIA”), and two federally recognized Tribal Nations (collectively “Amici Curiae”) submit this Amici Curiae brief in support of Plaintiff-Appellees and affirmance of the District Court.

The National Congress of American Indians (“NCAI”) is the oldest, largest, and most representative organization comprised of American Indian and Alaska Native tribal governments and their citizens. NCAI serves as a forum for consensus-based policy development among its member Tribal Nations from every region of the country. Its mission is to promote better education about the rights of Tribal Nations and to improve the welfare of American Indians.

ITAA is an intertribal organization comprised of twenty-one federally recognized Tribal Nations with lands located primarily in Arizona, as well as in California, New Mexico and Nevada. Founded in 1952, ITAA is a united voice for tribal governments on common issues and concerns. The representatives of ITAA

¹ No party’s counsel authored this brief, in whole or in part, and no party or party’s counsel made a monetary contribution to fund the preparation or submission of this brief. No person other than amici curiae, its members, or their counsel made a monetary contribution to preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4). All parties have consented to the filing of this brief.

are the highest elected tribal officials from each Tribal Nation, including tribal chairpersons, presidents, and governors.

AAIA is the oldest nonprofit American Indian and Alaska Native advocacy organization and is governed by an all-Native American board of directors. One of its priorities is to advocate for the protection of Native American lands as well as environmental resources and sacred and cultural places. AAIA's work in this area includes training and technical assistance to Tribal Nations and the general public. It also actively participates in legally required environmental and cultural review processes by providing comments and legal assistance to Tribal Nations.

The Gila River Indian Community and the Salt River Pima-Maricopa Indian Community are federally-recognized tribal governments and have inhabited and relied upon the lands in question from time immemorial. Both of the tribal amici ascribe great cultural and religious significance to the Santa Rita Mountains including the area the Rosemont Mine (also referred to herein as "Rosemont") proposes to destroy.

Amici Curiae share an interest in maintaining the federal government's fiduciary duty to protect the health and welfare of Tribal Nations, including the natural and cultural resources necessary to sustain them. Amici Curiae offer critical context regarding the grave consequences of disregarding tribal rights and the

necessary role courts play in the accountability of the federal government to Tribal Nations.

INTRODUCTION

The Santa Rita Mountains, located in the Coronado National Forest, are home to vast natural resources, including pristine high desert streams and endangered species such as the jaguar. The mountains are also a central thread in the spiritual and cultural fabric of Native Americans and the federally recognized Tribal Nations located in the region since time immemorial. To this day, tribal people visit the Santa Rita Mountains to gather cultural resources, including beargrass and yucca that are used to make their renowned baskets. Pls.-Appellees' Joint Suppl. Excerpts of R. 4SER647-49, ECF No. 39-4. The mountains are home to ancestral village sites, burial grounds, and archeological artifacts. They provide to Tribal Nation citizens in the region a source of medicine, subsistence and a spiritual place of being. Pls.-Appellees' Joint Suppl. Excerpts of R. 1SER42, ECF No. 39-1. In all, the Santa Ritas form an unbroken connection between modern day Native American religious and cultural practices, and their ancestors who walked the land long before the formation of the United States.

The Santa Rita Mountains are also, however, home to a resource coveted by the modern world: precious minerals. The proposed Rosemont Mine is a mineral deposit containing copper, molybdenum and silver. However, the deposit is low

grade, meaning the mine must extract over one billion tons of waste rock and nearly 700 million tons of tailings in order to extract these valuable minerals. This waste material must go somewhere. The United States Forest Service, who owns the public land adjacent to Rosemont, illegally determined that the Santa Rita Mountains were an acceptable location for the disposal of Rosemont's waste based upon the Service's unfounded assumption that Rosemont had a right to dump its waste on the public lands under the Mining Law.² In so doing, 2,447 acres of the Coronado National Forest—which contain no precious minerals but are home to the myriad cultural and natural resources of the surrounding Tribal Nations—will be lost forever.

Sadly, Rosemont is not a unique situation for Tribal Nations. The United States has a long and ignominious history of developing public lands at the expense of Tribal Nations and tribal citizens. Congress clearly has acted to identify and protect tribal resources from the destruction of past practices as evidenced through the enactment of several laws over the years. In practice, however, federal agencies often bend the application of such laws to the point of failure resulting in the permanent loss of resources vital to tribal cultural survival, solely to benefit non-Indian economic interest.

² For more discussion regarding occupancy rights on public lands under the Mining Law of 1872, see Tribal Appellee's Answering Br. 6-7, ECF No. 38.

ARGUMENT

I. FEDERAL PUBLIC LANDS WERE CREATED FROM THE CEDED AND TRADITIONAL TERRITORIES OF NATIVE NATIONS AND ARE HOME TO COUNTLESS TRIBAL TRADITIONAL AND CULTURAL RESOURCES

A. Native Americans Have Carried Heavy Burdens Caused by Extractive Industries and Natural Resource Development, While Non-Indians Have Realized the Benefits

The federal government has a long history of approving activities on federal land without due consideration of tribal rights and over the objections of Tribal Nation governments. These projects have come at great cost to Tribal Nations—harming the health of tribal citizens, damaging tribal natural resources, sacred places, and disregarding treaty rights. At the same time, the benefits of these projects have not inured to Tribal Nations and their citizens, whose drinking water, roads, and other infrastructure is either nonexistent or in shambles. *See* U.S. COMM’N ON CIVIL RIGHTS, *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 165-66 (2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>. Every single Tribal Nation has a story of federally approved destruction—often several. NAT’L CONG. OF AM. INDIANS, *NCAI COMMENTS ON TRIBAL TRUST COMPLIANCE AND FEDERAL INFRASTRUCTURE DECISION-MAKING* 3 (2016), <https://www.achp.gov/sites/default/files/2018-05/NCAI%20Comments%20-%20Tribal%20Trust%20Compliance%20and%20Federal%20Infrastructure%20DecisionMaking.pdf>.

Examples abound of federal agencies approving projects and activities without due consideration of tribal interests. The results often lead to decades long legal battles. For example, in the early 1980s the Forest Service approved oil and gas leasing in the Badger-Two Medicine Area, located within the Blackfeet Nation's ceded territory. The Badger-Two Medicine Area is where "the Creator introduced the Blackfeet to healing trees, bushes, and plants, and taught them how to seek the Creator and other spirits." *Solenex LLC v. Bernhardt*, 962 F.3d 520, 522-526 (D.C. Cir. 2020). It is an important ceremonial location and contains countless tribal artifacts and resources. *Id.* It took more than 30 years of litigation, and an intervening Act of Congress, for the United States to recognize that the government's initial lease approvals never took the Tribe's rights and interests into account. *Id.* Finally, in 2016, the Secretary of the Interior administratively canceled the remaining oil and gas leases as unlawfully issued. *Id.*

Unfortunately, the United States' reversal of course is more the exception than the rule. The failure to protect the San Francisco Peaks illustrates this point. Since time immemorial, the San Francisco Peaks have been the center of religious life for Native Americans of the Southwest. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1113 (9th Cir. 2008) (Fletcher, J., dissenting). For the Navajo, the four sacred mountains of the Peaks are the Mother of the Navajo people and play a role in every Navajo religious ceremony. *Id.* at 1100. In nearly every Navajo household, there are

medicine bundles that represent the Peaks and contain stones, herbs, shells and soil from the four sacred mountains. *Id.* According to the Hualapai people, the Earth was once deluged with water and they put a young girl on a log for her survival. She landed alone on the Peaks, where she bathed in the water and birthed twin warriors, from whom all Hualapai descend. *Id.* at 1101. Similarly, the Havasupai people come from the peaks, the tribe having been founded by a grandmother who survived a flood there. *Id.* at 1102.

The land that the San Francisco Peaks occupy was forcibly taken from Native people by the United States and is now part of the Coconino National Forest in Northern Arizona. *Id.* at 1064, 1113. Situated on the highest peak, Humphrey's Peak, is the Snowbowl ski area, which is privately operated pursuant to a special use permit issued by the Forest Service. *Id.* at 1064. Over the decades, Tribal Nations have struggled to gain consistent access to the area and have objected to uses and activities at Snowbowl that would destroy the ability of Native Americans to worship, including the expansion of operations and the use of treated sewage effluent for making artificial snow. *Id.* at 1064-66.

While the government has frequently neglected tribal rights in land use decisions, it has also targeted Native American sacred sites for destruction as part of a larger campaign to terminate tribal existence. *See* Sen. Daniel K. Inouye, *Discrimination and Native American Religion*, 23 UWLA L. Rev. 3, 14 (1992); John

Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13, 22-23 (1991). A prime example is the sacred Pipestone Quarry in Minnesota. This was a site of great importance for Tribes in a thousand-mile radius, and was under the protection of the Yankton Sioux, who in their treaties “took particular pains to ensure its sanctity.” INTERAGENCY TASK FORCE, REPORT TO CONGRESS ON THE IMPLEMENTATION OF AIRFA, 14 (1979) (“AIRFA Report”), <http://files.eric.ed.gov/fulltext/ED190329.pdf>. In 1891, at the behest of federal officials and missionaries who wanted to destroy its value as a sacred site, portions of it were deliberately blasted during railroad construction in order to render it useless for ceremonial purposes. *Id.*

A major driver of the taking and destruction of Native American sacred places has been a hunger to exploit the natural resources. This was unquestionably the motivation for the taking of the Black Hills. That area was within the Great Sioux Nation’s territory pursuant to the 1851 and 1868 Fort Laramie treaties, and the United States promised to protect the Tribes from non-Indian incursions. 11 Stat. 749 (1851); 15 Stat. 635 (1868); *see also United States v. Sioux Nation of Indians*, 448 U.S. 374, 374-75 (1980).

The 1868 treaty settled decades of warfare, and peace followed until vast quantities of gold and silver were discovered in the Black Hills. *Id.* at 376. The United States failed to protect the Great Sioux Nation’s rights to the Black Hills,

believing such efforts to be futile. *Id.* at 378. When the Great Sioux Nation refused to sell the Black Hills, which they regarded as sacred lands, the United States unilaterally abrogated the 1868 Treaty, and effectively stole the Black Hills away from them. *Id.* at 382-83; *see also* 19 Stat. 254 (1877).

The cost to Tribal Nations can span vast geography and persist decades after non-Indians have extracted their wealth. A recent example is the August 5, 2015, Gold King Mine spill of at least three million gallons of acidic, mine-impacted waters. This toxic waste was first released into the Animas River in Colorado and then naturally made its way into the San Juan River, which runs through hundreds of miles of Navajo Nation land. This spill originated from a collapsed mine structure abandoned after it was no longer economically viable. Today the Animas River system is one of many systems where hundreds of old and abandoned mines leak throughout the region. *See* EPA, EPA/600/R-16/296, ANALYSIS OF THE TRANSPORT AND FATE OF METALS RELEASED FROM THE GOLD KING MINE IN THE ANIMAS AND SAN JUAN RIVERS (2017), <https://www.epa.gov/goldkingmine/fate-transport-analysis>; Maeve Reston, *First on CNN: Navajo Nation Sues EPA Over Toxic Mine Spill*, CNN (Aug. 17, 2016, 10:46 AM), <http://www.cnn.com/2016/08/16/politics/navajo-lawsuit-epa-animas-river/index.html> (“In the immediate aftermath of the Gold King Mine spill, one water sample showed that the level of lead in the Animas River was 12,000 times higher than normal. The river was also contaminated with

high levels of arsenic, beryllium, cadmium and mercury.”). Among other economic and spiritual impacts, “[t]he health concerns [from the spill] have made it more difficult for Navajo farmers to sell their produce” and have irreparably harmed Navajo spiritual beliefs because they “harvest minerals from the banks of the river for use in their religious ceremonies.” *Id.*

Uranium mining has also caused harm spanning multiple generations of Navajo Nation citizens.³ “From 1944 to 1986, nearly 30 million tons of uranium ore were extracted from Navajo lands under leases with the Navajo Nation.” NAVAJO NATION: CLEANING UP ABANDONED URANIUM MINES, <https://www.epa.gov/navajo-nation-uranium-cleanup> (last visited Sept. 16, 2020). Unknown to the Navajo miners – some of whom were now working their first wage jobs – the scientific community already knew that uranium caused lung cancer. Doug Brugge et al., *Uranium Mining on Navajo Indian Land*, 25 *Cultural Survival Q.* (2001), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/uranium-mining-navajo-indian-land>. When a spike in lung cancer among Navajo miners was observed, the U.S. Public Health Service conducted an unethical study of Navajo miners without their consent, just as it had done with the now more famous Tuskegee study a few years before. *Id.* Even after the mines closed, the danger and sickness

³ For an in-depth public health analysis, see Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 *Am. J. Pub. Health* 1410 (2002), <https://ajph.aphapublications.org/doi/10.2105/AJPH.92.9.1410>.

reached beyond the miners. Homes were built with materials from the mines and mill sites, exposing entire families to contamination as they ate and slept. *Id.*; see also *Health Effects of Uranium*, NAVAJO NATION: CLEANING UP ABANDONED URANIUM MINES, <https://www.epa.gov/navajo-nation-uranium-cleanup/health-effects-uranium> (last visited Sept. 16, 2020). Today, more than 500 abandoned mines as well as homes, and waterways have elevated levels of hazardous radiation. *Cleaning Up Abandoned Uranium Mines*, NAVAJO NATION: CLEANING UP ABANDONED URANIUM MINES, <https://www.epa.gov/navajo-nation-uranium-cleanup/cleaning-abandoned-uranium-mines> (last visited Sept. 16, 2020). Unsurprisingly, Navajo people face an elevated risk of autoimmune impairment, lung cancer, bone cancer, high blood pressure, and impaired kidney and reproductive function. *Written Statement of the Navajo Nation Prepared for the H. Comm. on Nat. Res. Subcomm. on Energy and Mineral Res. on Uranium Mining: Contamination and Criticality and H.R. 3405, the Uranium Classification Act of 2019*, 116 Cong. (2019) (statement of Johnathan Nez, Navajo Nation President & Myron Lizer, Navajo Nation Vice President), <https://www.congress.gov/116/meeting/house/109694/documents/HHRG-116-II06-20190625-SD013.pdf>; CENTERS FOR DISEASE CONTROL AND PREVENTION/U.S. EPA, REGION 9, YOUR HEALTH: URANIUM AND RADIATION ON THE NAVAJO NATION (2014), <https://www.epa.gov/sites/production/>

files/2016-06/documents/atsdr_uranium_and_radiation_health_dec_2014.pdf;

Decades after mining companies sold off the uranium and moved on to the next venture, Navajo citizens are reckoning with an environmental and public health disaster.

A pattern emerges from these examples. Much of what is now considered public land in the United States, such as National Forests, are the historic and traditional territories of Tribal Nations. In making decisions about use and resource extraction on those lands, the United States has frequently ignored – and sometimes targeted – tribal rights and interests with detrimental results to tribal culture, religion, health, and welfare. Even as Congress took steps to safeguard tribal rights, federal agencies have not always followed those mandates and Native Americans have carried a heavy burden, while non-Indians have reaped the benefits.

B. Federal Public Lands Contain Vitaly Important Tribal Cultural Resources and Federal Land Management Agencies Must Follow Congressional Mandates Intended to Protect Them

Modern reservation and public land boundaries are not reflective of the traditional territories of Native people. Due to the federal policies of Indian removal, assimilation, and allotment, many areas with significant cultural and religious importance lie outside current tribal lands and are now located on federal public lands. *See* DAVID GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 769 (7th ed. 2017). As Leslie Weldon, National Forest System Deputy Chief

observed, “All or part of every national forest and grassland is carved out of the ancestral lands of American Indian and Alaska Native peoples. Indigenous communities across the country still maintain strong historical and spiritual connections to the land and connections that have not been extinguished despite changes in land ownership.” U.S. Forest Service, *Tribal Engagement Roadmap Highlights Report 4* (2016), https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/5082_tribalrd.pdf.

Understanding the Native American concept of sacred places helps explain the existential nature of this relationship. One commonality across the diverse cultures of the 574 federally recognized Tribal Nations in the United States is that each has irreplaceable places located in the natural world that are necessary for worship and ceremony. Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. Rev. L. & Soc. Change 373, 376 (1992). A distinguishing feature of Indigenous religion and culture is that without these places, their ceremonies and religions cannot continue to exist. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. Rev. 1061, 1068-69 (2005).

There are several reasons why a particular place may be regarded as sacred. *Id.*; VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 275-82 (3d ed.

2003); *see also, e.g., Navajo Nation v. U.S. Forest Service*, 535 F.3d at 1081-82, 1096-1102 (discussing how one location, the San Francisco Peaks, had diverse religious meanings for the thirteen plaintiff tribes, but all regarded it as a uniquely sacred place). Some locations are sacred because meaningful historical events occurred there, such as Wounded Knee, where the United States Calvary slaughtered Lakota religious practitioners for practicing the Ghost Dance, which had been outlawed by the United States. Carpenter, *supra*, at 1067. Other places are imbued with a sense of the sacred because “something mysteriously religious . . . has happened or been made manifest there.” *Id.* at 1068 (internal quotations and citations omitted). “An example is Buffalo Gap in the Black Hills, where the buffalo emerged in the spring to initiate the ceremonial year of the Lakota and other Plains peoples.” *Id.* A third type of sacred place is one where sacred plants, materials and minerals are gathered, such as the Peyote Gardens in Texas and a sacred pipestone quarry in Minnesota. WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* 332 (2010). There are also places for vision-questing, where Native people retreat and communicate directly with the Spirit World. *Id.* Finally, there are places where the Spirits have revealed themselves directly to Human Beings. These places are “the center of the world for tribes who practice human religiousness in its earliest mode in America.” *Id.* at 333.

Recognizing that the vestiges of reprehensible federal Indian policies continued to burden Native American religion and culture long after they had been abandoned, Congress mandated a comprehensive report to inform reforms in federal law and policy. Joint Resolution: American Indian Religious Freedom, Pub. L. No. 95-341, § 2, 92 Stat. 470 (“Joint Resolution”). The AIRFA Report recognized that:

Native American people have been denied access to sacred sites on federal lands for the purposes of worship. When they have gained access, they have often been disturbed during their worship by federal officials and the public. Sacred sites have been needlessly and thoughtlessly put to other uses which have desecrated them. Native people have been denied the opportunity to gather natural substances which have a sacred significance and have been disturbed in their use when they have been able to gather them.

Indian beliefs regarding care and treatment for the dead have not been respected by government officials in the past.

AIRFA Report at i.

With the passage of the American Indian Religious Freedom Act (AIRFA) of 1978, 42 U.S.C. § 1996, Congress recognized that restricted access to sacred sites on public lands interfered with the ability of Native Americans to exercise their religion and made it the policy of the United States to support the inherent right of Native Americans to practice their traditional religions, including access to sacred sites. Joint Resolution. Additional Executive action also requires federal land management agencies to accommodate access to and ceremonial use of Native American sacred sites and to avoid adversely affecting their physical integrity. Exec.

Order No. 13,007, 61 Fed. Reg. 26,771 (1996). Federal agencies also must consult with Tribal Nations on a government-to-government basis whenever plans, activities, decisions, or proposed actions affect the integrity of, or access to, sacred sites. *Id.*

Over the years, Congress has enacted other remedial and protective measures, in a variety of contexts, aimed at addressing these issues. *See* Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013; Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305-310; National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101-320303; Archeological Resource Protection Act, 16 U.S.C. §§ 470aa-470mm; Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-2000bb-4. Yet, as the following section demonstrates, even these safeguards fall short when federal agencies fail to take them seriously.

II. IN ORDER TO PROTECT TRIBAL CULTURAL RESOURCES, THE FOREST SERVICE MUST CONSIDER FURTHER ALTERNATIVES

The Forest Service's failure to evaluate a reasonable range of alternatives in the FOREST SERVICE, MB-R3-05-6, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE ROSEMONT COPPER PROJECT (2013) ("FEIS") puts tribal cultural resources at greater risk. The Alternatives examined by the Forest Service are mere variations on the construction of an open pit and the use of adjoining federal lands as the disposal site for tailings and waste rock. However, as the district court found, the Forest Service arbitrarily rejected other alternatives, such as the no action alternative and

an alternative confining mining activity to Rosemont's private held lands within the Coronado National Forest. While NEPA does not require consideration of every possible alternative to a project, it does require the consideration of every *reasonable* alternative. *Protect our Communities Found. v. LaCounte*, 939 F.3d 1029, 1038 (9th Cir. 2019) (quoting *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985)). The need for further analysis of alternatives here is clearly necessary.

The landscape at stake, the Santa Rita Mountains, is at the heart of tribal existence, culture, and religious ceremony in the region. Pls.-Appellees' Joint Suppl. Excerpts of R. 4SER656-57, ECF No. 39-4. Known as *Ce:wi Duag* (long mountain) to the Tohono O'odham and *dzil enzho* (beautiful mountain) to the Western Apache, it also holds tremendous significance in the lifeways of the Hopi, Zuni, and Pasqua Yaqui peoples. *Id.* at 4SER657. For these Tribal Nations, a host of ceremonies, religious activities, gathering of ceremonial items would be forever destroyed by Rosemont's proposed mine. *Id.* As a result of Rosemont's construction, operation, reclamation, and closure, many irreplaceable places and features may be inaccessible, destroyed, or degraded "to the point they are no longer usable." *Id.* at 4SER655-56. These are part of the Tribal Nations' "cultural inheritance and [are] necessary for perpetuation of their culture." *Id.* at 4SER657. There is no doubt that

this mining activity would harm “the health and vitality of O’odham culture, and the culture of other tribes for whom the Santa Rita Mountains are important.” *Id.*

A few examples illustrate this point. A unique feature of this area are the springs and seeps, which are centers of power for the Tribal Nations and considered sacred sites. *Id.* at 4SER656. The springs and seeps also contain mineral and clay deposits that are used for ceremonial purposes. *Id.* Not only would the mine pit and impoundment of surface water destroy them, but changes in the water table due to the operation “would likely desiccate springs beyond the project boundary.” *Id.*

Two Tribal Cultural Properties (“TCPs”)⁴ are located in the area and are “important in maintaining the cultural identity of the O’odham and other tribes and in continuing important cultural practices and beliefs.” *Id.* at 4SER651-52. All of the alternatives considered by the Forest Service “would destroy this historical and cultural foundation, diminish tribal members’ sense of orientation in the world, and destroy part of their heritage.” *Id.* at 4SER652. The results could not be more dire for the Tribal Nations: “[t]he proposed Rosemont Copper Mine would alter, directly and indirectly, characteristics of historic properties that qualify them for inclusion in

⁴ A TCP is a property “eligible for inclusion in the National Register because of its association with cultural practices and beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continued cultural identity of the community.” PATRICIA L. PARKER & THOMAS F. KING, NATIONAL REGISTER OF HISTORIC PLACES, NATIONAL REGISTER BULLETIN: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (rev. ed. 1998).

the [National Register of Historic Properties].” *Id.* at 4SER651. That is to say, the very characteristics and integrity that make the tribal TCP’s eligible for listing under the National Register of Historic Properties (“NRHP”) will be lost forever under the development alternatives proposed by the Forest Service. This creates an unconscionable irony for the Tribal Nations who participated in the Service’s Section 106 process: the contributing resources identified to the Forest Service, which form the basis for the TCPs’ eligibility for listing on the NRHP, will now be lost to the development of the mine and therefore lose the “potential that makes them eligible for the NRHP under criterion D.” *Id.* at 4SER651. Moreover, dozens of irreplaceable historic sites that are repositories of the Tribal Nations’ culture and heritage will be lost forever. *Id.* at 4SER652-53. The adverse effects from the mine would be “significant, irreversible, and irretrievable” and “direct and indirect impacts would have concomitant effects on the communities for whom the historic properties are important to maintaining their heritage.” *Id.* at 4SER654.

The Forest Service FEIS also acknowledges indirect impacts to high-elevation vantage points used by O’odham and Apache people for vision quests. Native Americans going there for religious retreats would be greeted by the noise of heavy machinery, lack of privacy, and an unobstructed view of an enormous open-pit mine. Even after the mine’s closure, views of the pit, waste rock facility, and tailings facility will remain. *Id.* at 4SER656.

This area is also necessary for the collection of important items. Native Americans use the Rosemont area for the collection of natural resources for food, medicine, firewood and traditional crafts. *Id.* at 4SER657. Construction of the mine would “preclude access to and destroy or degrade these types of resources.” *Id.* In any alternative considered by the Forest Service, the project would permanently remove access to more than 4,000 acres, and would preclude access to another 1,765 - 3,844 acres for the duration of mining operations. *Id.* at 4SER658.

The mine will also have concerning impacts on burial sites. While anthropologists view burial sites and remains as important sources of data, “[m]ost Native Americans believe that respect for the dead is more important than any knowledge of the past that might be gained by digging up graves.” ROGER C. ECHO-HAWK & WALTER R. ECHO-HAWK, *BATTLEFIELDS AND BURIAL GROUNDS: THE INDIAN STRUGGLE TO PROTECT ANCESTRAL GRAVES IN THE UNITED STATES* 21 (1994). The prospect of disturbing burial sites and remains in this case is perhaps even more disconcerting because it is solely in the pursuit of profit.

CONCLUSION

The Rosemont Mine represents one project in a long history of federal agencies favoring development at the expense of tribal history and culture. While the Forest Service’s FEIS detailed the many permanent impacts to tribal cultural resources, it failed to develop or amend even one alternative to protect those

resources from Rosemont’s impacts. This is not reasoned agency decision making. While NEPA requires the Forest Service to document the potential impacts to resources—including cultural resources—the Forest Service is also required under the NHPA to carefully consider how to avoid, minimize, or mitigate impacts to cultural resources. The most effective way to do this, by developing alternatives that would achieve this goal, was never considered by the Forest Service. The judgment of the district court should therefore be AFFIRMED.

Respectfully submitted this 18th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Numbers 19-17585 and 19-17586

I am the attorney or self-represented party.

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