



March 29, 2021

The Honorable Tom Vilsack  
Secretary of Agriculture  
1400 Independence Avenue SW  
Washington, DC 20250

**Ref:** *Resolution Copper Mining Project and Land Exchange  
Tonto National Forest, Pinal County, Arizona*

Dear Mr. Secretary:

In accordance with Section 106 of the National Historic Preservation Act (54 USC § 306108) (NHPA) and its implementing regulations, “Protection of Historic Properties” (36 CFR Part 800), I am conveying to you the final comments of the Advisory Council on Historic Preservation (ACHP) regarding the U.S. Department of Agriculture (USDA) Forest Service (FS) Tonto National Forest’s (TNF) proposed Resolution Copper Project and Southeast Arizona Land Exchange. On February 11, 2021, the ACHP terminated Section 106 consultation, having determined that further consultation to reach an agreement would be unproductive. I would again like to express the ACHP’s appreciation for USDA’s intervention on March 1, 2021, halting the statutory timeline to transfer the land for the project as this will allow you more time to consider our comments at this critical juncture. In accordance with 36 CFR § 800.7(c), the ACHP is providing these comments, which you must consider and respond to before reaching a final decision on the undertaking.

## **Background**

On December 19, 2014, President Barack Obama signed into law the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291) (NDAA), which directed a land exchange between the U.S. Government (USDA and Department of the Interior) and Resolution Copper Mining, LLC (Resolution Copper) for the purposes of extracting copper deposits known to be present in lands within the TNF. In the exchange, Resolution Copper would receive 2,422 acres of National Forest System (NFS) land known as the Oak Flat Federal Parcel in return for 5,344 acres of private land owned by Resolution Copper. The land exchange would facilitate Resolution Copper’s proposed copper mine by removing the Oak Flat parcel from federal ownership, therefore eliminating the mining restrictions put in place by Public Land Order 1229.

As the agency required by law to transfer the property, the FS is responsible for carrying out the Section 106 review and consultation regarding both the proposed Resolution Copper Project and the Southeast Arizona Land Exchange (jointly, the undertaking). The NDAA did not modify the Section 106 requirements for this undertaking. However, because the NDAA requires specific actions be taken by the FS, the parties to the Section 106 review were unable to consider alternatives that would avoid all adverse effects to historic properties. Further, the NDAA placed additional requirements on the FS and Resolution

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Copper regarding consultation with Indian tribes and impacts on cultural and archaeological resources. This included seeking “*to find mutually acceptable measures to—(i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper*” and, as part of the agency’s analysis under the National Environmental Policy Act (NEPA), identifying “*measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources, if any.*” These NDAA requirements are independent of the standard Section 106 procedural requirements, adding further complexity to the consultation process. The Programmatic Agreement (PA) that was being negotiated under Section 106 referenced the agency’s concurrent compliance with these measures in the NDAA. The NDAA also established a timeline for the land exchange, requiring it to occur no later than 60 days of the FS issuance of the Final Environmental Impact Statement (FEIS).

## **Undertaking**

The undertaking consists of the General Plan of Operations (GPO) to be approved by TNF for an underground copper mine submitted by Resolution Copper on land currently administered by the TNF, the Arizona State Land Department (ASLD), and private landowners, and the exchange of lands between Resolution Copper and the United States as directed by the NDAA. The GPO to conduct mining operations includes the mine site, associated infrastructure, a transportation corridor, and a tailings storage facility. Resolution Copper proposes to conduct mining using a technique known as panel caving, which uses a network of shafts and tunnels constructed below the ore body located within the Oak Flat Parcel. While the proposed mining would occur underground, the removal of the ore would cause the ground surface to collapse, creating a subsidence area at the Oak Flat Federal Parcel that would result in a crater between 800 and 1,115 feet deep and roughly 1.8 miles across. Additionally, several alternatives are being considered for the permanent disposal and management of the mine tailings, including an alternative on Bureau of Land Management (BLM) administered lands. The undertaking spans the life of the mine, which is envisioned to occur in three distinct phases: construction, operations, and reclamation, spanning roughly 56 years. At the end of operations, facilities would be closed and reclaimed in compliance with permit conditions.

## **Historic Properties and Effects**

The TNF made an extensive effort to identify historic properties, including the development of a comprehensive area of potential effects (APE) to guide identification efforts. The APE divides the effects of the undertaking to three zones—physical effects within the project footprint and Oak Flat Federal Parcel; auditory effects within two miles of the project footprint and Oak Flat Federal Parcel; and visual/atmospheric/socioeconomic effects within six miles of the project footprint, including the historic districts of Globe and Miami, Arizona. To support identification efforts within the APE, the TNF, with the assistance of Resolution Copper, also implemented a tribal monitoring program that utilized inventories/survey efforts conducted with tribal monitors and tribal field visits to identify historic properties of traditional religious and cultural importance within the APE. These efforts were used to expand and augment existing and ongoing identification efforts including past surveys and ethnographic studies conducted by and in consultation with Indian tribes.

Early on in the consultation process, the TNF determined that the undertaking would result in adverse effects to numerous identified historic properties, including the National Register of Historic Places-listed Chí’chil Bıldagoteel Historic District, known also as Oak Flat. The TNF identified Oak Flat as a historic property of religious and cultural significance to Indian tribes and a Traditional Cultural Property (TCP) significant to multiple Apache tribes. The TNF previously recognized the site as having physical and spiritual integrity essential to the continuation of traditional Western Apache cultural practices, particularly to the San Carlos Apache Tribe. On March 4, 2016, the National Park Service listed Oak Flat

on the National Register as a historic district and TCP under Criteria A, B, C, and D with particular emphasis on its association with Apache oral history and as a venue for ongoing Apache participation in traditional social activities. As part of the undertaking, Chi'chil Bildagoteel Historic District would be directly and permanently damaged by the subsidence area proposed for the Oak Flat transfer parcel.

At the time of the release of the final draft PA, the TNF had identified 644 archaeological sites in the portions of the APE that included the Oak Flat Federal Parcel, GPO project areas, and the proposed tailings locations. Of these, 506 sites were determined eligible for the National Register, 22 required further evaluation, one was a natural gas line exempt from further Section 106 review, and 116 sites were determined not eligible for the National Register. Forty-two of these eligible sites would leave federal ownership, along with the Chi'chil Bildagoteel Historic District, as part of the land exchange and would be permanently damaged by proposed mining operations. Another 377 of these sites would be affected by the TNF's proposed preferred alternative for the processing and disposal of mine tailings, which would occur on state and private lands.

In addition to these identified historic properties and known adverse effects, the TNF also identified several other properties of traditional religious and cultural importance within the APE that would require further evaluation. The TNF determined that further identification efforts would be required for various portions of the APE, specifically those zones related to auditory, visual, atmospheric, and socioeconomic effects. To address this, the TNF proposed to phase the identification of additional historic properties. The TNF had further determined that the undertaking would result in numerous potential auditory, visual, and atmospheric effects to known and yet to be identified historic properties.

### **Section 106 Process**

The ACHP recognizes that this consultation posed unique challenges for all parties involved. The constraints placed on the consultative process due to the legislated nature of a substantial portion of the undertaking juxtaposed with the magnitude of the adverse effects to historic properties severely restricted the TNF's ability to consider alternatives to avoid or minimize those effects. Further, attempting to resolve adverse effects to historic properties as immensely important as Oak Flat, a property of religious and cultural significance to Indian tribes, in addition to potentially affecting more than 500 other sites eligible for listing on the National Register, made reaching agreement on appropriate steps to resolve these effects very difficult.

Based on the documentation provided, the TNF appears to have initiated consultation with Indian tribes for the undertaking in 2015 following passage of the NDAA, though these efforts were not consistently characterized as Section 106 consultation. Records provided to the ACHP also suggest that as early as 2003, the TNF had carried out preliminary discussions with affected Indian tribes concerning the potential land exchange, exploratory activities by Resolution Copper, and the development of historic property inventories and ethnographic surveys. It is not clear whether any of these interactions were characterized as Section 106 consultation. On March 31, 2017, the TNF initiated consultation with the Arizona State Historic Preservation Officer (SHPO). On December 7, 2017, the TNF notified the ACHP of its finding of adverse effect for this undertaking, and on December 21, 2017, the ACHP informed the TNF that it would participate in the consultation.

Consultation has included the SHPO; the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Mescalero Apache Tribe, the Pueblo of Zuni, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache Tribe, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Nation, the Yavapai-Prescott Indian Tribe, the Ak-Chin Indian Community, the Fort Sill Apache Tribe, the Pascua Yaqui Tribe, and the Tohono O'odham Nation; and other consulting parties, including Archaeology Southwest, Arizona Mining Reform Coalition, Boyce

Thompson Arboretum, Inter Tribal Association of Arizona and others, and resulted in the development of a draft PA that would provide a mechanism for further identification and evaluation of historic properties as the undertaking was implemented, as well as a broad array of measures to attempt to resolve identified adverse effects. Because of the size and complexity of the undertaking and the scale of the adverse effects, the PA included a suite of proposed mitigation measures. These measures included treatment plans for data recovery efforts for the numerous historic properties that would be physically destroyed or damaged as part of the undertaking, including a specific plan developed solely for the Oak Flat Parcel. The agreement also featured a variety of off-site measures in the form of mitigation funds that would support tribal initiatives, including cultural resources, education, and youth programs; archaeological database funding; and development funds for historic properties in the local community. While initially these measures were vaguely defined, the TNF, through consultation and clarifying communication with Resolution Copper, refined and clarified them in the draft PA.

On July 9, 2020, Terry Rambler, Chairman of the San Carlos Apache Tribe, requested that the ACHP support the prompt completion of the PA and that it review and report on whether the TNF has complied with Section 106 regarding this consultation. On July 21, 2020, the ACHP responded to Chairman Rambler with its recommendations on moving the consultation process forward as well as committing to review and provide an advisory opinion on the TNF's compliance with Section 106 for this project pursuant to 36 CFR § 800.9(a). The ACHP undertook this assessment following its review of the revised PA in September 2020 and outreach to the San Carlos Apache Tribe, the TNF staff, and other consulting parties. Based upon the ACHP's ongoing participation in consultation, the ACHP was able to utilize many existing records and ongoing correspondence. On December 15, 2020, the ACHP provided its observations and recommendations to the TNF on how to continue moving the Section 106 consultation process forward. The letter recommended TNF provide consulting parties with a summary of responses to comments received on the latest version of the PA, respond to the ACHP's recommendations on improving transparency in communication and consultation, and consider hosting a final meeting of consulting parties to discuss how the TNF responded to comments and its intent to finalize and execute the PA. Additionally, the ACHP provided two recommendations to the TNF that were focused on broader, long-term efforts to improve Section 106 consultation within the Southwestern Region.

On December 23, 2020, the TNF responded to the ACHP's letter, and on December 29 released the final version of the PA, indicating its intent to move forward with its execution. On January 8, 2021, to inform the ACHP's decision on whether to sign the proposed PA, the ACHP again requested the TNF provide clarification on several items, including its coordination of the Section 106 review with the development of the FEIS under NEPA. On January 15, 2021, the TNF released the FEIS, which included an unsigned version of the PA. The issuance of the FEIS triggered the statutory timeline in the NDAA, requiring the TNF to execute the land transfer within 60 days.

On January 26, 2021, the TNF responded to the ACHP's January 8 letter. The TNF's response included correspondence from the Regional Forester regarding the ACHP's long-term recommendations. The same day, the TNF provided a copy of the final PA for the ACHP's signature. All other Signatories (the TNF and SHPO) and Invited Signatories (the BLM, U.S. Army Corps of Engineers, Resolution Copper, Salt River Project, Arizona State Land Department, and Arizona State Museum) had signed the agreement. On February 11, 2021, the ACHP terminated consultation pursuant to 36 CFR § 800.7(a)(4) and notified Acting TNF Supervisor Tom Torres accordingly. On March 1, 2021, the FS announced that USDA had directed the TNF to withdraw the Notice of Availability and rescind the FEIS and draft Record of Decision for the Resolution Copper Mining Project and Land Exchange. Following discussions with FS staff, the ACHP learned that the decision to withdraw the FEIS halted the statutory timeline to transfer the land for the project following the publication of the FEIS.

Execution and implementation of the proposed PA for this undertaking would have been one way for the TNF to fulfill its Section 106 responsibilities for this undertaking. Because the ACHP terminated consultation in this case, however, it is now your responsibility, as the head of the agency, to consider and respond to these advisory comments in reaching your decision on the undertaking in order to complete the Section 106 process. In accordance with the statute, you may not delegate this responsibility. 54 U.S.C. § 306114.

To inform the development of these comments to you, the ACHP solicited input from consulting parties and the public. The ACHP received more than 500 comments regarding the proposed undertaking and its potential effects to historic properties from consulting parties and members of the public. The ACHP submits the following findings and recommendations to you for your consideration in making your final decision on this undertaking.

### **ACHP Findings**

*Chi'chil Bildagoteel (Oak Flat) is a historic property of profound importance to multiple Indian tribes and plays a significant role in their religious and cultural traditions, and the proposed measures in the PA are not sufficient considering the severity of adverse effects to this property and numerous other historic properties.*

The historic significance of Oak Flat cannot be overstated and neither can the enormity of the adverse effects that would result to this property from the undertaking. Oak Flat would be directly and permanently damaged with a substantial portion of the property being destroyed through subsidence. In addition, hundreds of other historic properties would be destroyed or otherwise adversely affected by the undertaking. The ACHP recognizes the intent of the PA's mitigation measures to account for the loss of these historic sites. While the ACHP routinely advises agencies to seek creative ways to mitigate adverse effects where possible, it finds the mitigation measures within the PA to be wholly inadequate in light of the magnitude of adverse effects to this and other historic properties of such significance to numerous Indian tribes. The importance of attempting to develop adequate measures to resolve adverse effects in this case is further underscored by Section 110(a) of the NHPA, which requires the agency to give special consideration to preserving the historic and cultural values of the nationally significant Oak Flat (54 U.S.C. § 306102(b)(2)).

*The Tonto National Forest was frequently challenged to effectively and consistently consult Indian tribes on the resolution of adverse effects and in the development of the PA.*

Multiple Indian tribes notified the ACHP of their concerns that the TNF's consultation with them was inadequate, and the delay in TNF addressing these concerns diminished the effectiveness of its early efforts to consult. The TNF struggled to manage its consultation efforts with Indian tribes and to ensure that consultation informed the overall Section 106 review for this undertaking. It is clear that the TNF intended to carry out tribal consultation, including government-to-government consultation, and solicit tribal input. However, the TNF's records show the undertaking was not fully defined for Indian tribes at the outset of the Section 106 review process and that the agency's early outreach efforts to tribes often lacked transparency and consistency. The ACHP recognizes the TNF undertook efforts later in the process that worked to improve consultation, such as the development of the tribal consultation plan.

*The Tonto National Forest had difficulty managing the pace of consultation and coordinating the Section 106 process with other federal environmental reviews.*

As previously observed in the ACHP's assessment provided to the TNF on December 15, 2020, pursuant to 36 CFR § 800.9(a), the TNF was inconsistent in managing the pace of consultation and coordinating

the Section 106 process with other federal environmental reviews and the concurrent requirements of the NDAA. The TNF's communication on the purpose of, and audience for, consultation meetings was often irregular and erratic. There was a general lack of clarity delineating the Section 106 consultation from the NEPA review process and public outreach. This confusion was further exacerbated by the TNF's efforts to meet the requirements of the NDAA regarding consultation with Indian tribes and measures to minimize impacts on cultural and archaeological resources. The ACHP recognized the improvements made by TNF in the Section 106 consultation process but also noted that valuable time was lost due to miscommunications during earlier consultation. Lastly, the publication of the FEIS, which started the statutory 60-day time limit for the land transfer, challenged the TNF's ability to conclude the Section 106 review for this undertaking within the stated timelines.

*Due to its controversial nature and the high level of public interest in this undertaking and its effects, the Tonto National Forest would have benefitted from expertise within the Region and Washington Office to assist it in managing this consultation.*

Throughout the Section 106 review, the ACHP highlighted the challenges faced by the TNF during this consultation, including the inability of the TNF staff to commit to certain measures and persistent confusion regarding the timeline for completing the Section 106 process. The ACHP recognizes the concerted efforts of the TNF's Heritage, Tribal Relations, and Environmental Program staff as they sought to manage and maintain the consultation process along with the other concurrent reviews. However, the scope and magnitude of this undertaking exhibited the clear need for stronger agency support to the TNF to respond to consulting party questions and concerns, specifically those of Indian tribes. Efforts such as the dedicated Heritage staff assignment from the Region would have been more beneficial to this consultation had it occurred sooner and would have been strengthened by parallel assignments across the Tribal Relations and NEPA programs as well. While recognizing consultation was centered at the TNF, the ACHP encouraged more direct avenues for the TNF to seek support and resources from the Region, including such things as facilitation support for consultation meetings. The need for this support was further emphasized by the complex role Regional and Washington leadership appear to have had in the management of the FEIS schedule (which due to its implications on the timing of the land exchange further complicated and constrained the management of the Section 106 process). The ACHP believes more outwardly visible and transparent communication on the role the FS leadership had in this decision process and the constraints placed on the TNF would have aided the TNF in communicating with consulting parties on its decision process.

### **Undertaking Recommendations**

*USDA should work with the Administration and Congress to take immediate steps to amend or repeal the legislation directing the transfer or otherwise prevent it from happening as proposed.*

The ACHP was encouraged by the USDA's decision on March 1, 2021, to direct the TNF to withdraw the Notice of Availability and rescind the FEIS and draft Record of Decision (ROD) for the project. It is also encouraged by the FS' commitment to consult Indian tribes and other stakeholders further on the effects of this undertaking on, among other resources, historic properties. The ACHP urges the FS to explore directly with the Administration and Congress, and in consultation with other stakeholders, any and all opportunities to amend or repeal the exchange portion of the NDAA. It is evident that legislative action in this situation to stop this exchange would provide the most complete and appropriate protection of Oak Flat and the hundreds of other historic properties that stand to be affected by the transfer and subsequent mining activities.

*USDA should use further discussions with Indian tribes and other stakeholders to develop and evaluate alternatives and further modifications to the undertaking that might avoid adverse effects while also pursuing additional steps to modify or prevent the land transfer.*

As part of its efforts to conduct additional consultation with Indian tribes and evaluate its required environmental, cultural, and archaeological analyses for the project, the TNF, with the support of FS leadership, should take further steps in discussions with all stakeholders to develop and reevaluate any alternatives or modifications to the undertaking that could avoid or minimize adverse effects to historic properties. Such efforts should include a reassessment of alternative and more sustainable mining techniques in an effort to prevent subsidence at Oak Flat, including, if feasible, those techniques that were previously considered and rejected by the FS and Resolution Copper. Further, USDA should employ all measures at its disposal to incentivize the consideration of such alternatives.

*If USDA chooses to proceed with the undertaking as described, the Forest Service should commit to carrying out mitigation measures in the proposed PA, in consultation with the consulting parties.*

If USDA decides to proceed with the undertaking as described, the ACHP recommends the FS commit to implementing the terms of the PA, including but not limited to the phased identification process, the historic property treatment plans, and the listed mitigation measures in cooperation with Resolution Copper and the other invited signatories and in consultation with the consulting parties. These terms could be incorporated in to the final ROD and/or as part of other agreements made with Resolution Copper and other signatories. As stated earlier, the NDAA includes independent requirements that the FS must meet (e.g., to address the concerns of Indian tribes and minimize the adverse effects on the affected Indian tribes resulting from mining and related activities) that extend beyond and in addition to the procedural requirements of Section 106. The ACHP encourages USDA to exercise its authority to the fullest extent to fulfill these requirements alongside the proposed measures in the PA. Furthermore, the ACHP recommends the TNF, Resolution Copper, Indian tribes, and other consulting parties continue to consult over the life of the project to continue to evaluate and seek ways that might minimize adverse effects to historic properties as mining progresses both through the utilization of new mining techniques and in response to mine production. Given the FS' renewed commitment to consultation with Indian tribes, the ACHP recommends their efforts occur at a government-to-government level, with senior FS leadership, utilizing the full breadth of the FS' resources to support such consultation.

### **General Recommendations**

*The Forest Service should evaluate how the Regional and Washington Offices can provide more timely guidance and support for controversial or challenging Section 106 consultations.*

USDA should allocate resources within the FS for identifying and supporting complex Section 106 reviews early in the planning process that, while maintaining the individual Forest Unit's autonomy, could strengthen the agency's ability to carry out the consultation process. This is particularly salient given the frequent pressure placed on the FS Heritage Programs for large scale and complex undertakings. Such resources could include providing project-specific consultation support, including but not limited to additional staffing, facilitation support, and funding for travel to assist consulting party attendance at meetings. The identification of such consultations earlier on and the engagement of Regional and Washington Offices would allow these offices to convey best practices and lessons learned from other similar consultations and even consider detailing more experienced Heritage Staff to assist in certain consultations. The FS should leverage its existing network of heritage professionals to create a mechanism to direct knowledge, support, and resources to individual Forest Units when a controversial or challenging Section 106 consultation is identified.

*The Forest Service should work to identify and implement opportunities to better coordinate environmental and historic preservation reviews for large-scale projects.*

USDA and the FS should work with stakeholders to evaluate the existing guidance on consultation on mining activities in NFS lands, and to identify internal and Administration-driven improvements that might be pursued, particularly in how the various environmental reviews are managed as a part of this process. This consultation was emblematic of many of the challenges and constraints affecting previous and ongoing consultations regarding mining-related undertakings. The FS should seek perspectives from a broad array of stakeholders, including SHPOs, Tribal Historic Preservation Offices, Indian tribes, industry representatives, and other interested parties. These discussions should aim to assist the FS in developing a more collaborative approach, in keeping with the FS' policy regarding Heritage Management, which seeks to "[f]ully integrate opportunities for preservation, protection, and utilization of cultural resources into land use planning and decisions," by identifying and fostering the implementation of more sustainable mining activities on NFS lands (Forest Service Manual- Chapter 2360 Heritage Program Management).

*The Forest Service should pursue initiatives to strengthen early coordination with Indian tribes in this Region regarding proposed mining activities.*

USDA should continue to leverage and expand upon the FS initiatives such as the "Tribal Cultural Sensitivity Training" under development in the Southern Region and the annual "To Bridge a Gap" conference that includes participants from the Southern and Eastern Regions. These and other such efforts represent innovative measures to develop and improve relationships with Indian tribes, and through these relationships, work to improve the Section 106 consultation process. The ACHP's previous recommendation to consider establishing an advisory board comprised of representatives from Indian tribes with an interest in the protection of historic properties of religious and cultural significance on FS-managed lands was born out of the benefits the ACHP has seen from Region-wide initiatives by the FS to engage in long-term consultation relationships with Indian tribes. The ACHP recommends the FS leverage the extensive resources available within the Offices of Tribal Relations and Heritage Resources to implement expanded consultation with Indian tribes.

## **Conclusion**

Given the potential magnitude of impacts to highly significant historic properties, the ACHP urges USDA to carefully consider and carry out these recommendations. Section 800.7(c)(4) of the Section 106 regulations requires you, as the head of the agency, to take these comments into account in reaching a final decision on the undertaking. As mentioned above, per Section 110(l) of the NHPA (54 USC § 306114), you may not delegate this responsibility. A summary of your decision regarding the undertaking that contains the rationale for the decision and evidence of consideration of the ACHP's comments must be provided to the ACHP before making a final decision on the undertaking and shared with the Section 106 consulting parties and the public.

As the USDA and FS continue to consult on the potential effects of the proposed undertaking, the ACHP may provide additional advisory comments or technical assistance based on its responsibilities pursuant to the NHPA. If, however, the proposed undertaking and the potential effects to historic properties change, TNF should reinitiate the Section 106 review process with all consulting parties including the ACHP, to take into account the potential effects of the modified undertaking.

As the heads of federal agencies, we have a responsibility to exercise leadership in the preservation of the nation's irreplaceable cultural heritage. In that spirit, I hope you will see these recommendations as a wise



path forward.

I look forward to your response.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Rick Gonzalez', with a stylized flourish extending to the right.

Rick Gonzalez, AIA  
Vice Chairman