

1 Faegre & Benson LLP  
2 3200 Wells Fargo Center  
3 1700 Lincoln Street  
4 Denver, CO 80203-4532  
5 Telephone: (303) 607-3500  
6 Facsimile: (303) 607-3600  
7 Robert D. Comer, *Pro Hac Vice (pending)*, [rcomer@faegre.com](mailto:rcomer@faegre.com)  
8 Russell O. Stewart, *Pro Hac Vice (pending)*, [rstewart@faegre.com](mailto:rstewart@faegre.com)

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12 Attorneys for Northwest  
13 Mining Association

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15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

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18 **SAVE THE SCENIC SANTA RITAS;**  
19 **CENTER FOR BIOLOGICAL**  
20 **DIVERSITY; FARMERS**  
21 **INVESTMENT CO; and FARMERS**  
22 **WATER CO.,**

23  
24 **Plaintiffs,**

25  
26 **v.**

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28 **UNITED STATES FOREST SERVICE;**  
29 **JAMES UPCHURCH, Supervisor of the**  
30 **Colorado National Forest**

31  
32 **Defendants.**

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34 **and**

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36 **ROSEMONT COPPER COMPANY,**

37  
38 **Intervenor-Defendant.**

Case No. 4:11-CV-00094-TUC-FRZ

**BRIEF OF AMICUS CURIAE  
NORTHWEST MINING  
ASSOCIATION IN SUPPORT OF  
DEFENDANTS' OPPOSITION AND  
INTERVENOR-DEFENDANTS'  
RESPONSE TO MOTION FOR  
PRELIMINARY INJUNCTION**

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42 Northwest Mining Association (NWMA), cognizant of its obligation not to repeat  
43 arguments of other amici, joins in the arguments contained in the briefs filed by amici

1 Arizona Mining Association (DKT 68) and Barrick North American Holdings (DKT 59);  
2 and Intervenor Rosemont Copper Company (DKT 44). NWMA submits this brief to  
3 provide this Court with the benefit of the experiences and practices of NWMA members  
4 in 46 states.

5 NWMA has approximately 1800 members, representing every sector of the  
6 mining industry. NWMA's members produce metallic, non-metallic, and industrial  
7 minerals, sand and gravel and coal.

8 NWMA members have been involved in thousands of projects involving review  
9 under the National Environmental Policy Act of 1969 (NEPA) for more than 40 years; in  
10 not one of those thousands of projects have the procedural requirements of the Federal  
11 Advisory Committee Act of 1972 (FACA) been imposed on top of NEPA's procedures  
12 for obtaining and considering project proponent information critical to the very agency  
13 action that flows from the procedural NEPA process.

14 NEPA requires the lead Federal agency to consult with other Federal agencies, and  
15 encourages consultation with local agencies, which have jurisdiction or expertise with  
16 respect to any environmental impact of a proposed project on federal land. *See* 42 U.S.C.  
17 § 4332(2)(c). These agencies must have knowledge of the proposed project in order to  
18 carefully consider and comment upon project scope, timing and environmental impacts.  
19 Thus, in virtually every case, NWMA member projects trigger NEPA review, including  
20 multiple meetings to provide information and answer questions posed by cooperating  
21 agencies and the public.

1           For more than four decades, no one has suggested that NEPA’s mandated process  
2 requiring federal agencies to collect information to prepare an Environmental Impact  
3 Statement is subject to FACA. The plain language of FACA does not apply to NEPA  
4 proceedings, because the individual cooperating agencies and project proponents are not  
5 a “group” collectively providing “advice or recommendations” within the meaning of  
6 FACA. Nor is the project proponent “controlled” by the federal agency. The mere fact  
7 that cooperating agencies and project proponents meet with federal officials to exchange  
8 facts or information during the NEPA process does not result in recommendations as a  
9 “group.” This interpretation of the statute has been long-settled in regulations  
10 promulgated by the General Services Administration under FACA authority. *See* 41  
11 C.F.R. § 102-3.40 (f) (“any group that meets with Federal official(s) for the purpose of  
12 exchanging facts or information” is *not* covered by FACA); 41 C.F.R. § 102-3.40 (e)  
13 (FACA does *not* apply to “any group that meets with a Federal official(s), including a  
14 public meeting, where advice is sought from the attendees on an individual basis and not  
15 from the group as a whole.”)

16           Plaintiffs’ briefs filed in this matter mount no challenge to 41 C.F.R. § 102-3.40(e)  
17 and (f). Nor could they: The regulatory guidance, adopted by the United States General  
18 Services Administration, is entitled to the highest level of deference and may not be  
19 disturbed unless it is arbitrary or capricious in substance, or manifestly contrary to FACA.  
20 *See Mayo Foundation for Medical Educ. and Research v. United States*, \_\_\_ U.S. \_\_\_,  
21 131 S.Ct. 704 \_\_\_ (2011) (“*Chevron* deference is appropriate when it appears that  
22 Congress delegated authority to the agency generally to make rules carrying the force of

1 law, and that the agency interpretation claiming deference was promulgated in the  
2 exercise of that authority.”); *Chevron, U.S.A v. Natural Resources Defense Council, Inc.*,  
3 467 U.S. 837, 866 (1984) (“When a challenge to an agency construction of a statutory  
4 provision, fairly conceptualized, really centers on the wisdom of the agency’s policy,  
5 rather than whether it is a reasonable choice within a gap left open by Congress, the  
6 challenge must fail.”).

7 Plaintiffs concede, as they must, that “groups assembled to exchange facts or  
8 information are not FACA advisory committees” (Reply at 18-19), but they brush off the  
9 regulation with the suggestion that “that is not what happened here.” Yet Plaintiffs also  
10 concede (as in virtually all NEPA proceedings) that the “group” of cooperating agencies  
11 *never produced and never will produce* the “group’s” written advice or recommendations.  
12 (Reply at 14.) Plaintiffs’ construction of FACA turns the regulation on its head, and  
13 presumes that any meeting called to exchange facts and information will involve advice  
14 and recommendations *of the “group*, and that any meeting with a group to seek  
15 individual advice will be advice *from the “group”* even though the “group” never  
16 prepares a written (or oral) consensus report or recommendation.

17 The interpretation of FACA advanced by Plaintiffs is unprecedented, conflicts  
18 with the plain language of the regulations, and would be debilitating to the NEPA process.  
19 Project proponents must be free to interact with the agency both at the preliminary project  
20 stages and throughout the agency’s decision-making process, including any  
21 environmental review conducted under NEPA. *See, e.g.*, 40 C.F.R. § 1506.5 (discussing  
22 the submission of information by applicants to federal agencies during the NEPA

1 process). Plaintiffs' erroneous interpretation of FACA would open virtually *every* NEPA  
2 proceeding to a FACA challenge, depending only on what was said or not said at a  
3 meeting with a Federal official, never mind that the cooperating agencies and proponent  
4 were never asked to provide advice or recommendations as a group. A decision adopting  
5 Plaintiff's interpretation would cause substantial delay, uncertainty, harm and expense to  
6 all NWMA members in Arizona and 45 other states.

7 Furthermore, the Court's ruling in this matter will affect any entity that requires  
8 federal authorization or approval for its project, triggering the application of NEPA. The  
9 Court's ruling will affect a variety of federal actions ranging from leases, permits, rights-  
10 of-way and land and resource plan amendments. It also will affect businesses that  
11 depend on federal permits and approvals to operate, including industries as diverse as  
12 grazing, timber, oil and gas, recreation, transportation, renewable energy and aviation.  
13 To require the formation of formal FACA committees for every action that involves a  
14 federal agency meeting with the project proponent will delay and increase project costs  
15 while opening whole new opportunities for litigation.

16 For these reasons, and for the reasons set forth in the briefs of Rosemont Copper  
17 Company and amici Arizona Mining Association and Barrick North American Holdings,  
18 the NWMA respectfully urges the Court to reject Plaintiffs' erroneous interpretation of  
19 FACA.

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1 Dated: June 20, 2011

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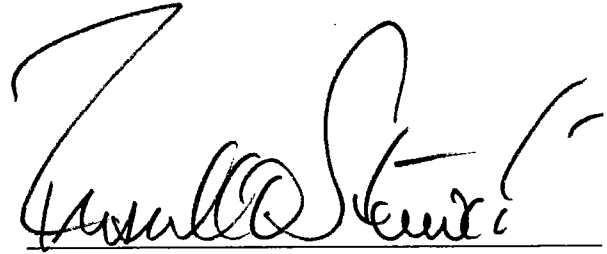
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A handwritten signature in black ink, appearing to read "Russell Stewart". The signature is written in a cursive style with a horizontal line underneath it.

Robert Comer (pro hac vice pending)  
Russell Stewart (pro hac vice pending)  
3200 Wells Fargo Center  
1700 Lincoln Street  
Denver, Colorado 80203-4532

ATTORNEYS FOR DEFENDANT  
NORTHWEST MINING  
ASSOCIATION

1  
2 **CERTIFICATE OF SERVICE**  
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4 I hereby certify that on June 20, 2011, I caused to be delivered by overnight  
5 service this document to the Clerk's Office, and placed copies in the United States mail,  
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7

8 Margaret B. LaBianca  
9 Lucas J. Narducci  
10 CityScape Tower  
11 1 East Washington Street, Suite 1200  
12 Phoenix, AZ 85004  
13

14 G. Van Velsor Wolf, Jr., Esq.  
15 Snell & Wilmer LLP  
16 1 Arizona Ctr., 400 E. Van Buren Street  
17 Phoenix, AZ 85004-0001  
18

19 Jeffrey C. Parsons  
20 Western Mining Action Project  
21 P.O. Box 349  
22 Lyons, CO 80540  
23

24 Roger Flynn  
25 Western Mining Action Project  
26 P.O. Box 349  
27 Lyons, CO 80540  
28


29 Dinah Bear, Esq.  
30 Attorney at Law  
31 4019 18<sup>th</sup> Street, NW  
32 Washington, DC 20011  
33

34 Charles Alexander Davis, Esq.  
35 US Attorney's Office  
36 405 W. Congress Street, Suite 4800  
37 Tucson, AZ 85701-5021  
38

39 Daniel Bensing, Esq.  
40 US Dept of Justice  
41 Federal Programs Branch  
42 P.O. Box 883, Ben Franklin Station  
43 Washington, DC 20530  
44

1  
2 Norman D. James, Esq.  
3 Fennemore Craig PC  
4 3003 N. Central Avenue, Suite 2600  
5 Phoenix, AZ 85012-2913

6  
7 Todd Christopher Wiley, Esq.  
8 Fennemore Craig PC  
9 3003 N. Central Avenue, Suite 2600  
10 Phoenix, AZ 85012-291

11  
12  
13  
14 /s/   
15

16  
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