

**A SUMMARY COMPARISON OF APPLICABLE
FEDERAL LAWS VS. STATE LAWS FOR LARGE SCALE
METAL MINING FACILITIES IN ARIZONA¹**

FEDERAL OWNERSHIP	PRIVATE OWNERSHIP
<p><i>MINING PLAN OF OPERATIONS</i></p> <p>U.S. Forest Service requires <u>mining company to submit complete mining plan of operations as specifically prescribed by 36 C.F.R., Part 228 for Service review and environmental analysis.</u></p> <p>Mining plan shall outline the plan for the entire operation for the full estimated period of activity.</p> <p>Mining operations must minimize adverse environmental impacts to forest resources and comply with all federal and state laws pertaining to <u>air quality, water quality, solid wastes, scenic values, fisheries and wildlife habitat, roads, reclamation.</u></p> <p>Forest Service maintains authority to require mining company to prepare supplemental plans for additional review or to modify plans to minimize disturbance of surface resources.</p> <p>Mining must be conducted in accordance with approved plan.</p>	<p><u>Mining company is not required to submit a mining plan of operations to any State agency or department for environmental analysis or review.</u></p> <p>Mining company required to submit only certain aspects of its project to meet requirements under State law pursuant to A.R.S., Title 27, Chapter 3, Operations of Mines; A.R.S., Title 45, Laws Relating to Waters; A.R.S., Title 49, Laws Relating to Environmental Quality.</p>
<p><i>NEPA COMPLIANCE</i></p> <p><u>Mining plan of operations shall be reviewed by Forest Service in accordance with NEPA.</u></p> <p>Large mines trigger the preparation of a full environmental impact statement (EIS). Required for “major Federal actions significantly affecting the</p>	<p><u>Arizona does not have a similar “NEPA like” statutory requirement.</u></p> <p>NEPA review of the <u>mining plan of operations</u> and full scope of the project is <u>not required.</u>²</p> <p>Limited NEPA review may be required, but <u>only if</u></p>

¹ This comparison chart is in summary form only and does not contain a complete comparison of every applicable law in every instance. Under H.R. 687, Resolution Copper would acquire over 2,400 acres of Forest Service lands in private ownership. Once in private ownership, it may be argued that only the limited protections under state law outlined here will legally apply to Resolution Copper’s mining activities. Source documents for this chart may be obtained from Susan B. Montgomery, Esq., MONTGOMERY & INTERPRETER, PLC, Attorneys at Law, 4835 E. Cactus Rd., Suite 210, Scottsdale, AZ, 85254, smontgomery@milawaz.com.

² H.R. 687 provides for sham NEPA requirements that are likely to be argued to have very little legal applicability to Resolution Copper’s activities once the mine is in private ownership.

quality of the human environment,” (NEPA Sec 102(c)).

Requires public disclosure about the action, alternatives, and environmental effects and allows public participation in the EIS process.

Forest Service must take a “hard look” at the entire mining plan of operations, consider alternatives and, where impacts cannot be avoided or sufficiently minimized, require mitigation.

Forest Service must engage in advanced government-to-government consultation with affected Indian tribes regarding the mining plan of operation and as part of the NEPA process.

Forest Service maintains authority to require supplemental EIS if plan of operations or other important facts change.

specific mining activities have a federal nexus (*for example*, if Army Corps of Engineers dredge and fill permit, known as a “Clean Water Act, 404 permit” is required).

Public participation and involvement and obligation of federal agency to consult with affected Indian tribes under NEPA and other laws limited to particular federal nexus activity.

RECLAMATION

Mining company is required to have a detailed plan for reclamation (clean up) of mining site and to post Financial Bond to ensure that there will be adequate funding for mine clean up and surface remediation, including cost of stabilizing, rehabilitating, and reclaiming the area of operations.

“Any operator required to file a plan of operations shall, when required by the authorized officer, furnish a bond conditioned upon compliance with 228.8(g), prior to approval of such plan of operations.”

Forest Service has authority for mining plans of operation to cover the cost of required reclamation on Forest Service lands where bond is necessary to insure performance of reclamation and mitigation measures.

Under Forest Service Manual direction (FSM 6561.3) bonds are required to cover the cost of reclamation described in the plan of operation.

Bonds should be provided to the authorized officer before Plan approval, though Bond estimates are subject to challenge and appeal (36 C.F.R. § 251).

Mere corporate promise or “financial assurance” required to ensure that mining company will reclaim mining site consistent with reclamation plan under Arizona laws. A.R.S. § 27-991.

Reclamation plan only required to achieve “stability and safety” of mine site, “consistent with post-mining land use objectives specified in reclamation plan.” A.R.S. § 27-901(13); *see also* A.R.S. § 27-971 (specifying contents of post-mining reclamation plan); A.R.S. 27-973 (approval criteria).

Reclamation obligations may be delayed for addition period if mining company informs state mine inspector that mining “will resume” at some point in future under certain conditions. A.R.S. § 27-926(B).

MINE INSPECTIONS

Forest Service retains authority under Part 228 to conduct “periodic” inspections of the mine site to determine if operator is complying with plan of operations and applicable requirements of federal law.

State mine inspector may inspect mine to enforce the mine safety provisions of A.R.S. Title 27, Chapter 3, only. These provisions have very limited protection for the environment, water, etc.

TREATY AND TRUST RESPONSIBILITY

United states has continuing Treaty and Trust responsibility to affected Indian Tribes, including with regard to the (a) impact of the mine on Tribal sacred sites and traditional cultural properties; and (b) duty to engage in meaningful government-to-government consultation during life of mine.

United States’ Treaty and Trust responsibilities do not apply where there is no federal involvement, discretion or oversight on private lands.³

CULTURAL RESOURCE LAWS

Continued applicability of federal laws and policies for the protection of sacred sites, traditional cultural properties and archeological resources apply to the mine operation and mining company. Forest Service must assure continued compliance with these laws throughout life of project, including, but not limited to:

Section 106 of the National Historic Preservation Act (NHPA) (requiring identification of tribal traditional cultural properties, tribal consultation and mitigation);

Archeological Resource Protection Act (ARPA);

Native American Graves Protection and Repatriation Act (NAGPRA);

E.O. 13007 (calling for protection of Indian “sacred sites”).

The cultural resource protections in NHPA, ARPA, NAGPRA and E.O. 13007 do not apply on private lands without a federal nexus.

No provisions exist in Arizona law for protecting identified Tribal sacred sites on private lands.

A.R.S. § 41-844 (the State’s “NAGPRA like” statue) requires reporting the discovery of any archaeological, paleontological or historical site or object that is at least fifty years old, BUT only where the discovery occurs on state, not private, lands.

A.R.S. § 41-865 (prohibits the intentional disturbance of a limited category of resources -- human remains or funerary objects -- including on private lands).

A.R.S. § 13-3702 prohibits damaging or defacing petroglyphs or pictographs only on the property of another. This does not apply to damages caused by a mining company on its own private lands.

ENDANGERED SPECIES ACT

Federal agencies are required under the

Section 9 of ESA is applicable. Mining company

³ Suggestions in H.R. 687 that there will be tribal consultation after the enactment of the proposed act are meaningless where the Secretary of the Interior has not authority to take action as a result of such consultation due to the fact that the lands are in private ownership. This point has been made with regard to prior legislation on this matter by USDA Secretary Vilsack and Mary Wagner, Associate Chief of the U.S. Forest Service.

Endangered Species Act (ESA) to assure that federal actions will not jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat.

U.S. Forest Service must ensure compliance with the Endangered Species Act. "Take" of species is prohibited under Section 9 of the ESA, without appropriate approvals of the U.S. Fish and Wildlife Service.

Due to ongoing federal oversight, where project action may affect listed species or their designated habitat, the Forest Service must also consult with the U.S. Fish and Wildlife Service under Section 7 of the ESA. "Action" is defined broadly to include funding, permitting and other regulatory actions.

Submission of the mining plan of operations would trigger Section 7 consultation regarding the impact of the entire mine project on federally listed species or critical habitat.

cannot "take" federally listed species as a result of the mine.

No obligation on the part of the mining company to consult with the U.S. Fish and Wildlife Service under Section 7 of the ESA, unless mining project requires a federal permit.

Section 7 consultation limited to only the particular action that implicates federal involvement.

WATER IMPACTS

Comprehensive examination of water impacts required under NEPA.

NEPA requires the Forest Service to perform a detailed review of the predicted impact of the proposed mine project (as outlined in mine plan of operations) on local and water supplies, including groundwater, surface water, springs, seeps and related sources.

Technical reports are prepared for the project and evaluated by the Forest Service and interested members of the public as part of the preparation of the Draft EIS. All water related aspects of the proposed mine, including the mine's potential to deplete and contaminate groundwater and surface water supplies over the life of the mine and at closure are examined.

Alternatives to the project may be considered pursuant to NEPA, Clean Water Act and other applicable laws and requirements.

For large mining projects, technical reports required by the EIS process often include:

No comprehensive examination of water impacts required.

Arizona does not have a comprehensive process to examines the direct, indirect and cumulative impact of a proposed mining project located on private lands on local water supplies and water quality.

Impacts to water supplies and water quality are considered by several different state agencies and departments under a handful of different statutory requirements scattered throughout Arizona's code. For example, see:

Mining company entitled to pump and use groundwater supplies on private property subject only to reasonable use restrictions under A.R.S., Title 45, Chapter 2.

Mining companies receive mineral extraction and metallurgical processing permits for the virtual unlimited withdrawal of groundwater under A.R.S. § 45-514.

Pumping of groundwater to remediate contamination cause by the mining company may be put to "beneficial use" by

Surface and groundwater baseline information, modeling and analysis;

Predictive scientific groundwater modeling and simulations;

Baseline regional groundwater flow modeling;

Infiltration, seepage, and transport modeling;

Tailings and facility stormwater management options;

Modeling and assessment of impacts to surface supplies;

Geochemical pit lake predictive models.

the mining operation for use at the metal mining facility. A.R.S. § 45-454.01 (allowing for the virtual unlimited use of groundwater, even in an AMA under certain circumstances, if the pumping and removal of groundwater is needed to remedy groundwater contamination).

Metal mining facilities may be exempted from certain permitting requirements or otherwise have permitting expedited under Title 45, when requirements interfere with contamination mitigation activities. A.R.S. § 45-290.02.

Mining company entitled to use appropriable (surface) waters, subject only to priority and beneficial use requirements under Title 45, Chapter 1, Articles 4 & 5.

Mining company to comply with environmental permitting under A.R.S., Title 49, which includes the permitting requirements set forth in:

Arizona Pollution Discharge Elimination System Program, A.R.S. §§ 49-255 to 255.03 requiring permits for the discharge of pollutants to the surface waters of the United States (federal Clean Water Act requirement);

Aquifer Protection Permits, A.R.S. §§ 49-241 to 49-252, mandating certain design and project requirements intended to protect groundwater supplies.

ADDITIONAL CAVEATS:

County Boards of Supervisor are prohibited from “regulating or restricting” the use or occupation of private mining lands greater than 5 acres by means of zoning ordinances or County Comprehensive Plans. A.R.S. §11-811(C); see also A.R.S. § 11-812(A)(2); A.R.S. § 11-821.

Mining company exempt from seeking approval from County flood control districts for construction of tailings dams and waste disposal areas used in connection with mining and metallurgical operations. A.R.S. § 48-3613.

Materials produced in mining or mineral processing operation exempt from normal restrictions that prohibit construction of solid waste

facility within one-half mile of a 100 year floodplain
as determined by FEMA. A.R.S. § 49-
772(A)(2)(b).