

**Resolution Copper Project and Land Exchange
Environmental Impact Statement**

USDA Forest Service
Tonto National Forest
Arizona

November 6, 2019

Process Memorandum to File

Summary of Selection Process, Contracting, and Conflict of Interest Management

This document is deliberative and is prepared by the third-party contractor in compliance with the National Environmental Policy Act and other laws, regulations, and policies to document ongoing process and analysis steps. This document does not take the place of any Line Officer's decision space related to this project.

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Purpose of Process Memorandum

Several verbal comments raised during public meetings on the draft environmental impact statement (EIS) for the Resolution Copper Project and Land Exchange (herein called the project) in October 2019 alleged contractual irregularities and conflicts of interest. These comments will be addressed in their entirety once they are received in written form (either from the meeting transcript or submitted otherwise), after the close of the public comment period.

The purpose of this memorandum is to provide a summary of the process used for selecting the third-party contractor (SWCA Environmental Consultants [SWCA]), the contractual arrangements pertaining to SWCA, Resolution Copper Mining, LLC (Resolution Copper), and the Tonto National Forest, and details of how potential conflict of interest has been identified and managed.

Another purpose of this memorandum is to clarify what documentation exists in the project record and what documentation does not. The project record documents process steps during the National Environmental Policy Act (NEPA) process, and the information considered by the Forest Service for the EIS as well as for the Record of Decision. Some information (such as the proposal process) predates the start of the NEPA process and is not contained in the project record. Other information (such as contractual documents and invoices) involve private financial transactions and these documents also are not contained in the project record.

Proposal Process and Selection of the Third-Party Contractor

The Tonto National Forest and Resolution Copper entered into a Memorandum of Understanding (MOU), dated June 30, 2015, prior to undertaking the selection process for the third-party consultant.¹ The MOU dictates how Resolution Copper, the Tonto National Forest, and the third-party contractor are to interact during the NEPA process.

Resolution Copper and the Tonto National Forest agreed on a scope of work for a third-party contractor, and Resolution Copper released an invitation to bid and an accompanying Request for Proposal (RFP) in May 2015. Two pre-bid site visits were scheduled in June 2015 for potential bidders, and additional question-and-answer information was also provided to all bidders during the proposal process. The due date for submitting proposals was originally scheduled for June 29, 2015, but was extended by Resolution Copper to July 9, 2015.

SWCA submitted a proposal to Resolution Copper in response to the RFP on July 9, 2015.² On July 29, 2015, Resolution Copper notified SWCA that they were one of three firms selected for consideration and interviews by the Tonto National Forest.

SWCA interviewed with the Tonto National Forest on September 3, 2015, and were subsequently notified on September 17, 2015, by Tonto National Forest Project Manager Mark Nelson that they had

¹ Project Record #0000140

² The Resolution Copper RFP itself, all attachments and subsequent documents, and the technical and cost proposals submitted by SWCA, all pre-date the start of the NEPA process and are not contained in the project record. These materials are maintained by SWCA separately.

been chosen as the selected third-party NEPA contractor, subject to a final interview with the Tonto National Forest Supervisor. That interview with Tonto National Forest Supervisor Neil Bosworth took place on September 29, 2015.

Contracting

Overview of Third-Party Contracting

The Tonto National Forest made the decision that a third-party contractor would be used to assist with the NEPA process for the Resolution Copper Project. This is the common approach for preparing EIS-level NEPA documentation with many Federal agencies, including the Bureau of Land Management and the Forest Service. To be clear of the distinction:

- A *first-party contractor* reports directly to the Forest Service and gets paid directly by the Forest Service.
- A *third-party contractor* reports directly to the Forest Service but submits all invoices to the proponent (in this case Resolution Copper) for payment. Invoicing/payment necessarily requires a private contract exist between the third-party contractor and the proponent.

There are benefits to using a third-party contractor that are particularly important during a complex NEPA process such as the Resolution Copper Project:

1. The process is often extensive and lengthy, and by using a third-party contractor no taxpayer funds are used for the purposes of conducting the analysis.
2. Similarly, while the Forest Service retains responsibility for oversight and decision making, much of the analysis and logistical workload can be done by the third-party contractor, thus greatly reducing the day-to-day draw on limited Forest Service staff time.
3. The third-party contractor is able to provide specialized expertise not available (or with very limited availability) within the Forest Service. In the case of Resolution Copper, this includes expertise in tailings design and management, mining techniques, groundwater modeling, geologic interpretation, geochemistry, and subsidence modeling.
4. The third-party contractor is also able to be flexible in the services provided. The nature of the NEPA process is such that the issues and concerns are not fully known at the start of the process. Public scoping, tribal consultation, alternatives development, and resource analysis all can drive investigation into new topics or require additional analyses that were never envisioned at the start. The Forest Service has a cumbersome first-party contracting process that requires detailed up-front knowledge of the tasks to be provided, whereas third-party contracting by a proponent provides freedom to expend funds on whatever tasks are required to advance the process.

For instance, the original scope of work envisioned that tribal consultation support might be needed (task 3.6 in the scope of work) and envisioned the potential for additional analysis after review of baseline data (task 2.6 in the scope of work). Neither of these tasks could be fully defined at the start of the NEPA process.

Ultimately, the tribal consultation task has involved numerous tasks including assistance with the tribal monitor training program (three training sessions to date), assisting with the Emory Oak Restoration program, and numerous tribal field trips and meetings, and has accounted for over 10% of total project expenditures. Similarly, the task of validating baseline data involved the formation of several specific workgroups (groundwater modeling, geology and subsidence, geochemistry) and has accounted for almost 25% of total project expenditures. None of these expenditures could have been properly estimated at the start of the project.

In a similar manner, there are other topics not even envisioned at the start of the project that required focused efforts. One example would be bringing on the expertise of Dr. Charles Kliche to investigate alternative mining techniques, a concern that arose during public scoping.

Third-party contracting allows for this flexibility in approach in order to obtain an objective and complete disclosure of project impacts.

Regardless of the benefits of third-party contracting for a complex NEPA process, in the case of the Resolution Copper Project, use of third-party contracting was mandated by Congress. Section 3003 of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015 (NDAA) was passed by Congress in December 2014 and authorized the land exchange, as well as requiring the preparation of a single EIS to be used as the basis for all Federal decisions related to the mine. The NDAA also specifies that:

Section 3003 (c)(7) COSTS.—As a condition of the land exchange under this section, Resolution Copper shall agree to pay, without compensation, all costs that are—(A) associated with the land exchange and any environmental review under paragraph (9); and (B) agreed to by the Secretary.

A third-party contracting arrangement is the most common and appropriate vehicle for Resolution Copper to pay all costs associated with the environmental review.

Third-Party Contracting Arrangement

SWCA executed a two-party Services Agreement with Resolution Copper, which was finalized on November 20, 2015.³ The contract provides for SWCA to submit invoices to Resolution Copper for payment, for work directed by the Tonto National Forest. Subsequent purchase orders have been

³ The original contract and all subsequent change orders between Resolution Copper and SWCA are private transactional documents with sensitive financial information and do not directly involve the Forest Service. These materials are not included in the project record and are maintained by SWCA separately. However, note that the bulk of the contract (minus financial information) was included in the Project Work Plan that is contained in the project record (see next footnote). Also note that the documentation accompanying all invoices (minus financial information) is provided to the Forest Service as required under the contract and included in the project record; these documents are known in the project record as “monthly status reports.”

obtained as needed to provide adequate funds, based on project billings and work being required by the Forest Service.

There are two key components of the third-party contracting arrangement that guide the work by SWCA. First, the contract refers explicitly to the scope of work developed by the Tonto National Forest (Exhibit A-2). Second, the contract refers explicitly to the MOU signed between Resolution Copper and the Tonto National Forest (Exhibit A-1). SWCA's actions under the contract are governed by the agreements contained in the MOU and the scope of work; SWCA has also contractually required all subcontractors to adhere to the requirements of the SWCA/Resolution Copper Services Agreement.

A primary condition of the contracting agreement is that SWCA operates solely under the direction of the Forest Service, not Resolution Copper. This is included in the MOU as a required contract item (item E.3.f) and duly appears in the contract itself (section 2.1):

"2.1 Standards...The Consultant acknowledges that it will be under the direction of the Forest Service, and that the Forest Service will make the final determinations concerning the scope and content of Consultant's work."

As required under the scope of work, SWCA subsequently produced a revised Project Work Plan⁴ that describes how SWCA personnel will conduct work on the project. A key component in the Project Work Plan is Chapter 3, Project Communication Plan. This summarizes the contractual requirements in both the MOU and the scope of work, and then dictates how communication will occur between SWCA (including subcontractors) and other parties. This includes Forest Service specialists, the media, the general public, and Resolution Copper. With respect to communications with Resolution Copper, the instructions provided to the SWCA team are: "Restricted to contracting and budget matters, unless explicitly authorized by Forest Service."

In practice, the Forest Service authorized numerous direct contacts with Resolution Copper and their contractors on complex technical matters throughout the process, provided that the Forest Service was notified of the communication or included on the communication. All such interactions are documented in the project record, including workgroup meetings, data requests and responses, and emails with pertinent technical information.

Conflict of Interest Management

During Initial Selection

Avoiding conflicts of interest has been a priority for the Tonto National Forest and Resolution Copper since the beginning of the process, starting with the MOU, which includes a specific requirement for the third-party contract (item E.3.b) to include a statement that there is no financial interest from the third-party contractor (SWCA), any subcontractors, and any professional personnel.

⁴ Project Record #0001187. Note that the original work plan was submitted as part of the proposal (July 2015), was subsequently revised after contracting (December 2015), and was updated several times thereafter. The most recent version is contained in the project record.

As required under the RFP, SWCA provided a Statement of Financial Interest (section VI in the proposal) that clearly disclosed previous work with Resolution Copper and any parent companies (Rio Tinto or BHP), and states the following:

“SWCA, Incorporated, dba SWCA Environmental Consultants certifies that, to the best of our knowledge and belief, no facts exist relevant to any past interest or activity (financial, contractual, personal, organizational, or otherwise) that may either directly or indirectly (through a client, contractual, financial, organizational, or their relationship) relate to the work to be performed and/or to the outcome of the proposed project; and bear on whether this organization has a conflict of interest with respect to: (1) being able to render impartial, technically sound, and objective assistance and advice; or (2) being given an unfair competitive advantage.

Other than the normal flow of benefits from the performance of the Contractor Retention Agreement, SWCA and its subcontractors do not have any enforceable promise or guarantee to provide any future work on the project, nor does any relationship exist with any person or entity with a financial interest in the outcome of the project, nor does any person or entity with a financial interest in the outcome of the project exercise any control over the work to be performed by SWCA as the NEPA contractor for the project.”

During Contracting and Project Implementation

The contract between SWCA and Resolution Copper contains similar requirements for identifying conflicts of interest (section 2.13), requiring:

“The Consultant, each of the Consultant’s involved professional personnel, and any of the Consultant’s subcontractors as well as the subcontractor’s professional personnel shall: execute a statement stating that each of the aforementioned has no financial or other interest in the outcome of the work described by this contract in accordance with 40 CFR 1506.5(c) and comply with any Forest Service project specific conflict of interest management plan.”

SWCA worked with the Tonto National Forest through the early part of 2016 to determine the appropriate level of disclosure needed to identify conflicts of interest. Eventually, the Tonto National Forest determined that each company involved needed to certify for the Forest Service that they had no conflict of interest; any further management of conflicts of interest would be the internal responsibility of SWCA and subcontractors. This request was made in writing by the Tonto National Forest Supervisor on June 22, 2016.⁵

Completed conflict of interest certifications for SWCA and all subcontractors were submitted to the Forest Service on October 7, 2016, for the following entities⁶:

- SWCA
- DOWL, LLC

⁵ Project Record #0000927

⁶ Project Record #0001153, also see Chapter 10 of Project Work Plan (Project Record #0001187)

- BGC Engineering USA, Inc.
- The Rozelle Group, Ltd.
- Geochemical Solutions, LLC
- HydroGeo, Inc.
- BBC Research and Consulting

Internal Conflict of Interest Management

The certifications submitted to the Tonto National Forest use specific language dictated by the Forest Service in the request letter of June 22, 2016. While the Tonto National Forest did not require any additional detail, internally it was incumbent on SWCA and subcontractors to identify potential conflicts of interest, and where the potential existed, to determine specific management actions to ensure integrity of the analysis.

For each subcontractor, SWCA required submittal of a “Disclosure of Current Open or Active Contractual Relationships with Corporate Entities Associated with Resolution Copper,” which specifically included Resolution Copper Mining LLC, Resolution Copper Company, Rio Tinto PLC, BHP Copper Inc. or BHP Billiton PLC.⁷ These disclosures were obtained from the entities listed above in 2016, and later also obtained from GeoStat Systems, an additional subcontractor added in 2017.

Potential conflicts of interest were identified for three of the contractors: SWCA, BGC Engineering, and GeoStat Systems, LLC. These potential conflicts are all of the same nature: professionals involved in the Resolution Copper project team are also working on other mining projects in a similar professional capacity. This situation was expected and recognized as unavoidable, as those professionals with the necessary and specific mining expertise (for instance tailings design and management) are involved in other mining projects in the course of their career.

To manage these potential conflicts of interest, specific conflict of interest management plans were executed for SWCA, BGC Engineering, and GeoStat Systems.⁸

All conflict of interest information was updated in mid-2018 (including another subcontractor, SLR International Corporation) and submitted to the Tonto National Forest on September 3, 2018.⁹

⁷ As this level of documentation was not requested or required by the Tonto National Forest, these more detailed disclosures are not in the project record. These materials are maintained by SWCA separately. See specifically an internal process memorandum titled “Internal Conflict of Interest Documentation,” dated December 7, 2016.

⁸ As this level of documentation was not requested or required by the Tonto National Forest, these conflict of interest management plans are not in the project record. These materials are maintained by SWCA separately. See specifically an internal process memorandum titled “Internal Conflict of Interest Documentation”, dated December 7, 2016.

⁹ Project Record #0110536