

Save the Scenic Santa Ritas
8987 E. Tanque Verde Rd.
#309-157
Tucson, AZ 85749
520.445.6615

Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710
520.623.5252

Farmers Investment Co.
P.O. Box 7
Sahuarita AZ 85629
520.791.2852

December 27, 2010

Mr. James Upchurch, Supervisor
Coronado National Forest
300 West Congress Street
Tucson, Arizona 85701

Dear Mr. Upchurch:

On behalf of Save the Scenic Santa Ritas (SSSR), a volunteer-based, non-profit organization that focuses on protection of the Santa Rita Mountains, the Center for Biological Diversity (CBD), a nonprofit organization dedicated to the preservation, protection and restoration of biodiversity and ecosystems throughout the world, and Farmers Investment Co., a family-owned farm which grows pecans on approximately 7,000 acres it owns in and around Sahuarita in the Santa Cruz River Valley, we are writing to notify you of violations of law in regards to the process of preparing the environmental impact statement (EIS) for the proposed Rosemont Mine. Specifically, the inclusion of Rosemont representatives on a regular and systematic basis in cooperating agency meetings is a violation of the Federal Advisory Committee Act, 5 U.S.C. App. II (FACA). Additionally, the Forest Service is in violation of the requirements of the Freedom of Information (FOIA) in regards to a response to a request filed by the Center for Biological Diversity on September 30, 2010.

The Federal Advisory Committee Act was passed by Congress in 1972 to provide a formal structure for management of any “committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof” which is established or utilized by a federal agency “in the interest of obtaining advice and recommendations for” the federal agencies. 5 U.S.C. Appendix app. § 3. One of the major issues that Congress sought to address through passage of the Act was the concern that committee meetings often did not adequately represent the public interest because of a bias in the makeup of the membership. It was also concerned that such meetings were too often closed to the public. Thus, Congress established rigorous requirements regarding the establishment, composition, and conduct of such committees. Realizing the need for representatives of different levels of government to be able to work together on matters, Congress later passed a provision exempting groups composed solely of federal, state, tribal and local government representatives who are in group meetings with federal agencies to exchange “official views regarding the implementation of public laws requiring shared intergovernmental responsibilities or administration.” Unfunded Mandates Reform Act of 1995, § 204(b).

“Cooperating agencies” in the context of compliance with the National Environmental Policy Act are, by definition, either federal, state, local or tribal agencies. 40 C.F.R. 1508.5. When meeting together in furtherance of the NEPA process, cooperating agencies evaluate information and give advice to the lead agency. 40 CFR 1501.6, 1506.5. We would have expected that cooperating agency

meetings, therefore, are solely attended by representatives of those agencies and that the aforementioned exemption from FACA covered cooperating agency meetings organized by the Forest Service in the context of complying with NEPA for the proposed Rosemont Copper Mine. Instead, we find a situation that represents precisely the type of scenario that Congress intended to eliminate when it passed FACA; that is, unbalanced representation by private interests in a series of meetings closed to the public.

While we have yet to get records fully responsive to CBD's FOIA request referenced above, from the information available to us we know that Rosemont Copper or Rosemont Copper's representatives attended at least 18 of 23 cooperating agency meetings between April 1, 2009 and July 15, 2010. At five of those meetings, Rosemont representatives made presentations to the group. We understand that there are occasions when an invited presentation by an outside party, including the applicant, may be permissible. However, in the other 13 meetings, there is no indication that Rosemont Copper representatives made any presentation. Rather, it appears that their invitation to attend these meetings has become a regular, systematic pattern and practice.

From the information available to the public, it appears that Rosemont Copper representatives were in meetings in which key decisions were made in regards to what alternatives would be analyzed, what mitigation measures might be appropriate, and other important issues. Yet while Rosemont Copper was represented, none of our organizations, which have submitted comments adverse to Rosemont, were invited to participate in these meetings. The meetings were neither publicly noticed nor open to the public.

Apparently, the Forest Service has never promulgated agency-wide guidance regarding compliance with FACA in the context of cooperating agency meetings. However, the Coronado National Forest's (CNF) website established for the Rosemont process contains the following question and answer:

“Are meetings between the Forest Service and cooperating agencies subject to the requirements of the Federal Advisory Committee Act (FACA, 5 U.S.C.A. App. 2)?”

Normally, no. The [Federal Advisory Committee Act](#) (FACA) applies whenever a federal agency official establishes, manages, or controls a committee, board, or similar group for the purpose of obtaining consensus advice or recommendations on issues or policies within the agency official's responsibility. Meetings among representatives of **governmental entities**, however, are exempt from the requirements of FACA when they involve intergovernmental activities associated with managing or implementing federal programs ([2 U.S.C. 1534\(b\)](#)) This is a broad exemption. Effectively, any meeting supporting the Forest Service's project-level activities would be exempt if the **cooperating agencies or representatives of other governmental entities** were providing information, guidance, or analysis related to their responsibilities or expertise.” (emphasis added)

That text is correct. Unfortunately, the Forest Service has, for inexplicable reasons, failed to act in accordance with its own advice.

It may be useful for you to know that the Bureau of Land Management (BLM) has promulgated agency-wide guidance specifically on this point. The guidance states that normally meetings between BLM and cooperating agencies do not trigger FACA because of the intergovernmental exemption. It explains that the exemption applies “to meetings between federal officials and elected state, local, or tribal government officials or their designated employees with authority to act on their behalf.” It also addresses the question of whether a cooperating agency may be represented by a contractor working at such a meeting. BLM’s answer in this respect is very instructive:

”The cooperating agency relationship is intended to facilitate the exchange of views and expertise among BLM managers and staff and other governmental officials and staff. For these reasons, the BLM discourages the use of contractors to represent the cooperating agencies. . . . Contractors should not represent the cooperating agencies in meetings where advice or recommendations are sought.”

The guidance goes on to explain that given limited staff and time demands, a cooperating agency might be represented by a contractor if the meeting was used solely for the purpose of exchanging information. . . . “In practice, however, the distinction between exchanging information and seeking recommendations may not be clear.” “For these reasons, the BLM discourages the use of contractors to represent the cooperating agencies.” Please note that this guidance is directed towards contractors representing other governmental entities. The guidance never suggests that it is ever appropriate to include an applicant or an applicant’s contractors on a regular basis in cooperating agency meetings.

http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/coop_agencies.Par.69801.File.dat/CAGUIDE05.pdf.

Given that no new information appears to have been posted on the CNF Rosemont website for several months, we do not have information about the participants in recent cooperating agency meetings. However, given that the draft environmental impact statement has, according to Rosemont Copper’s announcement, been delayed, we assume that cooperating agency meetings are continuing. We are also aware that the specific meetings about which we complain were held before you became Supervisor of the Coronado National Forest. However, in your brief time there, you have surely learned that the proposed mining activity is extremely controversial. Both the public as well as all government decision-makers must be able to rely on the draft EIS as credible, reliable information. The presence of Rosemont Copper representatives in the room has clearly tainted the process.

We believe that inclusion of Rosemont Copper representatives on a regular basis in cooperating agency meetings is a clear violation of law with extremely damaging implications. The violation of this law undermines confidence that the Forest Service understands the law; it undermines confidence in the credibility and objectivity of the document; and it makes the process unacceptably one-sided. It is totally at odds with the provision in the Memorandum of Understanding between the Coronado National Forest and Rosemont Copper Company that states:

“The complexity and the independent nature of the NEPA process requires a common understanding of the roles of the Forest Service personnel, the Proponent, the Prime Consultant, and other interested persons, agencies, and organizations. The role of the Proponent is the same as it would be if the process were being entirely performed by Forest Service personnel with no Proponent financing.” MOU, Section F 3.

This violation also calls into question other provisions of the MOU, which purport to preserve the independence of the Forest Service. For example, Section E 15 of the MOU states that:

“[The Proponent] shall **AT NO TIME**, direct the Prime Consultant in matters related to the NEPA review and/or EIS analysis and preparation.” (emphasis in original)

Other relevant documents, such as the protocol that was to be developed to facilitate communication and coordinate the exchange of information between Rosemont Copper and the Forest Service and the consultant hired to work for the Coronado, SWCA, have yet to be produced in response to the CBD FOIA request. MOU, Section D 8.

We are saddened to see evidence that the Coronado National Forest has been unable or unwilling to abide by its own website guidance and MOU provisions. We ask that you take this matter to heart and give both yourself and the public a fresh start. As you evaluate the status of the Rosemont EIS process, we ask that you remedy these problems by halting the EIS process and beginning it anew in full compliance with FACA. If you believe Rosemont Copper should be a regular participant in cooperating agency meetings, the committee should not meet again until it is legally chartered as a federal advisory committee with a balanced membership representative of all the various affected public interests including government, agriculture, tourism, business, communities, ranching, major water providers and users and other interests at the table, along with compliance with other requirements of a federal advisory committee, including open meetings. The draft EIS is now irreversibly tainted by this violation, and your decision must take this fact into account.

Thank you in advance for considering our concerns. Given that we have every reason to believe that these violations are continuing, we urge that you act quickly to establish a new process. We also request that you direct the CNF staff to respond to the remainder of CBD’s FOIA request expeditiously and that you respond to this letter by January 14, 2011 with an explanation of how you intend to proceed. If we do not receive a response by then, and are not assured of satisfactory compliance with FACA and FOIA, we will assume that you intend to continue the process as it is, and we will proceed accordingly, considering our full range of legal options.

Sincerely,



Gayle Hartmann
Save the Scenic Santa Ritas



Randy Serraglio
Center for Biological Diversity



Dick and Nan Walden
Farmers Investment Co.

c.c. The Honorable John McCain, United States Senate
The Honorable Jon Kyl, United States Senate
The Honorable Raúl Grijalva, United States House of Representatives
The Honorable Gabrielle Giffords, United States House of Representatives
The Honorable Nancy Sutley, Chair, Council on Environmental Quality
The Honorable Jay Jensen, Deputy Undersecretary, U.S. Department of Agriculture
The Honorable Jan Brewer, State of Arizona
The Honorable Joe Hart, Arizona Mine Inspector
Mr. Corbin Newman, Regional Forester, U.S. Forest Service
Arizona Department of Administration - Risk Management
Arizona Department of Environmental Quality
Arizona Department of Mines and Mineral Resources
Arizona Department of Public Safety
Arizona Department of Transportation
Arizona Department of Water Resources
Arizona Game and Fish
Arizona Geological Survey
Arizona State Land Department
Arizona State Parks
Arizona Water Banking Authority
Army Corps of Engineers
Bureau of Indian Affairs
Bureau of Land Management
Bureau of Reclamation
City of Tucson
Cochise County
Davis-Monthan Air Force Base
Department of Labor Mine Safety and Health Administration
Federal Highway Administration
Federal Railroad Administration
Office of Surface Mining Reclamation
Pima County
Santa Cruz County
State Historic Preservation Office
Tohono O'odham Nation
U.S. Environmental Protection Agency
U.S. Fish and Wildlife
U.S. Geological Survey