

SUPREME COURT OF ARIZONA

SAN CARLOS APACHE TRIBE,

Appellants,

v.

STATE OF ARIZONA;
ARIZONA WATER QUALITY
APPEALS BOARD; and
DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Appellees,

RESOLUTION COPPER
MINING, LLC,

Intervenor/Appellee.

Arizona Supreme Court
No. CV-22-0290-PR

Court of Appeals
No. 1 CA-CV 21-0295

Maricopa County Superior Court
No. LC2019-000264-001

SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

INTRODUCTION	5
ARGUMENT	8
I. The Court of Appeals Misapplied the “Substantially Independent” Test Under 40 C.F.R. § 122.29(b)(1)(iii).	8
A. Shaft 10 Is Integrated with the Existing Plant.....	8
B. Shaft 10 Is Engaged in the Same Type of Activity as the Existing Source.....	10
II. A Shaft Is Not a “Mine” and Therefore Cannot Be a New Source Under 40 C.F.R. § 122.2.....	12
A. “Mines” Are the Only Sources Subject to New Source Performance Standards.	12
1. The first step in the statutory analysis is to determine whether Shaft 10 is a “mine.”	13
2. Contrary to the majority’s conclusion, Shaft 10 is not a “mine.”	14
B. There Is No Evidence that Shaft 10 Will Cause Any Adverse Environmental Impact.....	16
CONCLUSION.....	18

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Mahelona v. Hawaiian Elec. Co.</i> , 418 F. Supp. 1328 (D. Haw. 1976)	14
<i>Rybachek v. U.S.</i> , 904 F.2d 1276 (9th Cir. 1990)	17
<i>San Carlos Apache Tribe v. State</i> , 254 Ariz. 179 (App. 2022)	passim
<u>Statutes</u>	
33 U.S.C. § 1251	7
33 U.S.C. §§ 1251 to 1387.....	6, 7
A.R.S. § 49-255.01.....	7
<u>Regulations</u>	
40 C.F.R § 122.2	12, 13, 15
40 C.F.R § 122.22	12
40 C.F.R. § 122.29(b)	9
40 C.F.R. § 122.29(b)(1).....	12
40 C.F.R. § 122.29(b)(1)(ii).....	9
40 C.F.R. § 122.29(b)(1)(iii).....	8, 9
40 C.F.R. § 122.29(b)(2).....	13
40 C.F.R. § 440	17
40 C.F.R. §§ 440.100 to 440.105	12

40 C.F.R. § 440.100(a).....	12, 13
40 C.F.R. § 440.132(a).....	15
40 C.F.R. § 440.132(g)	14, 16
40 C.F.R. § 440.144(c).....	17
49 Fed. Reg. 37,998	8, 10, 11

INTRODUCTION

The court of appeals majority held that Resolution Copper’s Shaft 10 is a “new source” based on its erroneous determinations that (i) Shaft 10 is “substantially independent” of the existing operations; and (ii) Shaft 10 is a “mine,” necessitating the “substantially independent” analysis in the first place.

As the dissent recognized, the first of these holdings is manifestly wrong under clear regulatory guidance that “substantial[] independen[ce]” hinges on the extent to which the new operation is (or is not) integrated with existing infrastructure and on whether it is engaged in the same type of activity as the existing source. The uncontroverted record below—as confirmed in the San Carlos Apache Tribe’s (“Tribe”) opposition to the Arizona Department of Environmental Quality’s (“ADEQ” or the “Department”) petition—establishes extensive, crucial integration. The Tribe is therefore left to assert that “Shaft 10 is not integrated into prior operations; those facilities are integrated into Shaft 10”—but that is semantical wordplay, not a legal argument. It is uncontroverted that Shaft 10 is a new feature that was added to facilitate the same activity—copper mining—that has occurred at the Mine since 1912.¹ Shaft 10 was not drilled into the ore body.

¹ See IOR 466 at 21-22 (“The mining process at the Mine is an extraction process that has not changed from the original process used when the site was called Magma Mine. . . . The [N]ever [S]weat Tunnel has been used to convey mine drainage since it was built in the 1970s and the new features will still utilize the tunnel to convey mine drainage. . . . Therefore, there is no production equipment to

(IOR 491 at 43, ll. 6-7.) Shaft 10’s base is “like a big sump” from which water is “pumped out, goes through the [N]ever [S]weat [T]unnel and over to the treatment facility on the west side of Superior.” (*Id.* at 52, ll. 9-15.) The dissent was unquestionably correct to find that Shaft 10 is not “substantially independent” and is therefore not a new source.

The court of appeals, moreover, did not even need to reach the “substantially independent” question because a single shaft on the existing footprint of a 100-year-old Mine is not itself a “mine” subject to new source review. In implementing the authority that Congress bestowed on the Environmental Protection Agency (“EPA”) in the Clean Water Act (“CWA” or “Act”), the EPA determined that new source performance standards for “mines” apply to the entire Mine, not to any individual feature constructed at a mine such as a tunnel or shaft. Neither Congress nor any court in the nation—save the Arizona Court of Appeals—has ever provided contrary instruction to the EPA or to any state implementing CWA permitting programs, and there is no reason to do so now.

The Act is instrumental in ensuring that mining is conducted in an environmentally responsible manner that prevents, reduces, and eliminates

‘totally replace’”); *see also* IOR 440 at 13 (“Water (mine drainage) drains Shaft 9 into Shaft 10. This water, and mine drainage flowing directly into Shaft 10, is pumped out and conveyed through the Never Sweat Tunnel to the [West Plant Site], where it commingles with drainage water from the historic Magma workings at the [West Plant Site], and is treated in the [Mine Water Treatment Plant]. The [West Plant Site] is dewatered through Shaft 8.”).

pollution in Arizona’s protected surface waters. *See* 33 U.S.C. § 1251; A.R.S. § 49-255.01. In this case, the Tribe has no valid complaint that the permit that ADEQ issued to Resolution Copper (“the Permit”) fails to protect the environment because the Permit “already requires compliance with the most stringent effluent discharge limits required by law” for any source, whether new or existing. (IOR 440 at 20, ¶ 117.) As Superior Court Judge Popko observed in his opinion upholding the Permit: “It appears that the [Tribe’s] motivation for opposing the Permit is not to require compliance with more stringent effluent discharge requirements, but to stop issuance of the Permit altogether as part of an effort to halt mining at the site,” a purpose that is not contemplated in the CWA. (IOR 602 at 8; *see also* 33 U.S.C. § 1251 [stating that the CWA’s object is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters,” not to prohibit mining]).

This Court should therefore reverse and vacate the court of appeals’ erroneous “new source” determination and affirm the superior court’s judgment.

ARGUMENT

I. The Court of Appeals Misapplied the “Substantially Independent” Test Under 40 C.F.R. § 122.29(b)(1)(iii).²

All parties agree that Shaft 10 can be deemed a “new source” only if “[i]ts processes are substantially independent of an existing source at the same site.” 40 C.F.R. § 122.29(b)(1)(iii). And this determination, in turn, is based on two factors: (1) “the extent to which the new facility is integrated with the existing plant,” and (2) “the extent to which the new facility is engaged in the same general type of activity as the existing source.” *Id.* As the dissent recognized, “[a] construction is not a new source if it merely *could* operate substantially independently, unless, in fact, it actually does.” *San Carlos Apache Tribe v. State*, 254 Ariz. 179 (App. 2022) (“Opinion”) ¶ 84 (Paton J., dissenting) (citing 49 Fed. Reg. 37,998, 38,044).

The Tribe’s efforts to address these factors in its opposition brief amount to dispositive admissions couched as arguments.

A. Shaft 10 Is Integrated with the Existing Plant.

Under any plain construction of the first factor, Shaft 10 is heavily “integrated” with the existing infrastructure, including through the Never Sweat Tunnel and Shaft 9, which are necessary to dewater and ventilate Shaft 10. As the dissent recited, these are “interlocking systems . . . not mere utilities” and “are

² This supplemental brief addresses the second issue for review first sequentially. The court of appeals’ errors on the respective issues for review independently require reversal.

essential to *and components of* the mining process itself.” Opinion ¶ 86 (Paton, J., dissenting). They are therefore “not analogous to the list of utilities the EPA states are insufficient for an integration finding.” *Id.*

When ADEQ analyzed whether the Mine’s new features were new sources under 40 C.F.R. § 122.29(b), it first looked to the permitted discharge of “mine drainage” and the associated effluent limitation. (IOR 466 at 21-22.) The Department then considered how mine drainage had historically been dealt with at the Mine and determined that because Shaft 10 did not totally replace the existing process of removing mine drainage from the Mine, it was not a new source under 40 C.F.R. § 122.29(b)(1)(ii). *Id.* Finally, ADEQ considered whether Shaft 10 was substantially independent of an existing source at the same site under 40 C.F.R. § 122.29(b)(1)(iii) and found as follows:

The new features added to the [M]ine are supporting the same process that has always existed at the site, which is extracting ore by any means or methods. Therefore, there are no processes that are substantially independent of the existing process to extract ore.

(*Id.* at 23.)

The Tribe offers no real controverting argument. Rather, it asserts that “Shaft 10 is not integrated into prior operations; those facilities are integrated into Shaft 10” (Opposition Brief [“Opp.”] at 11), which is a roundabout admission, not an argument disputing integration. Nor does the Tribe offer any legal support for its casual suggestion that Resolution’s heavy investment in Shaft 10 or its

conversion of “existing sources and facilities” supports a new source finding (Opp. at 10)—and it does not. On the contrary, Resolution’s “conversion” of existing infrastructure is reflective of the extensive integration.

Discounting these core, dispositive facts, the court of appeals found that new source standards should nonetheless be applicable because the “major construction” gave Resolution the “opportunity to install the best and most efficient production processes and wastewater treatment technologies.” Opinion ¶ 60 (internal quotation marks omitted). Setting aside the undue weight that the court gave to this single issue, the court overlooked or did not understand that Resolution Mine had *already* upgraded its wastewater treatment plant in 2010 and that this plant treats *all* mine drainage water from *all* facilities at the Mine—including Shaft 10—before discharge. (IOR 440 at 13, ¶ 76; IOR 491 at 52, ll. 16-22.)

Contrary to the majority’s misguided conception of Resolution Mine’s wastewater treatment, it is further evidence of Shaft 10’s integration.

B. Shaft 10 Is Engaged in the Same Type of Activity as the Existing Source.

As to the second factor, if the “facility is engaged in a sufficiently similar type of activity as the existing source, it will not be treated as a new source.” 49 Fed. Reg. 37,998, 38,044. The Tribe necessarily admits the undisputed fact that “Shaft 10 would also mine copper as other sources once did” (Opp. at 11), meaning

that this factor also weighs strongly in favor of the finding that Shaft 10 is an existing source.

As the Tribe acknowledges (*id.* at 10), the EPA’s guidance also provides that the second factor implicates whether the facility “replicates, without replacing” the existing source, 49 Fed. Reg. 37,998, 38,044—i.e., replication is indicative of a new source, while replacement suggests an existing source. And again, the Tribe has admitted the dispositive facts that the old Magma Mine closed “[t]wo decades ago” and that “Resolution drilled Shaft 10 [and] constructed new facilities” to mine ore adjacent to the “exhausted mine.” (Opp. at 1; *see also* Opinion ¶ 84 [“The Magma deposits are exhausted. It is not possible to open a second ‘factory’ when the first is largely shuttered.”] [Paton, J., dissenting].)

Applying the plain regulatory text to these undisputed facts unambiguously establishes that the dissent’s analysis was correct and that the majority’s was wrong. Shaft 10 is not “substantially independent” of Resolution Mine’s existing operations and is therefore not a new source.³

³ The majority concluded its analysis by holding that Shaft 10 “is substantially *separate* to be classified as a new source under § 122.29(b)(1)(iii).” Opinion ¶ 61 (emphasis added). Irrespective of whether the majority intended a distinct meaning with the word “separate” or merely used it as a synonym for “independent,” it misapplied the “substantially independent” standard.

II. A Shaft Is Not a “Mine” and Therefore Cannot Be a New Source Under 40 C.F.R. § 122.2.

The court of appeals’ decision should also be reversed because Shaft 10 is a single shaft, not a “mine,” obviating the need to even reach the “substantially independent” analysis in Section I. *See* 40 C.F.R. § 122.29(b)(1) (providing that to be considered a “new source” under § 122.29, a source must meet 40 C.F.R § 122.22’s definition of “new source”).

A. “Mines” Are the Only Sources Subject to New Source Performance Standards.

New source performance standards (“NSPS”) apply only to new construction after the date on which the applicable performance standards were promulgated, 40 C.F.R § 122.2, and the effluent guidelines for copper mines in 40 C.F.R. §§ 440.100 to 440.105 (“Subpart J”) were last promulgated in 1982. (IOR 466 at 18.) These standards apply to discharges from “mines,” 40 C.F.R. § 440.100(a)—not to individual shafts or other mine components—and it is undisputed that the mining complex that Resolution Copper now owns has been in operation since 1912, long before the 1982 Subpart J guidelines were promulgated.

The majority *correctly* recognized that “[b]ecause ‘mines’ are the only type of source subject to independently applicable standards here,” it had to “determine whether any sources Resolution constructed at its mining site after 1982 fall within

the definition of a ‘mine,’” Opinion ¶ 41—but then it went astray in finding that Shaft 10 is a “mine.”

1. The first step in the statutory analysis is to determine whether Shaft 10 is a “mine.”

The Tribe argues that it is irrelevant whether Shaft 10 is a “mine” because under 40 C.F.R. § 122.2, a new source is “any building structure, facility, or installation from which there is . . . a ‘discharge of pollutants,’ the construction of which commenced” after the relevant performance standards. (Opp. at 6-7.) However, reading this provision in isolation short circuits the overarching statutory framework, the starting point of which is that something can be “a new source only if a new source performance standard is independently applicable to it,” 40 C.F.R. § 122.29(b)(2). Here, the applicable new source performance standard (promulgated in 1982) applies to copper *mines*. (40 C.F.R. § 440.100(a).) Thus, based on the statutory text and decades of regulatory application of it, the first step is to ask whether a new “mine” was constructed after 1982. Because the Resolution Mine complex was constructed decades earlier, it is not a new source.

Although a “building, structure, facility, or installation from which there is or may be a ‘discharge of pollutants’” may be a new source under other circumstances, an individual feature (i.e., a shaft) cannot be a new source here because there is no new source standard independently applicable to it. 40 C.F.R. §§ 122.2, 122.29(b)(2); 40 C.F.R. § 440.100(a); *cf. Mahelona v. Hawaiian Elec.*

Co., 418 F. Supp. 1328, 1334-35 (D. Haw. 1976) (holding that while a discharge facility for electric generating plants came “within th[e] literal statutory definition of ‘source,’” it could not “be considered a ‘source’ within the [applicable statutory] framework” because “[t]he generating plants . . . [were the] existing source of pollution for which the discharge facility [was] the proposed method of control,” and “the method of control is not also the source”).

This case concerns the renewal of Resolution *Mine*’s permit, not the renewal of a permit for a single shaft, and it is undisputed that all mine drainage water from all sources at Resolution Mine (including Shaft 10) is mixed and treated together before discharge—and that it must meet the discharge limitations in the permit, regardless of the volume of waste rock or ore produced. (IOR 440 at 13, ¶ 76; IOR 491 at 52, ll. 16-22.) Treating an individual shaft as a potential new source therefore makes no sense and serves no environmental purpose.

2. Contrary to the majority’s conclusion, Shaft 10 is not a “mine.”

In analyzing the terms “mine,”⁴ “active mining area,”⁵ and “site,”⁶ the court of appeals deployed a “nesting dolls” analogy through which it found that an

⁴ A “mine” is defined as “an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method” 40 C.F.R. § 440.132(g).

“active mining area” nests within a “mine,” which in turn nests within a “site.” Opinion ¶¶ 41-42. From there, the court declared that “if a source would qualify as an ‘active mining area,’ it would also qualify as a ‘mine,’” *id.* ¶ 42—and from *there*, the court found that “Shaft 10 neatly falls within the description of a ‘mine,’ as opposed to a ‘site,’” *id.* ¶ 45.

This analysis went off track—logically and factually—in the second step, if not earlier.

First, under the court’s “nesting dolls” analogy, it does not make sense to say that “if a source would qualify as an ‘active mining area,’ it would also qualify as a ‘mine.’” Opinion ¶ 42. Rather, if an “active mining area” is a component of a “mine”—as it is—the component is *not* identical to the whole. To switch analogies, “a tire is not a car,” as Resolution Copper stated in its petition.

(Resolution Pet. at 8 n.3.)

Second, Shaft 10 does *not* “neatly fall[] within the description of a ‘mine.’” Opinion ¶ 42. A “‘mine’ is an active mining area, including all land and property . . . used in or resulting from the work of extracting metal ore or minerals from their

⁵ An “[a]ctive mining area’ is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted” 40 C.F.R. § 440.132(a).

⁶ A “site” is “the land or water area where any ‘facility or activity’ is physically located or conducted, including adjacent land used in connection with the facility or activity.” 40 C.F.R. § 122.2.

natural deposits by any means or method” 40 C.F.R. § 440.132(g). Most obviously, Shaft 10 is not “all land and property” used in the extraction of metal ore—it is a single shaft. No case law from any jurisdiction supports the court of appeals’ determination that a single shaft can be a “mine.”

Third, the court’s statement that Shaft 10 fit “the description of a ‘mine,’ *as opposed to a ‘site,’*” Opinion ¶ 45 (emphasis added), suggests that the court felt compelled to shoehorn Shaft 10 into at least one of the three definitions that it discussed. But there is no legal, factual, or logical reason to do this, just as there would be no reason to think that a tunnel or a filtration system would need to be considered a “mine” or a “site.”

The majority was correct that it matters whether Shaft 10 is a mine, but was misguided and illogical in finding that a single shaft is a mine. And because Shaft 10 is not a mine, it cannot under any circumstances be a new source.

B. There Is No Evidence that Shaft 10 Will Cause Any Adverse Environmental Impact.

This is not a case where statutory fidelity comes at the price of environmental damage. On the contrary, the record below is devoid of *any* evidence that Shaft 10 will produce a discharge of pollutants that differs in quantity or character from that previously permitted, negating even the pretext for a “new source” finding.

In *Rybachek v. U.S.*, 904 F.2d 1276 (9th Cir. 1990), a case involving gold placer mines—which, like copper mines, are subject to 40 C.F.R. § 440 Subpart J—the Ninth Circuit analyzed whether Subpart J required that a mine be considered a “new source” whenever “miners moved during the normal course of operations” and restarted operations after a period of dormancy. *Id.* at 1293. Conspicuously absent from the court’s analysis is any discussion of the size, length, or other details of the sluice boxes (i.e, shaft equivalents) at issue. Rather, the court held that whether a gold placer mine was a “new source” depended on the factors that the EPA had articulated in its regulations for gold placer mines, *see id.*, which included matters such as whether the “mine will operate outside of the permit area” that its CWA permit covered and whether the “mine” is significantly altering “the nature or quantity of pollutants discharged.” 40 C.F.R. § 440.144(c). None of these factors support a “new source” finding here.

The Resolution Mine will continue to operate on the same two-plus-mile wide piece of property that it operated on under its previous permit, with Shaft 10 being a mere 300 feet from the already existing Shaft 9 at the permitted Mine site. (IOR 440 at 12, ¶ 70.) Resolution Mine’s previous permit indisputably covered discharges of mine drainage collected from the entire mining site at issue, which includes the Resolution Ore Body that the Mine’s previous owner discovered

before Resolution Copper acquired the Mine.⁷ And Resolution Mine’s permit has always authorized the Mine to discharge into Queen Creek.⁸

Further, the permit standards are based on the concentration of copper *in the discharge*, and the concentration of copper discharged from Resolution Mine (regardless of the particular shaft or the totality of shafts) is *lower* than the concentration of copper that currently exists in Queen Creek. (IOR 483 at 103, ll. 19-25.)

In sum, Shaft 10 is not a “Mine,” it is not “substantially independent of the existing source at the same site,” and its operation will have zero adverse environmental impact. The court of appeals’ “new source” finding is therefore manifestly wrong in every conceivable respect.

CONCLUSION

For the foregoing reasons and for those set forth in ADEQ’s Petition for Review, this Court should reverse and vacate the court of appeals’ erroneous “new source” determination and affirm the superior court’s judgment.

⁷ All of the previous permits were issued to Magma Copper Company without any mention of which ore body was covered or of any other geographic restrictions. (IOR 213 at 3; *see also* IOR 440 at 3, ¶ 6.)

⁸ Despite being authorized to discharge into Queen Creek, Resolution Copper has not in the past discharged into it and is not planning to do so in the future. Instead, Resolution Copper has always sent its treated mine drainage water to an irrigation district in lieu of discharging it into Queen Creek. (IOR 440 at 14, ¶ 85.)

Respectfully submitted this 12th day of September, 2023.

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