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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Save the Scenic Santa Ritas; Center for)
Biological Diversity; Farmers Investment)
Co.; and Farmers Water Co.,)

Plaintiffs,)

vs.)

United States Forest Service; James)
Upchurch, Supervisor of the Coronado)
National Forest,)

Defendants.)

and)

Rosemont Copper Company,)

Intervenor-Defendant.)

No. CV 11-094-TUC-FRZ

ORDER

Before the Court for hearing and consideration is Plaintiffs’ Motion for Preliminary Injunction in this matter involving the environmental review managed by Defendants United States Forest Service (“USFS”) and James Upchurch, Supervisor of the Coronado National Forest (“CNF”), of a proposal by Augusta Resources, Inc. and its subsidiary Rosemont Copper Company.

Plaintiffs Save the Scenic Santa Ritas; Center for Biological Diversity; Farmers Investment Co.; and Farmers Water Co. filed the Complaint for Declaratory and Injunctive Relief on February 7, 2011, against Defendants USFS, Upchurch and CNF (hereinafter referred to collectively as “the Federal Defendants”), alleging the Federal Defendants failed

1 to comply with (I) the Federal Advisory Committee Act (“FACA”), 5 U.S.C. Appx. 1 *et seq.*,
2 and (II) the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended.

3 Plaintiffs filed the Motion for Preliminary Injunction on March 10, 2011, seeking (a)
4 to enjoin the USFS from utilizing, publishing, or relying upon the Draft Environmental
5 Impact Statement ("DEIS") currently being prepared by the USFS and CNF for the Rosemont
6 Copper Mining Project ("Rosemont Project") proposed by Augusta Resources, Inc.
7 ("Augusta") and its subsidiary Rosemont Copper Co. ("Rosemont"), and (b) to require that
8 any future meetings of the FACA advisory committee functionally created by the CNF to
9 give advice and recommendations to the agency in preparation of a DEIS (and subsequent
10 final EIS) meet the FACA requirements, including establishment by charter, public
11 notice/participation, document availability, and "fairly balanced" representation (including
12 that Plaintiffs' members and employees be considered for membership in such committee
13 with all rights and responsibilities on such committee).

14 Plaintiffs also requested that this Court order the USFS to produce documents/records
15 requested by Plaintiff Center for Biological Diversity (“CBD”) pursuant to FOIA. This
16 request, however, was withdrawn by Plaintiffs in their Consolidated Reply in Support of
17 Plaintiffs’ Motion for Preliminary Injunction, based on production of some of the requested
18 documents by the USFS. Plaintiffs state that they reserve the option of renewing their request
19 for injunctive relief under FOIA in the event the agency fails to produce the remaining
20 documents in a timely manner.

21 Also before the Court for consideration are separate briefs filed by Amici Curiae
22 Barrick North America Holdings Corporation, ABX Financeco, Inc., and Resolution Copper
23 Mining, LLC. and Amicus Curiae Arizona Mining Association addressing the FACA claim.

24 A hearing was held this date before the Court in which all parties and counsel for the
25 Amici Curiae addressed the Court. The matter was taken under advisement. In the interest
26 of issuing an expeditious ruling and brevity, the Court will refer only briefly and will not cite
27 to the supportive documents, inclusive of declarations and extensive exhibits,
28 notwithstanding that the Court reviewed and gave all matters presented careful consideration.

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Background

As set forth thoroughly in the Plaintiffs' Motion for Preliminary Injunction and the Federal Defendants' opposition, this action involves the environmental review managed by the USFS and CNF officials of a proposal by Augusta/Rosemont to develop and operate a large, open pit copper mine and associated waste dumping and processing facilities, which is proposed to cover thousands of acres of mostly federal public land in the CNF in the Santa Rita Mountains.

The Federal Defendants are required to conduct an environmental review of the Rosemont Project's Mining Plan of Operations ("MPO") for the Rosemont Project pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*

Augusta/Rosemont submitted the initial MPO to the CNF in July 2007 and a revised MPO to the CNF in February 2008. [See Motion for Preliminary Injunction, Exhibit 1, USFS "Notice of Intent to Prepare an Environmental Impact Statement. Rosemont Copper Project, Coronado National Forest, Pima County, Arizona." 73 Fed. Reg. 13627-13529 (March 13, 2008)].

Plaintiffs allege that for nearly two years, the Federal Defendants have convened and have been meeting regularly with a group of governmental "cooperating agencies," together with representatives of Rosemont, in order to review and analyze data, project alternatives, potential mitigation measures, and other project parameters, and advise the Federal Defendant officials regarding preparation of the DEIS under the NEPA. The DEIS is the primary document to be used for further evaluation of the Rosemont Project by the agencies and the public.

Plaintiffs allege that none of the FACA requirements were met by the USFS, the "lead agency" for purposes of NEPA, and that the formalized group of "cooperating agencies" and Rosemont representatives constituted a "Federal advisory committee" within the meaning of FACA; however, the committee was not properly established under the provisions of FACA; its membership is not "balanced" pursuant to FACA; nor have its meetings been conducted consistent with the requirements of FACA.

1 In summary, Plaintiffs allege that the following conduct violates the fundamental
2 Congressional intent behind FACA:

3 The USFS and the CNF have illegally allowed and invited, and, upon
4 information and belief, are continuing to allow and invite, designated and
5 identified Rosemont representatives to attend and participate in critical
6 meetings between the USFS, the CNF, and other Federal, state, and local
government agencies — without notifying, offering, inviting, or allowing the
public the same opportunities. This conduct violates the fundamental
Congressional intent behind FACA, . . .

7 Plaintiffs assert that they sent a letter to CNF on December 27, 2010, upon
8 discovering and verifying the alleged FACA violations, advising the agency of the FACA
9 violations and requesting immediate compliance with all of FACA's requirements. In a
10 response letter dated January 14, 2011, the CNF stated its belief that the agency had not
11 committed any FACA violations, acknowledging Rosemont's participation in the above-
12 noted meetings. Plaintiffs assert that they were left with no choice but to file this action for
13 review of the USFS's serious FACA violations, when faced with the USFS's intention to
14 continue the committee meetings with Rosemont, and the impending publication and reliance
15 upon the "irrevocably-tainted" DEIS.

16 **Standard of Review for Injunctive Relief**

17 To be entitled to injunctive relief, the movants must demonstrate (1) a likelihood of
18 success on the merits, (2) the likelihood of irreparable harm in the absence of preliminary
19 relief, (3) that the balance of equities tips in the movants' favor, and (4) that an injunction
20 is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365,
21 374, 376 (2008); *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir.2010); *see also*
22 *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir.2005).

23 Plaintiffs carry the burden of persuasion and must make "a clear showing" that the
24 "extraordinary and drastic remedy" of a preliminary injunction is warranted. *Mazurek v.*
25 *Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 1867 (1997) (per curiam).

26 **FACA**

27 Plaintiffs and the Federal Defendants provide a statutory background of the Federal
28 Advisory Committee Act, 5. U.S.C. App. § 1, et seq., enacted in 1972, to address and

1 regulate concerns regarding advisory committees, including both government and public
2 members, established to advise and make recommendations to the President, federal officials
3 and agencies, on decisions and proposed actions. All parties set forth a thorough analysis of
4 the requirements of FACA.

5 FACA requires, in summary, that "Federal advisory committees" be formally
6 chartered by the federal agency to which it reports and lays out extensive requirements for
7 the charter. 5 U.S.C. app. § 9 (2006). FACA further requires in part, that each "Federal
8 advisory committee" must be open to the public and properly noticed in the Federal Register
9 and that all committee records, reports, drafts, transcripts, and other documents be made
10 available to the public. 5 U.S.C. app. § 10 (2006). Also required under FACA is that
11 "membership of the advisory committee to be fairly balanced in terms of the points of view
12 represented and the functions to be performed by the advisory committee." 5 U.S.C. app. §
13 5(b)(2) (2006)(made applicable to federal agencies pursuant to 5 U.S.C. app. § 5(c)(2006)).
14 Additionally, FACA requires that: "No advisory committee shall meet or take any action
15 until an advisory committee charter has been filed" with the appropriate federal agency
16 officials. 5 U.S.C. app. § 9(c) (2006). Under FACA, "[n]o advisory committee shall be
17 established unless such establishment is - determined as a matter of formal record, . . . with
18 timely notice published in the Federal Register."

19 NEPA

20 Pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et*
21 *seq.*, the USFS and CNF must conduct an environmental review of the Rosemont Project's
22 Mining Plan of Operations ("MPO"). As set forth by the Plaintiffs, in the NEPA context,
23 "cooperation agencies" are governmental agencies at the federal, state, local, or tribal levels
24 with jurisdiction by law or special expertise in the subject matter of the proposal that is under
25 evaluation and are an extremely important part of the NEPA process. See 40 C.F.R. § 1508.5.

26 Discussion

27 Plaintiffs assert that they are likely to succeed on the merits, or, at a minimum, have
28 raised "serious questions" going to the merits to warrant injunctive relief. Setting forth the

1 statutory background of FACA, Plaintiffs assert that the Federal Defendants violated FACA
2 (1) by failing to meet FACA requirements, and that (2) the participation of Rosemont in the
3 USFS's Advisory Committee, without any public involvement and notice, among the other
4 significant errors, further violated FACA.

5 Plaintiffs assert that the 16 cooperating agencies and a NEPA consultant, working
6 under the direction of the CNF are contributing to the development of the EIS, of which the
7 draft is the primary document to be used for further evaluation of the Rosemont Project by
8 the agencies and the public, and that this formalized group of "cooperating agencies" and
9 Rosemont representatives constitute a "Federal advisory committee" within the meaning of
10 FACA.

11 Plaintiffs argue that "it is undisputed that none of the above-listed FACA requirements
12 were met by the USFS" and that "[t]he group of cooperating agencies, plus Rosemont, was
13 never chartered, publicly noticed, or open to public participation." Furthermore, due to the
14 USFS's failure to allow the public to participate in the committee, Plaintiffs assert that the
15 agency also fundamentally violated the requirement that "membership of the advisory
16 committee to be fairly balanced in terms of the points of view represented and the functions
17 to be performed by the advisory committee." 5 U.S.C. app. § 5(h)(2).

18 The focus of Plaintiffs' argument rests on their allegations that, between April 1, 2009
19 and November 18, 2010, 24 regularly scheduled meetings of the cooperating agencies
20 occurred monthly, and according to the minutes, appeared to provide guidance, advice, or
21 recommendations to USFS officials regarding evaluation of environmental impacts, potential
22 mitigation measures, and consideration of alternatives for use by the USFS in preparation of
23 the DEIS.

24 Plaintiffs argue that representatives of Rosemont were in regular attendance in at least
25 19 of the meetings according to the posted minutes, and that because Rosemont is a non-
26 government entity, its regular participation in the meetings of the government entities
27 constituting the "cooperating agencies" meant that the group of participants is a "Federal
28 advisory committee" subject to the requirements of FACA.

1 Plaintiffs submit that it is disingenuous to claim that the cooperating agencies
2 meetings did not provide guidance, advice, or recommendations to the USFS or that the
3 USFS did not “establish or utilize” the group for the purposes of obtaining “advice or
4 recommendations” related to the DEIS.

5 Plaintiffs set forth examples of the committee meetings and the participation of
6 Rosemont representatives, which include attachments to declarations to support their position
7 that “Rosemont representatives specifically offered their views on how the DEIS should be
8 prepared and the eventual content of the DEIS.”

9 Plaintiffs further argue that, in addition to Rosemont’s active offering of advice and
10 recommendations to the USFS in the committee meetings, Rosemont’s participation resulted
11 in a chilling effect on the other members of the committee and had the effect of negating or
12 overriding the input from Pima County and the other cooperating agencies, further and
13 irreparably tainting the DEIS.

14 Plaintiffs conclude that the evidence shows that the USFS failed to comply with the
15 clear and unambiguous requirements of FACA with respect to regular meetings of the
16 cooperating agencies at which Rosemont representatives participated, and that the pattern of
17 misconduct by the USFS has resulted in “advice or recommendations” provided to the USFS
18 and CNF in the course of their deliberations as required under, NEPA leading to the
19 preparation of the DEIS.

20 Plaintiffs further assert that they will be immediately and irreparably harmed by
21 continued operation of the alleged FACA committee and publication of, or reliance upon, the
22 “tainted” DEIS.

23 In their Consolidated Reply in Support of Plaintiffs’ Motion for Preliminary
24 Injunction, Plaintiffs clarify their position in response to the oppositions of the Federal
25 Defendants and Defendant-Intervenor Rosemont, and argue that both sets of Defendants
26 misunderstand the issue and the facts and mischaracterize the case law.

27 Plaintiffs proffer that this is a case of first impression and “represents an egregious
28 example of the USFS manipulating the FACA process to allow a private party inappropriate

1 access and involvement in the NEPA cooperating agencies review process — with immediate
2 and irreparable harm to Plaintiffs and the public.” Plaintiffs clarify that they “are not seeking
3 a ‘sweeping’ overhaul of the environmental review process under the National
4 Environmental Policy Act ... that would result in an ‘immense’ change to implementation of
5 FACA and NEPA across the country” . . . and that “[s]uch sky-is-falling pronouncements
6 ignore reality and the case-specific aspects of this case.”

7 Plaintiffs summarize their argument as seeking “to enjoin the USFS from issuing the
8 DEIS, based on the fact that the DEIS was prepared and will be issued in violation of FACA,
9 which has caused and will cause certain and irreparable harm to Plaintiffs and their members
10 — harm that outweighs any harm to the USFS or temporary financial discomfort to
11 Rosemont.”

12 Plaintiffs request, to “reasonably allow the NEPA process to continue ... and ... to
13 remedy the bias inherent in the EIS process to date,” that the Court:

14 (1) ... order that Rosemont no longer be permitted to attend the cooperating
15 agencies committee meetings, and (2) allow the public to comment upon the
16 preliminary draft DEIS that the USFS has publicly stated will be circulated to
the cooperating agencies

17 Plaintiffs emphasize that the Defendants collectively fail to understand that there is
18 no requirement, either pursuant to FACA or 41 C.F.R. Parts 102-03, the implementing
19 regulations promulgated by the General Services Administration (“GSA”), that there must
20 be a formal final written recommendation or report or consensus for a finding that the
21 committee provided “advice or recommendations” to the USFS. Plaintiffs further argue that
22 the equitable arguments presented by the Defendants collectively fail to understand the
23 nuances of the present case.

24 Central to Plaintiffs’ arguments that the USFS is not entitled to deference in
25 interpreting FACA; that the USFS created and managed the cooperating agencies meetings;
26 and the “advice or recommendation” of the cooperating agencies “relied” on the expertise
27 that each brought to the meeting; is the argument that the participation by Rosemont in the
28 cooperating agencies meetings, as a non-governmental entity, turned a non-objectionable

1 process into a FACA violation.

2 Plaintiffs emphasize that “advice and recommendations” are not restricted to formal
3 written statements in determining whether the committee provided advice and
4 recommendations to the USFS, nor need be in the form of a final formal written report, but
5 that the focus is on the cooperating agencies meeting participants having provided “advice
6 or recommendations” on critically import NEPA topics, specifically those dealing with
7 alternatives and mitigation. Plaintiffs argue that when the cooperating agencies meetings,
8 which included Rosemont’s participation, evolved into giving the USFS “advice or
9 recommendations,” they evolved into FACA advisory committees for purposes of complying
10 with the requirements of FACA. Plaintiffs do not dispute that groups that meet and “whose
11 **sole** function was to merely ‘exchange facts or information’ on an ‘individual’ basis are not
12 FACA committees,” but assert that is not the case at bar.

13 Furthermore, Plaintiffs argue that the limited opportunity to comment on the DEIS in
14 the future, which is the last important opportunity for public participation in the NEPA
15 process before the agency’s decision, and which must be free of taint and bias in the process
16 leading to preparation of the DEIS, does not cure the USFS’s FACA violations nor erase the
17 harm to Plaintiffs. Plaintiffs emphasize that the injunctive relief requested is not only proper,
18 but narrow in scope and proposes a limited remedy that will minimize the delay in the NEPA
19 process. Plaintiffs conclude that the balance of hardships tips decidedly in their favor and
20 that the public interest strongly favors the requested injunction.

21 The Federal Defendants contend that the evidence shows that cooperating agencies
22 did not deliberate together to provide advice to the USFS, but instead, submitted separate
23 individual recommendations on relevant issues to the USFS as part of the NEPA process, as
24 intended by the Council on Environmental Quality (“CEQ”) in accordance with the agency’s
25 regulatory authority, and that the monthly meetings at issue do not implicate FACA.

26 The Federal Defendants further contend that there are no judicially manageable
27 standards for determining “the membership” of a FACA committee, a determination that is
28 “committed to agency discretion by law” under the Administrative Procedure Act, (“APA”),

1 See 5 U.S.C. § 701(a)(2), and even if the Court were to find a FACA violation, the Court
2 lacks jurisdiction to remand for the development of a new draft EIS based on the advice of
3 an appropriately “balanced” committee as Plaintiffs seek.

4 The Federal Defendants conclude that if the Court were to find that Plaintiffs have
5 demonstrated a likelihood that there has been a violation of FACA, Plaintiffs have failed to
6 demonstrate that they have suffered irreparable harm because Plaintiffs have the opportunity
7 to comment on the draft EIS and the final EIS, as well as during any administrative appeal
8 process, which eliminates any potential for harm. Thus, Federal Defendants argue the Court
9 should not enjoin any use of the product of the NEPA process to date because Plaintiffs have
10 not carried their burden of proving a substantial and irreparable injury.

11 Rosemont properly summarizes its understanding of Plaintiffs’ argument as follows:

12 ... that an advisory committee was “functionally created by the CNF to give
13 advice and recommendations to the agency in preparation of a DEIS” because
14 “USFS and CNF officials have convened and have been meeting regularly
15 with a group of governmental cooperating agencies together with
16 representatives of Rosemont in order to review and analyze data, project
alternatives, potential mitigation measures and other project parameters, and
advise USFS and CNF officials regarding preparation of the DEIS” [and that]
“this formalized group of ‘cooperating agencies’ and Rosemont constitute a
‘Federal Advisory Committee’ subject to FACA.”

17 Rosemont contends that if Plaintiffs FACA claim is granted, such would constitute
18 an unprecedented expansion of FACA to situations in which a permit applicant provides
19 information and meets with regulatory agencies, and the relief sought “is grossly excessive
20 and in conflict with Plaintiffs’ own authorities.”

21 Rosemont outlines the purpose of the NEPA and EIS, the Memorandum of
22 Understanding (“MOU”) between Rosemont and the USFS to establish their respective
23 responsibilities in connection with completing the NEPA process, and the roles of the
24 cooperating agencies pursuant the CEQ NEPA regulations.

25 Rosemont emphasizes the NEPA process “is intended to ‘provide[] a springboard for
26 public comment’” . . . and that “Plaintiffs and other members of the public will have ample
27 opportunity to provide input to the Forest Service prior to approval of Rosemont’s MPO.”

28 Rosemont contends that the cooperating agency meetings at issue were for the primary

1 purpose “to exchange information and to educate the cooperating agencies, many of which
2 had little knowledge about Rosemont project, the standards for an MPO or the NEPA
3 process” and are documented as “information sharing” meetings.

4 Rosemont heavily relies on the declaration of Jamie Sturgess, Senior Vice President
5 for Augusta Resource Corporation, the parent company of Rosemont Copper, and a Vice
6 President of Rosemont since October 2005, and also the declaration of Gordon L. Cheniae,
7 President of Cheniae & Associates, Inc., Rosemont’s consultant.

8 Summarizing the standard for review for injunctive relief, and providing an overview
9 of FACA, Rosemont argues that Plaintiffs are not likely to succeed on the merits because
10 FACA is not applicable to the cooperating agency meetings. Rosemont argues that the cases
11 cited by Plaintiffs are distinguishable and that Plaintiffs are not likely to suffer irreparable
12 harm in the absence of a preliminary injunction.

13 Rosemont further argues that the balance of hardships tips in favor of denying
14 Plaintiffs’ motion for injunctive relief and that the relief requested, overbroad and without
15 supportive authority, is not in the public’s interest.

16 Rosemont reasons that if the Court were to determine that preliminary injunctive relief
17 were warranted, “the appropriate relief would be to prohibit the use of any joint
18 recommendations provided to the Forest Service by the federal advisory committee [as]
19 [s]uch relief would preserve the status quo pending a final determination by the Court on
20 Plaintiffs’ FACA claim, while allowing the NEPA process to proceed, thereby avoiding any
21 unnecessary injury to Rosemont and to the public.” Rosemont then notes, “[o]f course, given
22 that there was no committee report or other collective recommendation in this case, there is
23 nothing for the Court to enjoin, which underscores the groundless nature of Plaintiffs’ FACA
24 claim.”

25 The Court finds that Plaintiffs have failed to meet their burden of persuasion by
26 making a clear showing that they are entitled to injunctive relief base on a likelihood of
27 success on the merits of their FACA claim and the likelihood of irreparable harm in the
28 absence of preliminary relief, based on the fact that Plaintiffs, along with all public citizens,

1 will have the opportunity to review and be heard during the NEPA process, which provides
2 for public commentary on the draft EIS before its final publication. See *Winter v. Natural*
3 *Res. Def. Council, Inc.*, 29 S.Ct. at 374, 376; *National Meat Ass'n*, 599 F.3d at 1097;
4 *Beardslee*, 395 F.3d at 1067. See also *Mazurek*, 520 U.S. at 972, 117 S.Ct. at 1867.

5 As Plaintiffs correctly set forth in their pleadings and emphasized at the time of
6 hearing, the provisions of FACA “attempt to ensure that advisory committees to federal
7 agencies are transparent and adequately represent the public interest by imposing a number
8 of requirements on advisory groups regarding such matters as advance notice of committee
9 meetings, the keeping of public availability of minutes, and the composition of advisory
10 group membership.” *Idaho Wool Growers Association, v. Schafer*, 637 F.Supp.2d 868, 871
11 (D.Idaho 2009) (citing 5 U.S.C. App II, §§ 2, 9-11.)

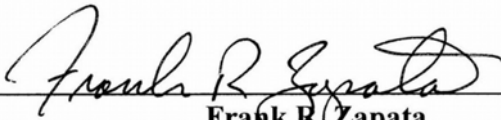
12 Plaintiffs failed to clearly show, however, that Rosemont and its associates or
13 representatives through their participation were *de facto* members of the cooperating agencies
14 meeting group, and further failed to show, either in their filings or at the time of hearing,
15 what indeed was the “taint.” Plaintiffs urge the Court to apply a standard of presumption.
16 The Court is aware of no authority, nor was any presented, which would allow it to make a
17 tenuous finding, based on the foregoing, that Plaintiffs are entitled to injunctive relief.

18 In reviewing the pertinent statutory, regulatory and case law authority, the Court does
19 find, at best, that the USFS was less than prudent in inviting Rosemont and its consultants
20 as the primary and only regularly invited non-governmental agency and that such actions, at
21 a minimum, presents an appearance of impropriety on the part of the USFS as well as
22 Rosemont.

23 Based on all matters, documents and arguments presented, the Court finds that the
24 requirements for issuing a preliminary injunction are not present. Accordingly,

25 IT IS ORDERED that Plaintiffs’ Motion for Preliminary Injunction is DENIED.

26 DATED this 27th day of June, 2011.

27 
28 **Frank R. Zapata**
Senior United States District Judge