No. 10-16513

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, *et al.,*

Plaintiffs-Appellants,

v.

KEN SALAZAR, SECRETARY OF THE INTERIOR, *et al.,*

Defendants-Appellees,

and

DENISON ARIZONA STRIP, LLC, *et al.,*

Intervenors-Defendants-Appellees.

On appeal from the United States District Court for the District of Arizona
No. 3:09-cv-08207-DGC (Honorable David G. Campbell)

ANSWERING BRIEF OF FEDERAL APPELLEES

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GLOSSARY

ADEQ	Arizona Department of Environmental Quality
BLM	Bureau of Land Management
EA	environmental assessment
EIS	environmental impact statement
FLPMA	Federal Land Policy Management Act
FONSI	finding of no significant impact
MPO	mining plan of operations
NEPA	National Environmental Policy Act
UUD	unnecessary or undue degradation

STATEMENT OF JURISDICTION

District Court – The district court had jurisdiction under 28 U.S.C. § 1331 (federal question).

Appellate Court – This is an interlocutory appeal of the district court's June 17, 2010 Order denying a preliminary injunction. ER 1.[1/] Appellants filed their notice of appeal on July 12, 2010. ER 14. The appeal was timely under FRAP 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Plaintiffs-Appellants Center for Biological Diversity, Grand Canyon Trust, Sierra Club, Kaibab Band of Paiute Indians, and Havasupai Tribe (collectively "CBD") appeal the district court's denial of a preliminary injunction. They allege that the Secretary of the Interior and the Bureau of Land Management (collectively "BLM") have violated the Mining Law of 1872 ("Mining Law"), 30 U.S.C. §§ 22-54; the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1784; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, by failing to take what CBD contends are required actions with respect to the ongoing operation of a uranium mine located on BLM-managed public land in Mohave County, Arizona. The mine, known as Arizona 1 ("Mine"),

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[1/] "ER__" refers to Appellants' Excerpts of Record. "SER__" refers to the Supplemental Excerpts of Record. "Dkt. __" refers to the district court document number.

is operated by Intervenor-Appellees Denison Arizona Strip, *et al.* (collectively "Denison") pursuant to a mining plan of operations ("MPO") approved by BLM in 1988. Denison recently resumed active mining after a 17-year hiatus, during which time the Mine was managed under the approved MPO's interim management and temporary closure provisions and subject to BLM field inspections and compliance reports. The issues on appeal are:

I.A. Whether CBD is likely to succeed (or has raised serious questions) on its claim that, as a result of the temporary closure of the Mine, the MPO automatically terminated and BLM therefore has a mandatory duty under the Mining Law and FLPMA to require Denison to seek approval of a new MPO.

I.B. Whether CBD is likely to succeed (or has raised serious questions) on its claim that BLM's 1988 decision to approve the MPO is an ongoing "major Federal action," and BLM therefore has a mandatory duty to undertake a supplemental NEPA analysis of the agency's 1988 decision to approve the MPO.

II. Whether CBD has demonstrated that it is likely to suffer irreparable harm in the absence of preliminary injunctive relief.

III. Whether CBD has demonstrated that the balance of equities tips in its favor and that an injunction is in the public interest.

STATEMENT OF THE CASE

A. Legal Framework

1. The Mining Law of 1872

The Mining Law opens federal lands to exploration and authorizes miners to locate mining claims and to secure exclusive rights to mine those claims, subject to federal regulation and state, territorial, and local regulations not in conflict with federal law. *See* 30 U.S.C. § 22. Of relevance here, and in contrast to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et. seq.*, and the Materials Act of 1947, 30 U.S.C. §§ 601 *et. seq.*, the Mining Law does not require claimants to "diligently develop" or extract minerals from the claim within a certain timeframe. *United States v. Curtis-Nevada Mines*, 611 F.2d 1277, 1281-82 (9th Cir. 1980). Rather, claimants maintain their claims through payment of an annual maintenance fee. 30 U.S.C. § 28f.

2. The Federal Land Policy and Management Act

FLPMA authorizes the Secretary of the Interior to manage the public lands for multiple uses, which include use of the land's renewable and non-renewable resources, recreation, and preservation of natural values. FLPMA directs the Secretary, "by regulation or otherwise," to "take any action necessary to prevent unnecessary or undue degradation" – or "UUD" – of the public lands. 43 U.S.C.

§ 1732(b). Rather than define UUD in FLPMA, Congress delegated the authority to do so to the Secretary. 43 U.S.C. § 1740.

3. The Secretary's Regulation of Mining on Public Lands

As authorized by the Mining Law and FLPMA, the Secretary has promulgated regulations governing mining on public lands. 43 C.F.R. Subpart 3809. The regulations define UUD and create a regulatory scheme whereby a mine operator must obtain BLM approval of an MPO before commencing mining activities. 43 C.F.R. § 3809.11 (2009); *id.* § 3809.1-4(a) (1987).[2/] The MPO must explain in detail what surface-disturbing activities the operator intends to undertake and how the operator will comply with all applicable local, state, and federal mining and environmental regulations. *Id.* The MPO must also include an "interim management plan" describing the measures to be taken during periods of temporary closure or inactivity, *see id.* § 3809.401(b)(5) (2009); *id.* § 3809.1-5(c)(6) (1987), and a reclamation plan that identifies how the mine site will be restored once operations permanently cease. *Id.* § 3809.401(b)(3), (b)(4) (2009); *id.* § 3809.1-5(c)(5) (1987). Consistent with the absence of a "diligence"

[2/] BLM promulgated the original Subpart 3809 regulations in 1980, and amended the regulations in 2000 and 2001. 45 Fed. Reg. 78902 (Nov. 26, 1980); 65 Fed. Reg. 69998 (Nov. 21, 2000); 66 Fed. Reg. 54834 (Oct. 30, 2001). BLM approved the Arizona 1 MPO under the original regulations, as published in the then-current 1987 Code of Federal Regulations. Unless otherwise noted, citations in this brief are to the current regulations, as published in the 2009 Code of Federal Regulations.

requirement in the Mining Law, the regulations do not require that the MPO include a set expiration date. *See* 65 Fed. Reg. 69998, 70053 (Nov. 21, 2000) (declining to adopt a commenter's suggestion that BLM establish a term or duration after which an MPO would expire); *id.* at 70054 (explaining that the final regulations do not require termination of an MPO after five years of inactivity).

When reviewing a proposed MPO, BLM considers whether the proposed activities will cause UUD, prepares an environmental analysis under NEPA, and consults with other government agencies as appropriate. *See* 43 C.F.R. § 3809.411(a)(3) (2009); *see also id.* §§ 3809.2-1, 3809.2-2 (1987). After BLM approves an MPO, the operator must post and maintain an adequate financial guarantee to ensure reclamation of the approved surface disturbance. *Id.* § 3809.500 (2009); *see also id.* § 3809.1-9 (1987).

An operator's authorization to conduct surface disturbing activities under an MPO is subject to the operator's ongoing compliance with the MPO and applicable regulations, including standards to avoid UUD and all pertinent Federal and state laws. 43 C.F.R. § 3809.420 (2009); *id.* § 3809.2-2 (1987). BLM has the authority to inspect an approved mining site at any time to confirm that the operator is not deviating from, or exceeding the disturbance approved under, the MPO. *Id.* § 3809.600(a) (2009). If BLM determines that an operator is causing UUD or deviating from its MPO, or learns that the operator is violating any

applicable state or federal regulation, BLM may order the operator to suspend work, issue a notice of noncompliance, revoke the MPO, or seek criminal penalties if appropriate. *Id.* §§ 3809.601, 3809.601(b)(2), 3809.602, 3809.604, 3809.700. In addition, BLM has discretion to terminate an MPO if a project is inactive for five consecutive years. *Id.* § 3809.424(a)(3). If BLM decides to terminate an MPO, it will order final closure and reclamation. *Id.* In addition, BLM may terminate an MPO and initiate bond forfeiture to cover costs of closure and reclamation if it determines that the operator has abandoned the project. *Id.* § 3809.424(a)(4).

As discussed below (pp. 25-26), the regulations set out a detailed process for terminating an MPO, which generally requires notice to the operator, an affirmative decision by BLM, and opportunities for an informal hearing, administrative appeal, and judicial review. *See* 43 C.F.R. §§ 3809.601, 3809.602, 3809.800, 3809.801, 3809.803.

4. The National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA imposes procedural rather than

substantive requirements. *Id.* at 351; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

NEPA requires a federal agency proposing a "major Federal action[] significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS") analyzing the potential impacts of the proposed action and possible alternatives. 42 U.S.C. § 4332(C). To determine whether an EIS is required, an agency may prepare an environmental assessment ("EA"). 40 C.F.R. §§ 1501.4(b), 1508.9. If the agency concludes there will not be any significant environmental impact, it may issue a Finding of No Significant Impact ("FONSI"), and no EIS is required. *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355-56 (9th Cir. 1994).

The requirement for an agency to prepare an EIS arises only when there is a proposal for "major Federal action." *Sierra Club v. Penfold*, 857 F.2d 1307, 1313 (9th Cir. 1988) (quoting 42 U.S.C. § 4332(C)). Similarly, the requirement for an agency to prepare a supplemental EIS arises "only if there remains major Federal action to occur." *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 73 (2004) ("*SUWA*") (quoting *Marsh*, 490 U.S. at 374) (internal quotation marks and alterations omitted); *see* 40 C.F.R. § 1502.9(c)(1); *Cold Mountain v. Garber*, 375 F.3d 884, 892 (9th Cir. 2004).

B. Facts

1. BLM's review and approval of the Arizona 1 MPO

In 1988, following 4 years of work under an exploration plan, Denison's predecessor submitted a proposed MPO for the Mine to BLM for approval. ER 407-08. BLM reviewed the proposal, took public comment, and prepared an EA. ER 497-98. The EA includes analysis of the project's potential impacts on air (ER 456-76), surface water (ER 476-77), and groundwater (ER 477-79), as well as the potential radiogenic impacts of mining operations, ore stockpiles, and ore transport. ER 480-86; *see also* SER 242, 295, 356, 462.

The EA's discussion of groundwater is particularly relevant to CBD's current claims. The EA explains that the depth of the proposed mine would be approximately 1,400 feet above the regional water table within the Redwall-Muav aquifer, and that the geological formation at Arizona 1 from which the uranium is to be mined (known as a "breccia pipe") is "effectively impermeable." ER 477. As a result, the EA finds that "the potential for any direct impact on water quality or quantity within the Rewall-Muav limestone aquifer is negligible." ER 478. In addition, the EA explains that the strata between the proposed depth of mining and the uppermost Redwall-Muav aquifer include thick sequences of highly absorptive mudstones and limestones, and that "absorption of heavy metal and radioactive constituents on the surfaces of clays as well as chemical reactions in the rock strata

would tend to minimize or eliminate any short-term or long-term potential water quality impacts." ER 478, 479.

BLM ultimately determined that the proposed project would not have a significant impact on the human environment and found the proposed MPO to be complete and consistent with the Mining Law, FLPMA, and the Subpart 3809 Regulations. ER 500-511. On May 9, 1988, BLM issued a decision record approving the MPO. ER 511.[3/]

As required by the Subpart 3809 regulations, the MPO includes provisions governing management of the Mine during periods of temporary closure. ER 533-34. Likewise, the EA discusses the possibility that, over the life of the Mine, there could be periods of temporary closure. ER 416-17. BLM's 1988 approval of the MPO has never been challenged.

2. Operations under the MPO

Following approval of the MPO, Denison's predecessor began excavating the Mine. ER 2, 311. In 1992, after the mine shaft was substantially completed, the operator placed the Mine on "Standby" or "interim management" status. ER 2; *see* ER 127, 109; SER 27. Denison acquired the Mine in 1997, and the Mine remained on interim management status until 2009. *See* ER 2. Throughout this

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[3/] CBD does not challenge the 1988 MPO or the adequacy of the environmental assessment that BLM prepared before deciding to approve the MPO, and does not allege that Denison has failed to comply with the MPO.

period, BLM conducted field inspections of the Mine and prepared compliance reports. SER 2 ¶ 5 (Decl. of Scott R. Florence and attached exhibits). At no time did BLM determine that the Mine's surface disturbance and occupancy of the public lands was not authorized by the MPO or not in accordance with applicable regulations. BLM has never undertaken an enforcement action to terminate the MPO. *See* SER 1-6.

Between 2007 and 2009, Denison advised BLM of its intention to begin production from the mine (ER 311), posted updated financial reclamation bonds with BLM and the Arizona Department of Environmental Quality ("ADEQ") (SER 2 ¶ 6; ER 280), and obtained updated Aquifer Protection and Air Quality permits from ADEQ. SER 114, 152; ER 247. Denison began extracting ore from the Mine in December 2009. *See* ER 2.

In the years since Denison's acquisition, BLM has continued to inspect the Mine and monitor the surrounding public lands.[4/] *See* SER 2 ¶5; SER 5-33.

[4/] On May 3, 2010, the Environmental Protection Agency ("EPA") issued a finding of violation ("FOV") to Denison. ER 16A at 1. The FOV finds that Denison's operation of the Mine under the 2009 ADEQ Air Quality permit does not satisfy certain requirements of 40 C.F.R. Part 61, Subpart B (National Emission Standards for Radon Emissions from Underground Uranium Mines), because EPA has not delegated to ADEQ the authority to implement or enforce that Subpart. ER 16A at 4. BLM reviewed the FOV and issued a noncompliance order requiring Denison, within thirty days, to (1) provide BLM with copies of correspondence and any documents that demonstrate Denison has contacted the EPA and initiated action to resolve the FOV; and (2) provide BLM a proposed plan of action that indicates the process and timeframe Denison will adhere to in

3. The Secretary's Notice of Proposed Withdrawal

In July, 2009, BLM published notice of the Secretary of the Interior's proposal to withdraw certain public lands in the Arizona Strip from location and entry under the Mining Law. "Notice of Proposed Withdrawal," 74 Fed. Reg. 35887 (July 21, 2009). As the Notice explains, "[t]he purpose of the withdrawal, if determined to be appropriate, would be to protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining." *Id.* The Notice temporarily "segregates" or closes the designated lands to new claims, in order to "allow time for various studies and analyses, including appropriate National Environmental Policy Act analysis. These actions will support a final decision on whether or not to proceed with a withdrawal." *Id.* The proposed withdrawal would be "subject to valid existing rights," *id.,* and neither the segregation nor the proposed withdrawal would "prohibit ongoing or future exploration or extraction operations on valid pre-existing claims." ER 238 (DOI Press Release). The Mine is located within the area of the proposed withdrawal.

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resolving the FOV. Dkt. 52-6; *see* SER 4 ¶ 11. The order also provides that, within 90 days of receipt of the order, BLM will evaluate Denison's progress towards resolving the FOV and will determine if the order will be lifted or if BLM will take further action. Dkt. 52-6.

C. Proceedings Below

CBD filed its initial complaint on November 16, 2009 (Dkt. 1), and moved for a preliminary injunction on April 8, 2010. Dkt. 36. The district court denied the motion in a written Order issued June 17, 2010. ER 1. The court held that CBD had failed to demonstrate that it was likely to succeed on the merits of its claims. With respect to CBD's Mining Law/FLPMA claim, the court found that CBD was unlikely to succeed on its argument that, under Subpart 3809, the 1988 MPO ceased to be effective in 1992 when Denison's predecessor began managing the Mine under the MPO's interim management provisions. ER 3. The court found ambiguities in the regulation, but concluded that BLM's view that an approved MPO remains in effect during periods of temporary closure is "more consistent with the overall regulatory scheme" than CBD's, and "appears to comport with the original intent of the regulations." ER 6-8. In addition, the court found that it was required to defer to BLM's interpretation because the interpretation was "not plainly erroneous or inconsistent with the regulation[s]." ER 7 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

Turning to CBD's NEPA claim, the court found that the decision whether to approve the MPO was the relevant "major Federal action" for purposes of NEPA, and that that action was completed in 1988 when BLM approved the MPO. The court found that CBD was not likely to succeed on the merits of its argument that

BLM's action was "ongoing" because the agency had required Denison to provide a new financial guarantee and obtain a new air permit. The court concluded that, in the absence of an ongoing major federal action, BLM was not required to supplement its previous EA. ER 10-13.

Because it found that CBD was not likely to succeed on the merits, the district court did not reach the questions of irreparable harm, the balance of harms, and the public interest. ER 13.

CBD filed its notice of appeal on July 12, 2010 (ER 14), and moved for an injunction pending appeal in the district court on July 14, 2010. Dkt. 80. The district court denied the injunction pending appeal on August 12, 2010. Dkt. 102. CBD then moved for an emergency injunction pending appeal in this Court. In an August 31, 2010 Order, the motions panel denied the injunction pending appeal, citing *Winter v. Natural Res. Defense Council,* 129 S. Ct. 365 (2008), and *Alliance for the Wild Rockies v. Cottrell,* 613 F.3d 960 (9th Cir. 2010).[5/]

SUMMARY OF ARGUMENT

CBD has failed to demonstrate that it is entitled to the extraordinary remedy of a preliminary injunction. CBD can show neither a likelihood of success nor

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[5/] As discussed below, *Alliance* holds that "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance,* 613 F.3d at 965.

serious questions on the merits of its claims. CBD's assertion that BLM has a mandatory duty under the Mining Law and FLPMA to require Denison to seek approval of a new MPO is untenable, because it is premised on CBD's incorrect view that the 1988 MPO automatically "became ineffective" when Denison's predecessor temporarily halted mining in 1992. That view is inconsistent with the regulations' broad definition of the term "operations," other provisions of the regulations, and BLM's interpretation, which is entitled to substantial deference.

Similarly, CBD has shown neither a likelihood of success nor serious questions on its claim that BLM has a mandatory duty to supplement its NEPA analysis of its 1988 decision to approve the MPO. Supplementation is required only when there remains "major Federal action" to occur. No such action remains here. The agency completed the relevant action – the decision to approve the proposed MPO – in 1988, and that long completed action has never been challenged.

Given CBD's failure to make the required showing on the merits, this Court need not reach CBD's claims regarding irreparable harm, the balance of hardship, and the public interest. In any event, the harms alleged by CBD are speculative, not supported by the record, and insufficient to show that the balance of hardship and the public interest support the issuance of a preliminary injunction.

STANDARD OF REVIEW

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion and reviews the legal issues underlying the district court's decision *de novo*. *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 973 (9th Cir. 2009).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter,* 129 S. Ct. at 376. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. Concluding that *Winter* had not completely eliminated the "sliding scale" test, a panel of this Court recently held that "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance*, 613 F.3d at 965.

When reviewing an agency's construction of a statute, courts must give effect to clearly-expressed congressional intent. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous with respect to an issue, however, courts defer to an agency's interpretation as long as it is "based on a permissible construction of the statute." *Id.* at 843. Where the construction

of an administrative regulation rather than a statute is at issue, courts must give "substantial deference" to the agency's interpretation. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (internal notation and citations omitted); *Auer,* 519 U.S. at 461; *Sierra Pac. Power Co. v. EPA*, 647 F.2d 60, 65-66 (9th Cir. 1981) ("An appellate court will ordinarily give substantial deference to a contemporaneous agency interpretation of a statute it administers. When dealing with an interpretation of regulations the agency has itself promulgated, 'deference is even more clearly in order.'").

An agency's decision whether to take enforcement action is "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citation omitted); *see* 5 U.S.C. § 701(a)(2); *Ness Inv. Corp. v. United States Dep't of Agric.*, 512 F.2d 706, 715-16 (9th Cir. 1975).

ARGUMENT

I. CBD has failed to demonstrate either a likelihood of success or serious questions on the merits.

Neither the Mining Law, FLPMA, nor NEPA provide a right of action or a waiver of sovereign immunity. *See Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 882 (1990); *Oregon Natural Res. Council Action v. BLM,* 150 F.3d. 1132, 1135

(9th Cir. 1998). Accordingly, CBD seeks to pursue its claims under the limited waiver of sovereign immunity and right of action provided in § 706(1) of the Administrative Procedure Act, which grants federal courts the power to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see* CBD Br. at 13-14. As CBD acknowledges (Br. at 13), a claim under § 706(1) "can proceed only [if] plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64 (emphasis in original); *see also Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932-33 (9th Cir. 2010). Here, CBD cannot identify any such required agency actions, because (1) the 1988 MPO remains in effect and neither the Mining Law nor FLPMA imposes a mandatory duty on BLM to require Denison to seek approval of a new MPO; and (2) NEPA does not require BLM to complete supplemental NEPA analysis of an action that BLM completed in 1988. Accordingly, CBD cannot demonstrate either a likelihood of success or serious questions on the merits of its claims.[6/]

[6/] CBD argues that the district court committed reversible error when it denied the preliminary injunction on the ground that CBD was not likely to succeed on the merits without also addressing whether there were serious questions on the merits and a hardship balance tipping sharply in CBD's favor. Br. at 26-27, citing *Alliance*, 613 F.3d 960. But CBD, unlike the plaintiffs in *Alliance*, did not argue that it satisfied the "serious questions" test in the district court. *See Alliance,* No. 09-00107 (D. Mont.), Dkt. 9 at 10-12. Nor did CBD seek reconsideration by the district court when, shortly after the district court denied the injunction, *Alliance* was decided. *Center for Biological Diversity*, No. 09-08207 (D. Ariz.), Dkt. 102

A. CBD's Mining Law/FLPMA claim is without merit.

CBD's claim that BLM has a mandatory duty under the Mining Law and FLPMA to require Denison to seek approval of a new MPO is entirely dependent on a single false premise: that the 1988 MPO automatically "became ineffective" when Denison's predecessor temporarily suspended mining in 1992. *See, e.g.,* Br. at 1, 3, 11, 28, 30. According to CBD, the "plain language" of 43 C.F.R. §§ 3809.5 and 3809.423 compels this conclusion. Br. 30. But CBD's argument is at odds with the express language of § 3809.5, inconsistent with other provisions of the regulations, and contrary to BLM's interpretation, which is entitled to substantial deference.

1. CBD's argument is inconsistent with Subpart 3809's broad definition of "operations."

Section 3809.5 defines "operations" as:

> *all* functions, work, facilities, and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws; reclamation of disturbed areas; *and all other reasonably incident uses*, whether on a mining claim or not, including the construction of roads, transmission lines, pipelines, and other means of access across public lands for support facilities.

43 C.F.R. § 3809.5 (emphasis added).

(Order denying injunction pending appeal) at 3. In any event, even if the issue has been preserved, CBD cannot satisfy the serious questions test, as we demonstrate below.

Section 3809.423 in turn provides that a "plan of operations remains in effect as long as you [the operator] are conducting operations, unless BLM suspends or revokes your plan of operations for failure to comply with this subpart." *Id.* at § 3908.423.

CBD argues that § 3809.5 must be read to mean that only "active and ongoing" functions, work, facilities and activities constitute "operations." Br. at 29. That narrow reading ignores the section's broad references to "*all* functions, work, facilities, and activities" and "*all* other reasonably incident uses." 43 C.F.R. § 3809.5 (emphasis added). Indeed, when BLM adopted this definition of operations, the agency explained that it intended the definition to be read broadly. 65 Fed. Reg. 69998, 70013 (Nov. 21, 2000) (definition of operations "is intended to be broad in scope to address 'cradle to grave' activities authorized under the mining laws on the public lands" and "covers all activities under the mining laws which occur on public lands"). Similarly, CBD's contention that § 3809.423 must be interpreted to mean that an MPO automatically terminates if the operator temporarily suspends "active" mining is contrary to BLM's contemporaneous explanation of that provision. BLM explained that "§ 3809.423 provides that the plan of operations approval is *good for the life of the project* as described in the plan." 65 Fed. Reg. at 70053 (emphasis added).

2. CBD's argument is inconsistent with the provisions of Subpart 3809 that authorize temporary closures.

CBD's narrow reading of the term "operations" is also inconsistent with the provisions of Subpart 3809 that address temporary closures. These provisions authorize operators to temporarily suspend mining during the course of a project and *require* that the MPO include a plan for interim management during periods of temporary closure. The regulations both now and at the time the MPO was approved make clear that temporary closures are authorized activities that may take place – and indeed, may occur multiple times – under a single approved MPO during the life of a mine. And there is no suggestion in any of these provisions that the MPO will automatically terminate if the operator elects to temporarily suspend active mining in accordance with the MPO's interim management provisions.

Specifically, 43 C.F.R. § 3809.401(b) and (b)(5) provide that an MPO "must contain" an interim management plan "to manage the project area during periods of temporary closure (including periods of seasonal closure)." The interim management plan, in turn, "must include, where applicable,"

> (v) Plans for monitoring site conditions during periods of non-operation; and
>
> (vi) A schedule of anticipated periods of temporary closure during which you would implement the interim management plan, including provisions for notifying BLM of unplanned or extended temporary closures.

Id. § 3809.401(b)(5) (2009); *see also* 43 C.F.R. § 3809.1-5(c)(6) (1987) (MPO shall include "[m]easures to be taken during extended periods of nonoperation to maintain the area in a safe and clean manner"). Similarly, 43 C.F.R. § 3809.424(a)(1)(ii) (2009) requires the operator to modify its interim management plan if the plan does not cover the circumstances of a temporary closure. In adopting these provisions, BLM explained that "[a]n operator, in planning to mine, should also be able to plan under what conditions they might temporarily not mine, and how they would manage the site to prevent unnecessary or undue degradation during the temporary closure." 65 Fed. Reg. at 70042.

Consistent with these regulations, BLM's NEPA analysis of the MPO discussed the possibility of temporary closures at the Mine, ER 416-17, and the MPO includes a plan for maintaining the mine during periods of temporary closure, including closures of more than one year. ER 533-34.[7]

In support of its argument that a temporary closure results in the automatic termination of the MPO, CBD cites § 3809.424(a)(1), which provides in part that if "you stop conducting operations * * * you must follow your approved interim management plan." On the basis of this use of the phrase "stop conducting operations" in § 3809.424(a)(1), CBD argues (Br. at 31-35) that interim

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[7] CBD does not allege that Denison has failed to comply with the MPO's temporary closure provisions.

management is not "operations," and therefore interim management results in automatic termination of the MPO under § 3809.423.

As the district court recognized, (ER 4-6), the phrase "stop conducting operations" in § 3809.424(a)(1) is ambiguous given the definition of "operations" in § 3809.5 and the use of the phrase "conducting operations" in § 3809.423. Nevertheless, CBD's argument fails because CBD reads § 3809.424(a)(1) in isolation to produce a result that is contrary to the remainder of Subpart 3809 and at odds with the agency's stated intent. *See Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1442 (9th Cir. 1990) ("our task is to interpret the regulation as a whole, in light of the overall statutory and regulatory scheme, and not to give force to one phrase in isolation") (internal quotation marks and citation omitted).

First, as discussed above, § 3809.401(b)(5) unambiguously contemplates that *multiple* temporary closures may occur under a single approved MPO during the life of a mine. Multiple temporary closures could never occur pursuant to a single MPO, however, if CBD were correct that the MPO automatically terminates as soon as a temporary closure occurs.

Second, § 3809.424(a)(3) provides that BLM will "review" operations that have been inactive for five consecutive years to "determine whether" to terminate the MPO. BLM would never have occasion to conduct such a review and make a

determination whether to terminate an MPO if, as CBD maintains, the MPO automatically terminates as soon as the mine becomes inactive.[8/]

Third, BLM's explanation of § 3809.424 in the Federal Register makes clear that the agency intended for approved MPOs to remain in effect during periods of temporary closure:

> Because of the recognized value an approved [MPO] may have, and the potential for changing market conditions, the rule allows up to 5 years to pass before BLM conducts a review to see if the plan should be terminated. *The final regulations do not require the plan to be terminated after five years*, only that a review be conducted to determine if it should be terminated. *If there is adequate bonding in place, no unnecessary or undue degradation occurring, and persuasive reasons exist to maintain an inactive status, there may be no reason for BLM to terminate the plan and direct final closure.*

65 Fed. Reg. 69998, 70054 (emphasis added).

Accordingly, § 3809.424(a)(1) is properly read as a statement that a mine operator must comply with the interim management provisions of its MPO during periods of inactivity. CBD's attempt to derive an automatic termination requirement from the section's use of the phrase "stop conducting operations" is unpersuasive.

[8/] CBD attempts to the reconcile its reading of § 3809.424(a)(1) with § 3809.424(a)(3) by arguing (Br. at 35) that § 3809.424(a)(3) must be read to authorize BLM to decide whether to terminate only the interim management plan, not the MPO. That argument is contrary to the plain language of § 3809.424(a)(3), which refers to BLM's decision to "terminate your *plan of operations* and direct final reclamation and closure." 43 C.F.R. § 3809.424(a)(3).

3. CBD's argument is inconsistent with the provisions of Subpart 3809 that deal with termination of an MPO.

CBD's contention that temporary closure results in the automatic termination of an MPO is also inconsistent with the detailed process for terminating an MPO set out in Subpart 3809, which generally requires notice to the operator and affirmative action by BLM. The termination process typically begins with BLM issuing an enforcement order under § 3809.601 to notify the operator that it is not in compliance with its MPO and affording the operator the opportunity to rectify the situation within a specific timeframe. 43 C.F.R. § 3809.601(a). If the operator does not come into compliance, BLM may order a suspension of all or part of the operations after giving notice and opportunity for an informal hearing with the State Director. *Id.* § 3809.601(b)(1). Where necessary to protect health, safety, or the environment, however, BLM may issue an immediate temporary suspension, without notice. *Id.* § 3809.601(b)(2). Under § 3809.602(b), if BLM determines that a pattern of violations have occurred, BLM may institute notice and informal hearing procedures to revoke an MPO. If, after notice and opportunity for an informal hearing, BLM decides that the MPO should be revoked, it will issue a formal written decision to that effect. *Id.* § 3809.602. The operator may then appeal the revocation decision to the State Director and/or

the Interior Board of Land Appeals. *See id.* §§ 3809.800, 3809.801. The operator can also bring a challenge in Federal district court. *See id.* §§ 4.21(c), 3809.803.

CBD's attempt to read into Subpart 3809 a rule that an MPO automatically terminates without action by BLM or notice to the operator is inconsistent with these express termination provisions.

4. BLM's interpretation that the MPO remains in effect is controlling because it is neither plainly erroneous nor inconsistent with the regulations.

In light of the foregoing, BLM's interpretation of its regulations to mean that the Mine's MPO remains in effect is neither plainly erroneous nor inconsistent with the regulations, and is therefore controlling. *Long Island Care*, 551 U.S. at 171 (agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal notation and citations omitted); *Auer*, 519 U.S. at 461. And because CBD's Mining Law and FLPMA claim is entirely predicated on a contrary reading of the regulations, CBD cannot demonstrate a likelihood of success or serious questions on the merits of this claim.

CBD contends (Br. 35-36) that BLM's interpretation of its regulations is not entitled to deference because it is (purportedly) a post-hoc rationalization offered for the first time in litigation. That characterization is unfounded. As described above (pp. 19-20), BLM explained its intention that the term "operations" be

defined broadly and that the MPO apply throughout the life of a mining project when it promulgated the amendments to Subpart 3809 in 2000, long before this litigation began. 65 Fed. Reg. at 70013, 70053. Further, BLM has consistently taken the view that the Mine's MPO remained in effect during the years the Mine was inactive, as demonstrated by the agency's continuing inspections, its allowance of the operator's continued use and occupancy of the public lands, and the fact that the agency never initiated any enforcement action against Denison or its predecessors seeking to terminate the MPO. *See* ER 239, 280-81; SER 2 ¶¶ 5, 6; SER 5-33. Thus, here as in *Auer,* the agency's interpretation "is in no sense a 'post hoc rationalizatio[n],'" and deference is appropriate. *Auer*, 519 U.S. at 462.

5. Even if CBD were correct that the MPO is not in effect, CBD would not be able to state a claim under APA § 706(1).

Even if CBD were correct that the MPO is no longer in effect – and, as demonstrated above, that is not the case – CBD would still be unable to demonstrate a likelihood of success (or serious questions) on the merits of its claim that BLM has a mandatory duty to require Denison to seek approval of a new MPO. As CBD acknowledges, (Br. at 13), CBD cannot state a claim for a failure to act under § 706(1) of the APA in the absence of a discrete mandatory duty. *SUWA,* 542 U.S. at 64. Yet CBD has failed to identify any statute or regulation that imposes a discrete mandatory duty on BLM to require Denison to

seek approval of a new MPO. The regulations cited by CBD impose requirements on mine operators, not BLM. Br. at 30, citing 43 U.S.C. §§ 3809.10(c) ("operator must submit a plan"); 3809.11(a) (operator must submit a plan and obtain BLM's approval); 3809.605(b) (operator prohibited from beginning operations prior to MPO approval). The mere fact that operators are required to comply with the regulations does not establish that BLM has a mandatory duty to enforce the regulations against Denison. To the contrary, an agency's decision whether to enforce is "generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831 (citation omitted); *see* APA § 701(a)(2); *Ness Inv. Corp.*, 512 F.2d at 715-16. Thus, CBD cannot state a claim under APA § 706(1).

B. CBD's NEPA claim is without merit.

CBD has also failed to demonstrate a likelihood of success (or serious questions) on the merits of its claim that BLM has a mandatory duty to supplement its NEPA analysis of its 1988 decision to approve the MPO. NEPA requires that federal agencies evaluate the potential environmental impacts of *proposed* major federal actions and provide an opportunity for public participation *before* taking that action. *See* 40 C.F.R. §§ 1502.5, 1502.9(c)(1)(ii), 1508.23; *Robertson*, 490 U.S. at 349 (discussing NEPA's "statutory requirement that a federal agency *contemplating* a major action prepare" an environmental analysis) (emphasis added, citations omitted); *Baltimore Gas & Elec. Co. v. Natural Resources*

Defense Council, Inc., 462 U.S. 87, 97 (1983) (in enacting NEPA, Congress "required only that the agency take a 'hard look' at the environmental consequences *before taking a major action*") (emphasis added, citations omitted). Once an agency completes a NEPA analysis, supplementation is required "only if there remains major Federal action to occur." *SUWA*, 542 U.S. at 73 (quoting *Marsh*, 490 U.S. at 374) (internal quotation marks and alterations omitted); *see also* ER 298 (BLM NEPA Handbook) ("Supplementation is not appropriate when new information or changed circumstances arise after the Federal action has been implemented.").

No such major federal action remains to occur here. The action that was the subject of BLM's NEPA analysis was the decision whether to approve the proposed MPO. ER 506 (Decision Record); ER 420 (EA). That action was completed in 1988 when BLM approved the proposed MPO. *See SUWA*, 542 U.S. at 73 (although "'*[a]pproval* of a [land use plan]' is a 'major Federal action' requiring an EIS . . . , that action is completed when the plan is approved" (alteration and emphasis in original)); *Cold Mountain,* 375 F.3d at 894 ("there is no ongoing 'major Federal action' requiring supplementation . . . . Because the Permit has been approved and issued, the Forest Service's obligation under NEPA has been fulfilled"); *see also Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1122 (10th Cir. 2009) (because NEPA only applies to federal agencies, the inquiry

must focus on the actions of the agency, not the non-federal party actually implementing the project).

Since approving the MPO in 1988, BLM has continued to monitor the Mine and surrounding public lands, and to oversee the operator's compliance with the MPO and generally-applicable regulations, including the requirements that Denison (as the new operator) post a new financial guarantee and obtain a new air permit. SER 2 ¶¶ 5, 6; ER 291; *see* 43 C.F.R. §§ 3809.593 (requiring a new financial guarantee where there is a change of operator), 3809.415(a), 3809.420(a)(6) (operators must comply with federal and state law), 3809.420(b)(4) (operators must comply with applicable federal and state air quality standards). But contrary to CBD's argument (Br. at 37-43), these actions do not transform the agency's 1988 decision to approve of the MPO into an ongoing "major Federal action" that requires NEPA supplementation. *See* 40 C.F.R. § 1508.18 (NEPA regulations providing that judicial and administrative enforcement actions are not "major Federal action"); *Penfold,* 857 F.2d at 1314 (BLM's ongoing monitoring and oversight of "notice-level" mines for compliance with applicable regulations does not qualify as "major Federal action"). Nor does the fact that Denison uses gravel from a BLM-approved borrow area for maintenance work on the county road that provides access to the Mine (ER 302) – a routine activity not governed

by the MPO – somehow transform BLM's 1988 approval of the MPO into an ongoing "major Federal action."[9/]

CBD (Br. at 38-39) relies on *Marsh* as support for its argument that supplementation is required, but ignores critical factual distinctions between this case and *Marsh*.[10/] The project at issue in *Marsh* was the construction of a federal dam by the Army Corps of Engineers. At the time of the litigation, the dam was only one-third completed. *Id.* at 363, 368. Thus, *Marsh* involved an ongoing major federal action. *SUWA*, 542 U.S. at 73. Here, in contrast, the relevant "major Federal action" is not the construction and operation of the Mine, but BLM's 1988 decision to approve the MPO. That action was completed in 1988 and was never challenged. *See SUWA*, 542 U.S. at 73; *Marsh*, 490 U.S. at 374 (whether supplemental NEPA analysis is required "turns on the value of the new information to the *still pending decisionmaking process*") (emphasis added).[11/]

[9/] CBD does not allege that these post-MPO BLM actions are themselves "major Federal actions significantly affecting the quality of the human environment," and thus independently subject to NEPA. *See* 42 U.S.C. § 4332(2)(C). Any such allegation would be without merit. *See* 40 C.F.R. § 1508.18(a); *Penfold,* 857 F.2d at 1314.

[10/] CBD misstates the case's ultimate holding: after concluding that there was a continuing action, the Supreme Court upheld the Corps of Engineers' determination that it was *not* necessary to prepare a supplemental EIS. *Marsh*, 490 U.S. at 385.

[11/] In addition, CBD's attempt to use APA § 706(1) to compel BLM to undertake a supplemental NEPA analysis fails because review under the APA is

CBD asserts (Br. at 44-54) that "significant new information and changed circumstances" require BLM to prepare a supplemental NEPA analysis. Even if that assertion were well-founded, it would be insufficient given the absence of an ongoing major federal action. In any event, as we demonstrate in the following section, the record does not support CBD's characterization of current information and circumstances.

II. CBD has failed to demonstrate that it is likely to suffer irreparable harm in the absence of a preliminary injunction.

Because CBD has failed to make the required showing of either a likelihood of success or serious questions on the merits, this Court need not consider CBD's arguments regarding irreparable harm, the balance of hardship, and the public interest. In any event, CBD has failed to make the required showings on these issues as well. A plaintiff seeking a preliminary injunction "must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief."

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limited to "*final* agency action," and only final agency action can be compelled under § 706(1). *SUWA*, 542 U.S. at 62-63 (quoting 5 U.S.C. § 704) (emphasis supplied by *SUWA*). To be "final," an action must mark "the consummation of the agency's decision making process" and be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted); *see also Hells Canyon Pres. Council*, 593 F.3d at 930. A NEPA analysis, standing alone, is a "preliminary, procedural, or intermediate agency action" which does not determine rights or obligations. *See* 5 U.S.C. § 704; *SUWA*, 542 U.S. at 73. Accordingly, a NEPA document is not final agency action and cannot be compelled under APA § 706(1).

Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original). Speculative injury is not sufficient. *Id.*; *see also Goldie's Bookstore, Inc. v. Superior Court of Cal.,* 739 F.2d 466, 472 (9th Cir. 1984).

CBD alleges (Br. at 14) that it (or its individual members) are being harmed as a result of the purported impact of the Mine on groundwater and soils, the California condor, access to sacred sites, and archaeological resources. These claims do not withstand scrutiny.

A. Groundwater and soils

CBD asserts (Br. at 15) that "[u]ranium mining at Arizona 1 is likely introducing radioactive pollution" into the Grand Canyon and the Colorado River. This assertion, however, is speculation based on reports that discuss mining in the region generally – including the impacts of historic mining and un-reclaimed mine sites that were abandoned decades ago, before the advent of stricter environmental controls. *See, e.g.,* ER 204 (comparing the impacts of historical mining activity and the "stricter environmental regulations and improvements in mining practices" begun in the 1970s). None of the reports cited by CBD are specific to Arizona 1. And even as to the impacts of mining generally, the conclusions of these reports are not as definitive as CBD suggests. For example, the U.S.G.S. report quoted by CBD (Br. at 17, quoting ER 219) notes the presence of dissolved uranium "related to mining processes" at some sites, but concludes that "[o]bservation of

groundwater-chemistry relations between concentration and mining condition (no mining activity, active mines on standby, or reclaimed mine areas) were limited and inconclusive." ER 219; *see also* ER 193 ("Relations of uranium and 13 other trace elements to mining activity were few and inconclusive."); ER 217 (same). Similarly, the Grand Canyon National Park memorandum quoted by CBD (Br. at 16, quoting ER 241), which discusses potential impacts from mining on Park resources, explains that "[o]verall, there is not enough hydrologic data for [the relevant area] to quantify with any certainty the effects of uranium mining and exploration activities on the groundwater system(s)." ER 241.

On the other hand, the information in the record that *is* specific to Arizona 1 contradicts CBD's allegations of harm. The EA and the underlying radiological and groundwater studies conclude, based on the specific geological characteristics of the Arizona 1 site, that the project will have negligible impacts. ER 477-79, 508; SER 242, 295. 356, 462. Furthermore, the Mine operates under a State Aquifer Protection Permit (ER 247-72), yet CBD does not allege that Denison is violating that permit or any other applicable surface or ground water requirements. *See* ER 249, 262-63 (permit provisions requiring testing of mine sump permeability and annual reporting of mine shaft sump discharge monitoring).

CBD's reliance (Br. at 8-9, 19) on the Secretary's July 2009 "Notice of Proposed Withdrawal," 74 Fed. Reg. 35887, is similarly misplaced. As explained

above (p. 11), the Notice describes the Secretary's *proposal* to withdraw (or close) the designated public lands to *new* mining claims, subject to valid existing rights. The Notice "segregates" or temporarily closes the designated areas to new mining claims to preserve the status quo while the Secretary undertakes various studies, including NEPA analysis, to determine whether to proceed with a withdrawal. 74 Fed. Reg. 35887. Contrary to CBD's suggestion (Br. at 19), neither the Notice nor the accompanying DOI Press Release state that the proposed withdrawal is "needed to protect Colorado River drinking water and Grand Canyon National Park resources." Rather, the purpose of the Notice is to determine *whether* the proposed withdrawal is needed. *See* 74 Fed. Reg 35887; ER 237-38. Further, CBD fails to acknowledge that the Notice's segregation provision currently allows, and the proposed withdrawal would continue to allow, ongoing or future exploration or extraction operations on valid pre-existing claims. 74 Fed. Reg. 35887; ER 238.

B. California condor

Like its allegations regarding groundwater, CBD's allegation that Arizona 1 is "likely to irreparably harm the California condors" (Br. at 18) is speculation. CBD bases its allegation on the facts that (1) condors are present in the general vicinity, and (2) the surface evaporation ponds used to manage mine waste "serve as an attractant and may represent a significant hazard to wildlife." ER 536a-7.

But there is no evidence that condors have ever been present at Arizona 1, and a recent biological survey commissioned by Denison concluded that there were no protected species, including condors, in the area. SER 92.

C. Access to sacred sites

CBD contends that members of the Kaibab Paiute Tribe will suffer irreparable harm because "Arizona 1 operations preclude access to sacred sites" due to increased truck traffic and (purportedly) poor road conditions on Mt. Trumbull Road, the 29-mile-long unpaved county road that provides access to the Mine. Br. at 21-22 (citing declarations at ER 75-76, 80, 86, 88). These declarations are contradicted by information in the record showing that access to the areas surrounding the Mine is not being impeded by Denison's use of the road, and that the road is being maintained by Denison in accordance Denison's agreement with Mojave County. SER 3 , 41, 44, 67. Further, while CBD asserts that some tribal members are "scared to live and pass by mines like Arizona 1" due to their fears of exposure to radiation (Br. at 22-23), the record contains a detailed analysis of the potential radiological impacts from the mine – including the ore trucks – which concluded that they are negligible. ER 436-38; ER 480-86; ER 483 (theromoluminescent dosimeters placed along existing haul routes have not detected any change in radiation from background levels).

D. Archaeological resources

CBD asserts (Br. at 22 n.3) that "[a]dditional irreparable harm to archaeological resources and sacred sites has come to light," and has submitted under seal several extra-record, post-decision declarations in support of this assertion. In response to CBD's motion to file these declarations, and the Appellees' objections, the motions panel of this Court directed the Clerk to lodge the declarations and provided that the declarations (plus responsive materials that may be offered by the Federal Appellees) "shall be referred to the panel that will consider the merits of this case, for such consideration as it deems appropriate." Order of Aug. 31, 2010, at 2.

CBD's reliance on these declarations in this appeal is improper. This Court's review of the district court's Order "is, of course, restricted to the limited record available to the district court[.]" *Sports Form, Inc., v. United Press International, Inc.,* 686 F.2d 750, 753 (9th Cir. 1982); *see also Lowry v. Barnhart,* 329 F.3d 1019, 1024 (9th Cir. 2003) ("Save in unusual circumstances, we consider only the district court record on appeal"). As this Court explained in *Lowry,*"[t]he appellate process is for addressing the legal issues a case presents, not for generating new evidence to parry an opponent's arguments." 329 F.3d at 1025. Further, it is a "basic tenet of appellate jurisprudence" that "parties may not unilaterally supplement the record on appeal with evidence not reviewed by the

court below." *Id.* at 1024 (quoting *Tonry v. Sec. Experts, Inc.,* 20 F.3d 967, 974 (9th Cir.1994)). Here, contrary to this fundamental principle, the declarations (1) are not part of the record that was before the district court when it issued the June 17, 2010 Order that is the subject of this appeal, and (2) involve an issue that was not raised in CBD's district court briefs. Indeed, the declarations, dated July 12, 13 and 14, 2010, post-date the Order on appeal by several weeks. Accordingly, this Court should decline to consider the declarations.

In any event, if the Court does consider CBD's declarations, it should also consider the responsive materials lodged under seal by Federal Appellees concurrently with this brief pursuant to this Court's August 31, 2010 Order. Those materials demonstrate that, shortly after CBD brought its allegations of harm to archaeological resources and sacred sites to BLM's attention, Denison, at BLM's request, discontinued the activities that were the alleged cause of those harms.

III. CBD has failed to demonstrate that the balance of hardships and the public interest support a preliminary injunction.

CBD has failed to show that the balance of hardships and the public interest favor an injunction in this case. The loss of economic value and detriment to the public interest in preventing the extraction of the uranium ore posed by enjoining Denison's mining operation outweigh the environmental harms alleged by CBD.

FLPMA requires that BLM manage public lands under principles of multiple use and sustained yield while preventing UUD, 43 U.S.C. § 1732(b), and embodies Congress's determination that public lands should be "managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber." 43 U.S.C. § 1701(7), (8), (12). An injunction in this instance would impede these statutory objectives. *See United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (2001) (court sitting in equity cannot ignore the judgment of Congress expressed in legislation).

CONCLUSION

The district court's denial of the preliminary injunction should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the Federal Appellees is not aware of any related cases pending in this Court, as defined by Circuit Rule 28-2.6.

s/Mark R. Haag

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 8,942 words.

s/Mark R. Haag

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2010, I electronically filed the foregoing Answering Brief of Federal Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that each participant in this case has at least one registered CM/ECF user and that service of the foregoing Response will be accomplished by the appellate CM/ECF system.

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