SAN CARLOS APACHE TRIBE
DEPARTMENT OF JUSTICE
Alexander B. Ritchie, AZ Bar No. 019579
Justine Jimmie, AZ Bar No. 019148
Laurel Herrmann, AZ Bar No. 025623
Jana Sutton, AZ Bar No. 032040
Bernardo M. Velasco, AZ Bar No. 033746
P.O. Box 40
San Carlos, Arizona 85550
Tel. (928) 475-3344
alex.ritchie@scat-nsn.gov
justine.jimmie@scat-nsn.gov
laurel.herrmann@scat-nsn.gov
jana.sutton@scat-nsn.gov
bern.velasco@scat-nsn.gov
Attorneys for the San Carlos Apache Tribe

THE SPARKS LAW FIRM, P.C.
Joe P. Sparks, AZ Bar No. 002383
7503 First Street
Scottsdale, Arizona 85251
Tel. (480) 949-1339
joesparks@sparkslawaz.com
Attorney for the San Carlos Apache Tribe

TITLA & PARSI, PLLC
Steve Titla, AZ Bar No. 009325
245 S. Hill Street
P.O. Box 1143
Globe, Arizona 85502
Tel. (928) 812-7714
steve@titlaparsi.com
Attorney for the San Carlos Apache Tribe (of counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

San Carlos Apache Tribe, a federally recognized Indian tribe,

Plaintiff

v.

United States Department of Agriculture, *et al*.,

Defendants

v.

Resolution Copper Mining LLC,

Intervenor-Defendant

No. CV-21-00068-PHX-DWL

(Hon. Dominic W. Lanza)

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUCTION TO ENJOIN CONVEYANCE OF OAK FLAT

Oak Flat is a deeply sacred place to members of the San Carlos Apache Tribe ("Tribe"), and before Federal Defendants have legal authority to transfer it to Resolution Copper Mining LLC ("Resolution") for its complete destruction, they must first satisfy certain statutory conditions precedent. *See* 16 U.S.C. § 539p(c)(9). Specifically, the Southeastern Arizona Land Exchange and Conservation Act of 2015 ("SALECA") directs the federal government to first prepare a comprehensive environmental impact statement ("EIS") that considers every aspect of the planned mine and all related infrastructure ("Project") to such a degree that it "shall be used as the basis for all decisions under Federal law." 16 U.S.C. § 539p(c)(9)(B). The EIS must also "assess the effects of the mining and related activities . . . on the cultural and archeological resources" within Oak Flat and "identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources." 16 U.S.C. § 539p(c)(9)(C). Until the government prepares such an EIS, it lacks authority under SALECA[1] to convey Oak Flat to Resolution.

Federal Defendants' failure to prepare such an EIS causes the Tribe and its members to suffer six distinct injuries, each of which may be redressed by an order of this Court that vacates the 2025 FEIS and enjoins Oak Flat's transfer until such time that Federal Defendants produce the required EIS. Rather than squarely contest the Tribe's injuries, Federal Defendants and Resolution misdirect the Court by insisting that the Tribe's only injury will be Oak Flat's eventual destruction and that any hope of

[1]Any transfer of "all right, title and interest" in Oak Flat by the United States under SALECA cannot include property interests held by the United States in trust for the Tribe. SALECA is silent as to those property interests and did not extinguish such interests. *See* Tribe's Second Amended Complaint at ¶¶ 187-96. The United States must protect property interests held in trust for the Tribe under the United States Constitution, the Treaty of Guadalupe Hidalgo of 1848, the Apache Treaty of 1852, and the Gadsden Treaty of 1853, which treaties are recognized by Article VI of the United States Constitution as the "supreme Law of the Land," the 1934 Trade and Intercourse Act, and the Tribe's Constitution under the 1934 Indian Reorganization Act.

addressing that injury is futile. Further, Federal Defendants and Resolution fail to interpret SALECA's plain terms, transforming language which establishes a timeframe to transfer Oak Flat into a provision that strips federal courts of jurisdiction to review Federal Defendants actions, and ignoring text that requires a specific EIS as a condition precedent before allowing Oak Flat's transfer.

The 2025 FEIS fails to meet the requirements of SALECA, and therefore, Federal Defendants lack authority to transfer Oak Flat. Because Oak Flat's transfer will cement the Tribe's injuries that can still be redressed, the Court should enjoin Oak Flat's transfer until Federal Defendants publish an EIS meeting SALECA's express requirements.

I. THE TRIBE HAS STANDING UNDER THE APA AND ARTICLE III

This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1362. The Tribe has standing under Article III of the Constitution, the APA, the Apache Treaty of 1852, 10 Stat. 979 (July 1, 1852), and as the beneficiary of rights held in trust by the United States[2], and neither Federal Defendants nor Resolution show otherwise. The 2025 FEIS is a final agency action under SALECA, the National Environmental Policy Act ("NEPA"), and the National Historic Preservation Act ("NHPA"). Further, the 2025 FEIS has injured the Tribe and its members, and Oak Flat's transfer will cement those injuries and cause further imminent injuries. Because preliminary and final relief from this Court will redress those injuries, the Tribe has Article III standing. Nevertheless, Federal Defendants and Resolution attempt to waive away the Tribe's standing by mischaracterizing both the Tribe's alleged injuries and SALECA itself.

A. The Tribe Has Standing Under the APA Because the 2025 FEIS is a "Final Agency Action" Under SALECA, NEPA, and NHPA.

Under SALECA, NEPA, and NHPA, the 2025 FEIS is a "final agency action," establishing the Tribe's standing under the APA. Under the APA, "[a]n agency action is

[2] *See* Tribe's Second Amended Complaint at ¶¶ 11-13, 78.

'final' when (1) the agency reaches the 'consummation' of its decisionmaking *[sic]* process and (2) the action . . . is one from which 'legal consequences will flow.'" *Rattlesnake Coalition v. U.S. E.P.A.*, 509 F.3d 1095, 1103 (9th Cir. 2007) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

In pure-NEPA contexts, the Ninth Circuit has "repeatedly held that final NEPA documents are final agency actions" because they culminate the environmental review process. *See Envt'l Defense Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 868 (9th Cir. 2022) (collecting cases). SALECA, however, is broader than NEPA and its structure makes an EIS the final agency action before the injurious legal consequences flow. *See* 16 U.S.C. § 539p(c)(10); *Rattlesnake Coalition*, 509 F.3d at 1103.

Federal Defendants and Resolution urge that publishing the EIS did not consummate any decision-making process(es) because, they assert, an EIS is merely an investigatory document and only a final record of decision ("ROD") consummates the decision-making process. (US Response, p. 6; Resolution Response, p. 17). Further, Federal Defendants insist that under *Environmental Defense Center* and *Oregon Natural Desert Association*, a final record of decision is necessary before a plaintiff has APA standing. (US Response, pp. 11-12).

Here, the Tribe's challenges are not brought under NEPA or the NHPA alone, but rather through SALECA, which incorporates important aspects of those statutes. Further, SALECA does not require, or mention, a record of decision and attaches no significance to one. Instead, SALECA requires that the government publish an EIS, further, that the EIS in question be broader than what NEPA ordinarily requires. Accordingly, it is not necessary to resolve whether a final ROD is ordinarily required for standing under the APA. *See* 16 U.S.C. § 539p(c)(9). Under SALECA, the decision to publish an EIS formally concludes Federal Defendants' investigation into the subjects that the statute mandates, and constitutes a final action under NHPA. *See* 16 U.S.C. § 539p(c)(9). That is, SALECA charges Federal Defendants with preparing an EIS that is broader than what

NEPA alone requires, and this Court should conclude that the 2025 FEIS represents a final agency action in this broader context. *See* 16 U.S.C. § 539p(c)(9)(B)-(C).

In particular, SALECA requires an EIS that considers the land exchange itself, as well as the mine plan of operations, all ancillary facilities, and the surrounding region. *Id.* Although Federal Defendants may not have discretion in whether to transfer Oak Flat once a legally compliant EIS is prepared, they must nevertheless prepare an EIS evaluating these impacts, as well as any others flowing from any decision that an agency will make under federal law regarding the Project. *See* 16 U.S.C. § 539p(c)(9)(A). SALECA also requires the EIS to include an analysis of the cultural and archaeological impacts of the mine and to identify potential measures to minimize them. *See* 16 U.S.C. § 539p(c)(9)(C). These concerns are beyond the scope of NEPA, encompass analysis under NHPA, and would not be included as part of an ordinary ROD under NEPA for the various decisions that may later be made under federal law by various agencies.

As such, NEPA is the floor for the EIS. Further, because SALECA requires no further decisions—other than the decision to publish—before Oak Flat is transferred, the 2025 FEIS necessarily consummates Federal Defendant's environmental review and decision-making processes under SALECA, NEPA, and NHPA. *See Rattlesnake Coalition*, 509 F.3d at 1103. Moreover, because SALECA otherwise compels the transfer after publication, legal consequences unquestionably flow from that action. *See id.*; *Tohono O'odham Nation v. U.S. Dep't of Interior*, 138 F.4th 1189 (9th Cir. 2025). As such, the 2025 FEIS is a final agency action under SALECA and the APA.

Federal Defendants and Resolution insist that *Tohono O'odham Nation* is distinguishable because that case involved limited notices to proceed, which authorized construction of transmission towers in the San Pedro Valley after the Bureau of Land Management concluded its NHPA process. (Resolution Response, pp. 13; Resolution Response, p. 18-19). As such, both acknowledge the notices were final agency actions from which legal consequences flow. (*Id.*) The United States took the exact opposite

position in *Tohono O'odham Nation*, urging there that the ROD in that case—which was published beyond the six-year statute of limitations—was the only agency action and the limited notices categorically are not final agency actions. *See* 138 F.4th at 1198, 1200.[3]

In determining that the limited notices were final agency actions, the Ninth Circuit applied *Bennett's* two-factor test using a pragmatic approach. *Id.* at 1200-02. The Ninth Circuit determined the limited notices were final agency actions because they consummated the agency's investigation into whether historic properties lay in the towers' path and because they authorized the proponent to begin construction. *Id.* This is consistent with *Environmental Defense Center*, which Resolution quotes to argue that "it is 'the effect of the action and not its label that must be considered.'" 36 F.4th 850, 868 (9th Cir. 2022); (Resolution Response, p. 11). Here, the 2025 FEIS is a final agency action because its publication consummated the wide investigation that SALECA imposes on Federal Defendants and legal consequences unquestionably flow from it. The analysis in *Tohono O'odham Nation* also demonstrates that the 2025 FEIS is a final agency action under NHPA because the 2025 FEIS will result in the transfer Oak Flat, removing it from federal protection under NHPA. Accordingly, Federal Defendants and Resolution's insistence that the 2025 FEIS is not a final agency action rings hollow.

On the question of whether *Seven County Infrastructure Coalition v. Eagle County* is "clearly irreconcilable" with Ninth Circuit precedent holding that final NEPA documents are final agency actions, neither Federal Defendants nor Resolution identify any language demonstrating that the Supreme Court analyzed the question. Instead,

---

[3]Notably, in *Tohono O'odham Nation*, the United States took a familiar tact to this case, disregarding Plaintiffs' own characterization of their claims as challenges to the NHPA process, and insisting they were challenges to a route-setting decision in the ROD. Here, Federal Defendants urge that the Tribe's challenges under SALECA, NEPA, and NHPA are really challenges to Oak Flat's transfer. To be sure, the Tribe challenges Oak Flat's transfer and SALECA itself under separate claims not advanced in this Motion. Here, however, the Tribe asks the Court to enjoin Oak Flat's transfer under SALECA, NEPA, and NHPA because its transfer would cement distinct injuries.

Resolution advises the Court that it should not disregard the scope of NEPA review that *Seven County* prescribes. (Resolution Response, p. 18). This is a *non sequitur*—the scope of review under NEPA (which is more limited than SALECA) does not concern standing. Federal Defendants avoid the *Tingley* standard that to abrogate Ninth Circuit precedent, superior authority must be "clearly irreconcilable" with it. *See Tingley v. Ferguson*, 47 F.4th 1055, 1075 (9th Cir. 2022).

If the Court is persuaded that it lacks jurisdiction over the Tribe's SALECA, NEPA, and NHPA claims because there will be no final agency action until the Forest Service publishes a final ROD, it should enjoin Oak Flat's transfer under the All Writs Act until the ROD becomes final. *See* 28 U.S.C. § 1651 ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law").

At bottom, the 2025 FEIS is a "final agency action" under the APA, and the Tribe has standing to challenge the 2025 FEIS and obtain necessary preliminary relief to maintain the *status quo* during the pendency of this challenge.

B. The Tribe Has Article III Standing Because the 2025 FEIS Has Injured the Tribe and Its Members, Further Injuries Are Imminent, and an Order of This Court Will Redress Them.

Enjoining Oak Flat's transfer is necessary to redress immediate harms that the Tribe and its members have already suffered, and also to prevent further imminent harm that a favorable order of this Court will redress. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). These harms include: (1) the Tribe did not receive due consideration of the issues it raised before both the 2021 FEIS and 2025 FEIS were published; (2) the Tribe did not receive an opportunity to review and comment on new issues presented in the 2025 FEIS that should have been published as part of a supplemental DEIS and to have those comments thoughtfully considered; (3) the Forest Service's inadequate consideration of action alternatives increases the risk of catastrophic

harm to water resources, burial sites, and important areas and resources central to traditional Apache religion, culture, and sovereignty; (4) the Tribe and its members will imminently and permanently lose access to all but 50 of Oak Flat's 2,422 acres (2%);[4] (5) Oak Flat's physical destruction will be irreversibly set in motion by its transfer to Resolution; and (6) the Tribe and its members will lose any further opportunity to identify, preserve, and mitigate the loss of historic properties and traditional Apache religious and cultural sites within Oak Flat through NHPA consultation.

These injuries are traceable to the 2025 FEIS, which does not meet the express requirements of SALECA, and a favorable decision immediately enjoining Oak Flat's transfer and later vacating the FEIS will redress them. Federal Defendants and Resolution do not contest that the Tribe has suffered these injuries; instead, they waive them away, insist that Congress stripped jurisdiction over SALECA or otherwise made its provisions unreviewable, and insist that the Court cannot redress the Tribe's injuries. These arguments mislead the Court about the Tribe's injuries and its power to cure them.

At the heart of Federal Defendants' and Resolution's argument that the Tribe's injuries are not redressable is the fatalistic notion that the Tribe's only real injury is Oak Flat's destruction, which will be an inevitable consequence of the transfer that SALECA directs. (US Response, pp. 13-17; Resolution Response, pp. 14-15). Although Oak Flat's ultimate transfer and destruction will constitute a severe harm to the Tribe and its members, it is not the exclusive harm. Rather, through reasoned investigation of the issues that the Tribe identifies and further consultation, harms represented by selection of the Skunk Camp alternative as planned and the failure to reengage in government-to-government consultation could meaningfully redress some of the Tribe's injuries.

Indeed, both Responses constitute a simple failure to analyze the Tribe's injuries

[4]The Tribe' Constitutionally protected rights to the use, access, and occupancy of Oak Flat, and the Tribe's religious and cultural practices, cannot be made subordinate to Resolution's rules of access. *See* Second Amended Complaint at ¶ 187-95.

in good faith. That some harms may be permanently avoided is most evident through changes to the action alternative that the Forest Service prefers for the tailings storage facility ("TSF"), or changes to the TSF plans that may be required because of the risk of catastrophic harm to important Apache areas and resources. It is also evident that much harm could be avoided through further sincere consultation related to historic properties and burial sites, the destruction or disturbance of which would violate federal and state law. Federal Defendants and Resolution do not address these harms and, instead, rush to judgment by reducing the questions to whether Federal Defendants can decide against Oak Flat's transfer. (U.S. Response, pp. 13-17; Resolution Response, *passim*).

Resolution also insists that this Court lacks jurisdiction because SALECA either does not provide an express right of action or it deprives federal courts of jurisdiction. (Resolution Response, pp. 15-16). Both contentions are wrong. An express right of action is not required because the APA provides a broad right to any person "adversely affected or aggrieved by agency action within the meaning of *a relevant statute*." 5 U.S.C. § 702 (emphasis added). Here, the Tribe and its members are aggrieved by Federal Defendants' actions under SALECA in publishing the 2025 FEIS.

Similarly, Federal Defendants and Resolution urge that Congress expressly intended that no party could seek review of whatever EIS Federal Defendants might publish by directing Oak Flat's transfer within sixty days of publication. (US Response, p. 6-7; Resolution Response, p. 9-10). Congress, however, did not use express language to strip district courts of jurisdiction to consider such challenges—something it knows how to do (a principle Resolution relies upon elsewhere). *See Appalachian Voices v. U.S. Dep't of Interior*, 78 F.4th 71 (4th Cir. 2023); *see also* Resolution Response at 39 (which recognizes that "when Congress wanted to force a change in the status of Resolution's mineral rights, it knew how to do so."). In *Appalachian Voices*, Congress expressly approved the Federal Energy Regulatory Commission's actions in the Fiscal Responsibility Act of 2023 and stripped federal district courts of jurisdiction over

petitions challenging them and reserved jurisdiction of any challenge to that provision to the D.C. Circuit. *Id.* at 75, 79; Pub. L. No. 118-5, § 324(e). SALECA is silent as to this matter, and says nothing about limiting the Court's jurisdiction or the Tribe's standing under the Constitution, the Apache Treaty, 28 U.S.C. §§ 1331 and 1362, or the APA.

Rather, the simple provision that the Secretary transfer Oak Flat within 60 days after publishing the EIS merely establishes a timeframe for the transfer in the ordinary course and is silent regarding the power of federal courts. The Court cannot read such an extreme limitation on its own jurisdiction into that silence.

Similarly, Resolution wrongly relies on *Flint Ridge Development Services v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776 (1976), and *Jamul Action Committee v. Chaudrui*, 837 F.3d 958 (9th Cir. 2016), for the proposition that a short time frame for an agency to act means that NEPA does not apply. Those cases did not involve statutes that require an EIS. SALECA not only requires an EIS, it requires one broader than ordinarily required under NEPA. *See* 16 U.S.C. § 539p(c)(9)(B)-(C).

Federal Defendants further argue that had Congress intended to permit judicial review, it would have "conditioned the land exchange on a final judicial finding that the EIS is sufficient." (US Response, pp. 20-21). Of course, the United States provides no examples of any statutes articulating this framework, and the Tribe is not aware of any.

Instead, Congress certainly knew that NEPA and APA challenges are common and often lengthy. If it wanted to eliminate any such challenges, Congress could have excluded the Project from NEPA entirely. Congress did the opposite by requiring an EIS consistent with NEPA but subject to additional requirements. *See* 16 U.S.C. § 539p(c)(9). In this context, a preferable interpretation of the sixty-day timeframe is that it permits sufficient time for aggrieved parties to seek preliminary relief while the federal agencies proceed cautiously, aware of the Tribe's likely opposition and cognizant of their trust and treaty obligations to federally recognized Indian tribes. Further, to the extent there is an ambiguity in how to construe the sixty-day transfer period, the Court should

recognize that SALECA did not progress through committee or Congress's ordinary deliberative procedure. In fact, SALECCA did not advance in the House or Senate through regular order—no hearings, no markups, and it never went to the floor because of bi-partisan opposition for some ten years. Instead, Resolution's supporters found an alternate path by persuading Senators Flake (a former Rio Tinto lobbyist) and McCain to attach it in the last minutes of a waning lame duck session as a non-germane rider to the Carl Levin and Howard P. Buck McKeon National Defense Authorization Act of 2015, a must-pass bill, in a process entirely without transparency or any substantive review by Congress as a whole. Had Congress and Resolution's lobbyists intended the outcome they now advance, they could have revised SALECA to state as much.

In an attempt to avoid the conclusion that SALECA requires an EIS meeting specific requirements as a condition precedent "*prior to*" directing Oak Flat's transfer, Resolution points to other irrelevant events surrounding the land exchange, such as the form of title, payment of certain costs, surrender of certain mineral claims, and ensuring temporary access to Oak Flat's Campground. (Resolution Response, p. 10). These requirements, however, are not obligations placed on the Secretary by Congress as a condition precedent to Oak Flat's transfer, but are obligations placed on Resolution itself. *See* 16 U.S.C. § 539p(c)(2), (c)(7), (g)(3), (i)(3). There is no reason for the Tribe to cite to *Resolution's* obligations in its challenge against *Federal Defendants*.

Federal Defendants' final standing argument, that NEPA does not apply to non-discretionary actions like the transfer of Oak Flat, overlooks that the Tribe does not challenge the decision to transfer Oak Flat as arbitrary or capricious. Rather, enjoining the transfer is necessary to ensure that the Tribe's injuries are redressed because once Oak Flat is transferred, many of the Tribe's injuries will become cemented. Ultimately, the Tribe seeks review of Federal Defendants' actions taken pursuant to SALECA. Because preserving the *status quo* is essential to redressing the Tribe's injuries, the Court

should enjoin Oak Flat's transfer during the pendency of this action.[5]

II. THE COURT SHOULD ENJOIN OAK FLAT'S TRANSFER DURING THE PENDENCY OF THIS ACTION.

The Tribe is entitled to a preliminary injunction during the pendency of this action that enjoins Oak Flat's transfer to prevent the irreparable harms that the Tribe and its members have already suffered and will imminently suffer.

A. Preliminary Injunction Standard

The Tribe is entitled to an injunction, because the balance of factors warrants relief. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011).

1. The Tribe Is Likely to Succeed on the Merits Because the 2025 FEIS Fails to Satisfy the Requirements of SALECA, NEPA, and NHPA.

SALECA includes a condition precedent *before* Federal Defendants can convey Oak Flat. *See* 16 U.S.C. § 539(c)(9)(B). This language is mandatory and it specifies an order of operations: "[p]rior to conveying [Oak Flat], the Secretary *shall* prepare a single [EIS]." In other words, SALECA requires a legally compliant EIS before allowing Oak Flat's transfer, and the Secretary lacks statutory authority to transfer Oak Flat to Resolution in the absence of one. Further, the EIS required by SALECA is much more robust than what NEPA ordinarily requires and must support each and every future action related to the Resolution Mine. Rather than allowing piecemeal processes to proceed by various agencies, SALECA requires a single, comprehensive EIS.

Here, the defects in the 2025 FEIS would render several future decisions under federal law inadequately explained, arbitrary, and capricious. As Dr. Steven Emerman

[5]Both Resolution and Federal Defendants discuss 16 U.S.C. § 539p(c)(9)(D), which allows the Secretary to issue separate environmental review documents for activities unrelated to the land exchange or mining under Oak Flat. Neither, however, assert that this exception applies to any of the holes in the EIS that the Tribe identifies and neither avow that future environmental documents are forthcoming. (US Response, p. 19; Resolution Response, p. 12-13).

states in his declaration, the 2025 FEIS fails to consider numerous relevant, industry-standard factors related to the tailings storage facility alternatives and both the tailings and concentrate pipelines. *See San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (permitting extra-record evidence that is "necessary to determine whether the agency has considered all relevant factors") (cleaned up).[6]

Relevant factors that the 2025 FEIS fails to consider include:

(1) nine of ten possible causes of pipeline failure, including the most common cause of failure (Exh. 32, at 2-6);

(2) factors heightening the consequences of pipeline failure including the volume of tailings conveyed, the inability of Resolution to rapidly halt production, and the high-risk features like canyon crossings (*Id*. 6-9);

(3) the probability of a concentrate pipeline failure (*Id*. 9-10);

(4) factors heightening the consequences of a concentrate pipeline failure to the immediate environment and downstream communities (*Id*. 10-12);

(5) a dam breach analysis and emergency preparedness and response plan and the consequent risks to downstream communities directly impacted before any kind of emergency action may be taken (*Id*. 12-16).

(6) the 268-mile runout distance associated with a tailings dam failure as predicted by the empirical model the 2025 FEIS otherwise relies upon (*Id*. 16-19);

(7) all credible failure models after arbitrarily and erroneously defining a "credible" failure in terms of probability rather than possibility (*Id*. 19-20);

---

[6]As more fully explained in the Tribe's Response to Federal Defendants' Motion to Strike, Dr. Emerman's and Dr. Wells's declarations, memoranda, and any testimony they might offer fall within the recognized exceptions for extra-record evidence because they: (1) are "necessary to determine whether the agency has considered all relevant factors and has explained its decision,"; and (2) "explain technical terms or complex subject matter." *Locke*, 776 F.3d at 992 (cleaned up). Similarly, Resolution asserts that Dr. Emerman's opinions are waived for having failed to raise them before the FEIS was published. (Resolution Response, p. 32). Dr. Emerman and Dr. Wells, however, commented extensively on the DEIS on these topics as reflected in Appendix R of the FEIS and discussed herein.

(8) industry standard factors for foundation characterization including intrusive investigations, in situ testing, geophysics, and laboratory testing (*Id*. 20-21).

(9) a stability analysis of the tailings (*Id*. 21);

(10) how outer embankment slopes that are steeper than allowed by U.S. Army Corp of Engineers may increase the risk of catastrophic failure (*Id*. 22-24).

(11) international standards for minimum separation between tailings dams and downstream communities (*Id*. 24-26);

(12) factors informing whether a modified centerline method or downstream method for the tailings dam should be preferred (*Id*. 26-28);

(13) factors informing whether tailings potentially generate acid and whether treating so-called NPAG tailings, which include potentially acid-generating tailings, to construct the tailings dam increases the risks of dam failure and of uncontrolled acid mine drainage into the aquifer and downstream waterways, including the Gila River (*Id*. 28-31); and

(14) factors indicating water consumption of the Project will exceed Resolution's projections by a factor of three (*Id*. ¶ 4).

Importantly, the FEIS reflects that Dr. Emerman raised these concerns. *See* FEIS R-304-05 (breach analysis and emergency planning); 306 (TSF and embankment design); and 333-35, 342 (water use and pipelines). The failure to consider these factors completely undermines the Forest Service's decision to prefer the Skunk Camp tailing storage facility alternative as presented, and renders that decision and any decision based upon the selection of this action alternative as arbitrary and capricious. Had the Forest Service considered these basic factors, as is minimally expected in the industry, it would have eliminated the Skunk Camp alternative as presented instead of selecting it as the preferred action alternative. *See Seven County*, 145 S. Ct. at 1514. These are not questions about how to weigh the evidence, as Federal Defendants suggest, but whether substantive factors were considered at all.

Resolution attempts to waive away these opinions by reducing them to mere disagreements between engineers while ignoring whether the omitted analyses and considerations were necessary to evaluating the TSF alternatives. (Resolution Response, p. 33). This argument, however, swallows up the *Locke* exceptions—so long as an agency consults with relevant professionals, its decisions would be unassailable. *See* 776 F.3d at 992. Even *Seven County* does not go so far.

Similarly, Dr. James Wells identifies additional factors that the Forest Service did not consider, including those bearing on whether acid rock drainage will impact water quality at the mine and the TSF and increase the risks to groundwater downstream of the TSF. (*Id.* ¶¶ 14-16). As Resolution notes in its response, Dr. Wells raised his concerns as part of his work on two Project workgroups. (Resolution Response, p. 30). As such, his opinions were timely presented to the Forest Service. Had the Forest Service considered these factors, it likely would have preferred different alternatives. *See Seven County*, 145 S. Ct. at 1514.

Federal Defendants insist that *Seven County* directs the Court to disregard the declarations of Emerman and Wells due to what must be characterized as unfettered deference. (US Response, pp. 31-34). *Seven County*, however, does not give agencies such authority; instead, federal courts continue to have a role in "confirm[ing] that the agency has addressed environmental consequences and feasible alternatives as to the relevant project." 145 S. Ct. at 1511. Read together with *Locke*, federal courts may exercise this authority by considering whether an EIS considers "all relevant factors." *Locke*, 776 F.3d at 992.

Federal Defendants characterize the declarations of Emerman and Wells as mere second guessing that "*Seven County* officially rebukes." (US Response, pp. 31-32). Federal Defendants enlarge *Seven County* beyond its holding. The facts of *Seven County* are instructive. There, the Court of Appeals vacated an agency decision because the EIS did not consider effects that were tangentially related to the Utah railroad at issue, such as

increased third-party emissions from oil refining in Texas and Louisiana. 145 S. Ct. at 1507. Here, Drs. Emerman and Wells note holes in the Forest Service's analysis related to the very subjects that SALECA requires Federal Defendants to investigate.

Federal Defendants also urge that "it would be unfair in light of the Court's Order that defendants not be permitted to rely on 'any documents not available on the [agency] internet site," but permit the Tribe to rely on expert opinions. Federal Defendants agreed to that restriction at the request of AMRC to ensure that, for purposes of these motions, Federal Defendants put their cards on the table—cards they have been holding for several years. At that same hearing, the Tribe made clear that it would be relying on experts Emerman and Wells, supplied declarations from them with the previous round of briefing, and sought additional time for those experts to review the FEIS. Federal Defendants cannot be surprised or prejudiced and their voluntary decision to disclose their evidence at once is no basis to restrict the Tribe and avoid legitimate scrutiny.

Concerning whether the Forest Service should have published a supplemental draft EIS, Federal Defendants rely on *Westlands Water District v. U.S. Department of the Interior*, to assert that new information does not always require publication of a supplemental draft EIS. *See* 376 F.3d 853, 873 (9th Cir. 2004). The test remains whether differences will have a significant impact on the environment in a manner not previously evaluated and considered." *Id.* Here, the FEIS includes information from nine reports consisting of thousands of pages that purport to fill gaps in water quality impacts from the mine and TSF. Because these substantive areas were not previously evaluated and considered, a supplemental EIS was necessary. *See id.*[7] Federal Defendants attempted to

[7]In a footnote, Federal Defendants assert that CEQ regulations are no longer in force. However, Katherine R. Scarlett, the President's Chief of Staff, issued a memo on February 19, 2025, directing federal agencies to continue following those regulations until such time that each agency promulgates new regulations. Scarlett, Katherine R., *Implementation of the National Environmental Policy Act*, Executive Office of the President, *4 (Feb. 19, 2025).

foreclose meaningful evaluation of the FEIS by controlling the record, first through refusing to publish a supplemental EIS, and then opposing the Tribe's efforts to submit comments and evidence after publication of the 2025 FEIS.

As a surrogate for a substantive defense of the 2025 FEIS, Resolution recites that the FEIS consumes many pages and that its many contributors have considerable experience. (Resolution Response, pp. 21-22). These statistics, however, are not a substitute for considering necessary relevant factors that are absent from the 2025 FEIS.

Regarding NHPA, SALECA requires the Secretary to assess cultural resources at Oak Flat and identify mitigation measures related to impacts thereon. 16 U.S.C. § 539p(c)(9)(C). Federal Defendants recognized this failure in 2021, but did not engage in substantive government-to-government consultation on these issues. (Doc. 36). At most, the Forest Service consulted with the San Carlos Council about the terms of a memorandum of understanding ("MOU") to guide consultation that was never executed. At that meeting, the parties discussed potential terms of the MOU that would result in the substantive consultation that Federal Defendants acknowledged was lacking in 2021. Important to that MOU were terms related to the Tribe's "Traditional Knowledge," and "Traditional Ecological Knowledge," both of which it safeguards and considers proprietary, not unlike trade secrets. (Exh. 19 Rambler May 2025 Declaration, ¶ 7(j)(v)).

Federal Defendants also reference a listening session, other written correspondence, and a generalized description of consultations with 15 Tribes. (US Response, pp. 45-47; FEIS at 998-1000, S-1-110). A listening session is not government-to-government consultation and neither is correspondence. Both Federal Defendants and Resolution rely on Appendix S of the 2025 FEIS to establish, they insist, over 400 consultations. This list of emails and letters, however, is inadequate to constitute the required government-to-government consultation, which can only occur before the Tribe's governing body, the San Carlos Council. Furthermore, such consultation must be "meaningful" (E.O. 13175, 65 FR 67249, Nov. 6, 2000) and thus responsive to the issues

raised by the Tribe.

Fundamental to government-to-government consultation is that each sovereign authorizes who may appear on its behalf. The Tribe vests that authority in the San Carlos Council, the governing body of the Tribe, and no evidence indicates that the Council authorized written consultation. The only consultation that the Forest Service and San Carlos Council participated in after the withdrawal of the 2021 FEIS occurred in May 2024. (Exh. 19, Rambler May 2025 Declaration, ¶¶ 5-6). Even assuming that the San Carlos Council authorized written consultation, the Forest Service still had not, by the time of the May 2024 consultation, provided written responses the San Carlos Council requested to certain letters and comments raised in the December 2019 as well as those raised by the ACHP and BLM. (*Id.*, ¶¶ 6-7). Instead, the Forest Service suddenly gave notice of the forthcoming FEIS on April 17, 2025.

Resolution contends that the Tribe seeks veto power through coercive consultation. (Resolution Response, p. 41). This ignores that Federal Defendants stated in writing on the record that they needed to consult with Tribes to understand their concerns, but then published the 2025 FEIS without engaging in substantive consultation. (Doc. 36). Resolution further relies on the same record of emails, occasional letters, and informal meetings that, after March 2021, did not involve substantive consultation with the San Carlos Council. FEIS, S-84-107. More troubling, the record casts informal contacts as official meetings with the Council when the Council was not in session and such meetings were merely with members of the Tribe's Department of Justice. (*Compare* FEIS, S-106, 6/07/24 entry *with* Exh. 34). Further, a "transcript" of that June 7, 2024, meeting produced by the Forest Service demonstrates not only that such meeting was not a consultation and that the San Carlos Council was not present but also that the Forest Service resisted even the most basic acknowledgements, including whether Oak Flat was part of the Tribe's ancestral territory. (Exh. 34, p. 6, 27-28). As such, Resolution's assertions that the Tribe ignored the Forest Service's attempts at

consultation ring hollow. To be meaningful, government-to-government consultation must be responsive and the record shows instead that the Forest Service avoided the Tribe's concerns as doing otherwise would have stymied their rush to complete the FEIS.

Because the 2025 FEIS fails to satisfactorily address these substantive areas, any subsequent decision based on that 2025 FEIS would be arbitrary and capricious. Because SALECA requires that all this analysis occur "*prior to*" Oak Flat's transfer, Federal Defendants lack authority to convey Oak Flat to Resolution.[8]

2. The Tribe Will Be Irreparably Harmed on Oak Flat's Transfer and Many Harms May Still Be Avoided.

Of the Tribe's six injuries, Federal Defendants and Resolution do not dispute that three will be cemented upon Oak Flat's transfer: (1) lost access to all but 50 of Oak Flat's 2,422 acres; (2) Oak Flat's destruction would be set in motion; and (3) the Tribe and its members would lose the ability to further identify and meaningfully preserve historic properties located within Oak Flat. Instead, both argue that because these injuries resulting from Oak Flat's destruction are inevitable, there is no legally cognizable injury. On the contrary, under SALECA's text and structure, Oak Flat remains withdrawn from mining activity and enjoys federal protection that will only be lost when Federal Defendants satisfy SALECA's condition precedent by publishing the requisite FEIS and then transfer Oak Flat. The illegitimate loss of these protections is a cognizable injury.

Regarding the remaining harms, Federal Defendants and Resolution do not contest that the Tribe's other injuries will be cemented as progress begins on the mine and related infrastructure while the Forest Service is compelled to revise its analysis (the remedy Resolution prefers). Instead, both simply assert that the Forest Service will not change

[8]In addition to the NEPA challenges raised by the Arizona Mining Reform Coalition, *et al.* ("AMRC"), in *Arizona Mining Reform Coalition v. United States Forest Service*, 2:21-cv-00122-DWL, in AMRC's amended complaint and motion for preliminary injunction, the Tribe also incorporates by reference any reply in support of such motion.

any of its conclusions related to the Project. Avowals that an agency is entrenched, however, cannot defeat the Tribe's challenges. Only a preliminary injunction can prevent all six of the Tribe's injuries from becoming irreparable.

3. Public Interest and the Balance of Hardships Favor Enjoining Oak Flat's Transfer.

If Oak Flat's transfer is not enjoined, Resolution will press forward with the entire Project, injuring the Tribe and its members who practice traditional Apache religion and who participate in other vital cultural practices. The transfer will seal Oak Flat's fate and start the irreversible countdown to its destruction, preventing members from gathering religiously significant foods and medicines, and ending essential, traditional Apache cultural and religious practices, thus harming the Apache culture and traditional Apache religion itself and its system of beliefs.

Federal Defendants and Resolution urge that the American public will benefit from Resolution's copper; yet the copper will not be smelted domestically, and Resolution will not keep it on American shores. To try to support its assertions, Resolution refers to legislative history -- of SALECA and other legislation – as well as an announcement from the White House, Resolution Response at 49-50, apparently not recognizing its earlier argument that, "Legislative history 'is not the law.'" *Id.* at 39 (which quotes *Axon Enter. Inc.*, 452 F. Supp. 3d 822, 893 (D. Ariz. 2020)). These benefits to Resolution, its owners, and foreign customers do not outweigh the harms to the Tribe or its members.

For their part, Federal Defendants identify no further hardship for the Forest Service. Resolution repeats its assertions that it must continue to pay monthly carrying costs of $11 million (a mere pittance when measured against the hundreds of billions of dollars in revenues that Resolution and its foreign owners will realize) while it awaits a publicly funded windfall that will dwarf these claimed losses. Resolution adds that certain jobs may be in jeopardy as it waits, but this is a problem of Resolution's own making. Resolution voluntarily elected to incur costs and hire employees *prior to* securing a

protectable property interest in Oak Flat[9]. Resolution cannot manufacture an exigency after accepting this calculated risk. Resolution cannot in good faith create jobs without securing the necessary foundations for these jobs, and then transfer the blame for the potential loss of these jobs to Plaintiffs or the Court.

The balance of hardships weighs against the Federal Defendants and Resolution. Because the balance of factors favors the Tribe, the Court should enjoin Oak Flat's transfer during the pendency of this case.

4. Seven County *does not hold that vacating an EIS is improper.*

Finally, Resolution insists that that *Seven County* holds that the remedy for any defect in the EIS would be a remand *without vacatur* of the EIS. (Resolution Response, pp. 19-20). *Seven County* articulates no such holding; instead, it plainly states that vacating the agency action remains a valid option when further analysis could lead an agency to disapprove a decision. 145 S. Ct. at 1514. Here, the Tribe has demonstrated that if the Forest Service undertakes a dam breach analysis and considers other factors not reviewed, it might disapprove the Skunk Camp TSF in favor of another alternative.

III. CONCLUSION

To avoid irreparable harm that will come with the destruction of Oak Flat, the Tribe asks the Court to maintain the *status quo* by enjoining Oak Flat's transfer during the pendency of this action.

///

///

[9]Resolution has been legally prohibited from acquiring a property interest in the 760-acre parcel known as the Oak Flat Picnic and Camp Ground, which was withdrawn from "all forms of appropriation under the public land laws, including the mining but not the mineral-leasing laws" by President Eisenhower in 1955 through Public Land Order 1229, 20 Fed. Reg. 7,336 (Oct. 1, 1955), and which was further protected from appropriation under the U.S. mining laws by President Nixon in 1971 through Public Land Order 5132, 36 Fed. Reg. 19,029 (Sept. 25, 1971).

Respectfully submitted this 4th day of August 2025.

San Carlos Apache Tribe
Office of the Attorney General

By: */s/ Alexander B. Ritchie (with permission)*
Alexander B. Ritchie
Justine Jimmie
Laurel Herrmann
Jana Sutton
Bernardo M. Velasco
Attorneys for Plaintiff San Carlos Apache Tribe

THE SPARKS LAW FIRM. P.C.
By: */s/ Joe P. Sparks*
Joe P. Sparks
Attorney for Plaintiff San Carlos Apache Tribe

TITLA & PARSI, PLLC

Steve Titla
Attorney for Plaintiff San Carlos Apache Tribe (of counsel)