UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16513

CENTER FOR BIOLOGICAL DIVERSITY, GRAND CANYON TRUST, SIERRA CLUB, THE KAIBAB BAND OF PAIUTE INDIANS OF THE KAIBAB INDIAN RESERVATION, AND THE HAVASUPAI TRIBE

Plaintiffs-Appellants,

v.

SECRETARY OF THE INTERIOR KEN SALAZAR AND THE U.S. BUREAU OF LAND MANAGEMENT,

Defendants-Appellees,

and

DENISON MINES, CORP.,

Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA
Case No: 09-8207-DGC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1, Appellants Center for Biological Diversity, Grand Canyon Trust, Sierra Club, the Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, and the Havasupai Tribe state that they have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF JURISDICTION

The U.S. District Court for Arizona had jurisdiction under 5 U.S.C. § 701 et seq. and 28 U.S.C. § 1331. Appellants Center for Biological Diversity, Grand Canyon Trust, Sierra Club, the Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, and the Havasupai Tribe (the "Center") timely filed a Notice of Appeal on July 12, 2010. ER 14. This Court has jurisdiction over this appeal of a denial of a motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Are harms to the Center's interest in Grand Canyon National Park, the endangered California condor, and cultural and archeological resources caused by mining operations at the Arizona 1 mine irreparable, and do they outweigh any harm to Appellees.

Did the district court commit legal error by failing to consider the merits of the Center's claims under the Ninth Circuit's "serious question" test for preliminary injunctions.

Before uranium mining operations resume at the Arizona 1 mine, must the Bureau of Land Management (BLM) approve a plan of operations under the Federal Land Policy and Management Act (FLPMA) because the previously-approved 1988 Plan of Operations became ineffective when the mine stopped operating in 1992.

Must BLM prepare a supplemental analysis under the National Environmental Policy Act (NEPA) to address the environmental impacts of the Arizona 1 mine because (1) additional BLM approvals were provided before uranium mining operations resumed, and (2) significant new information exists concerning the mine's environmental impacts.

STATEMENT OF THE CASE

The Center filed suit on November 16, 2009 challenging the Arizona 1 uranium mine, which is situated a few miles from Grand Canyon National Park. BLM initially authorized the uranium mine in 1988 by approving a "plan of operations" and issuing a NEPA environmental assessment (EA) and finding that Arizona 1 would have no significant impact to the environment. Though initially approved and partially constructed, mining never commenced at Arizona 1 until the Canadian corporation Denison Mines (Denison) bought the mine in 2007 and, after securing additional BLM approvals, began operations in December 2009. BLM did not reevaluate Arizona 1 through a new approval of a plan of operations under FLPMA or a supplemental EA or environmental impact statement (EIS) under NEPA.

Accordingly, the complaint, as amended (ER 126-150), contends: (1) FLPMA requires that mining may occur on public lands provided there is a BLM-approved and valid plan of operations, and the 1988 Plan of Operations for

Arizona 1 is no longer effective because operations had stopped over 17 years ago, 43 C.F.R. § 3809.423; and (2) if the 1988 Plan is nonetheless effective, BLM must complete a supplemental EA or EIS because it took additional approval actions concerning Arizona 1, and significant new information has emerged since 1988 concerning impacts to Grand Canyon National Park, the endangered California condor, and cultural and archeological resources. See 40 C.F.R. § 1502.9(c)(1)(ii).

A month after the Center filed suit, Denison restarted Arizona 1 operations and began transporting uranium ore across the Kaibab Paiute Reservation to a mill in Blanding, Utah. ER 137, ¶ 33 (Complaint); ER 120, ¶ 33 (BLM Answer). Neither BLM nor Denison informed the Center or the public of these resumed activities.

On April 8, 2010, the Center moved for a preliminary injunction to stop all mining activities at Arizona 1. ER 544. The district court denied that motion on June 17, 2010, finding the Center was not likely to succeed on the merits while not addressing the remaining preliminary injunction requirements. ER 1-13.

Upon filing an appeal, the Center moved for an emergency injunction pending appeal in both this Court and the district court. ER 550, 551. At the time of this filing, the district court has yet to rule and a motions panel denied the motion without prejudice to provide time for the district court to rule.

STATEMENT OF FACTS

I. BLM'S INITIAL 1988 APPROVAL OF ARIZONA 1

The 1872 Mining Law generally authorizes the public to develop hard rock minerals, including uranium, on lands of the United States. 30 U.S.C. §§ 22, 26. BLM regulates mining on public lands under FLPMA and its implementing regulations. 43 U.S.C. § 1732; 43 C.F.R. §§ 3809 et seq. (the "3809 regulations"). BLM must ensure mining activities will comply with FLPMA's overarching duty to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b); Mineral Policy Ctr. v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003) ("FLPMA, by its plain terms, vests the Secretary of the Interior with the authority -- and indeed the obligation -- to disapprove of an otherwise permissible [activity] because the [activity] . . . would unduly harm or degrade the public land."). BLM approval of mining occurs under a three-tiered system: casual use, notice-level, and plan level. 43 C.F.R. § 3809.10. Each tier corresponds to an increasing level of impact and regulatory oversight, with plans of operations required for the most significant of operations that cause a surface disturbance of five acres or more. Id. § 3809.10(c); § 3809.11(a), § 3809.21(a).

Arizona 1 is located on public lands administered by BLM in the Arizona Strip, approximately five miles north of Grand Canyon National Park and just west of the Kaibab National Forest and the Kanab Creek Wilderness. ER 23. The mine

site is approximately 120 acres and contains a large uncovered waste pit. The mine shaft plunges deep into the ground, adjacent to an underground geological formation known as a "breccia pipe" where uranium deposits are found. ER 408. The shaft penetrates small aquifers and underground pathways, through which groundwater moves and eventually spills out as seeps and springs in the Grand Canyon National Park and the Colorado River and its tributaries. ER 342-43 ("springs on the North Rim [] provide significant perennial base flows to the Colorado River"); ER 285-86; ER 195, 196-98. Mt. Trumbull Road, an unpaved road that runs through the Kaibab Paiute reservation and aboriginal lands after departing south from Arizona State Highway 389, provides access to Arizona 1. ER 23 (map).

Energy Fuels Nuclear originally owned and developed Arizona 1. On October 4, 1984, BLM approved a plan of operations to explore for uranium at Arizona 1. ER 407. After 24 exploratory holes were drilled between 1984 and 1988, a modified plan of operations was submitted to fully develop and mine Arizona 1, which was approved by BLM on May 9, 1988. Id. Prior to approval, BLM prepared an EA under NEPA and issued a finding of no significant impact. ER 404; ER 500. Operations under the 1988 Plan were to last "approximately 10 years." ER 501.

Soon after constructing a portion of the mine shaft, Energy Fuels Nuclear shut down all operations. ER 133, ¶14 (Complaint); ER 120, ¶14 (BLM Answer). The low price of uranium, a 50-year uranium ore surplus, and limited capacity at the nearest mill site made uranium mining in northern Arizona infeasible. ER 2; ER 228. At Arizona 1, no mining activities occurred for at least 17 years, during which time ownership of the mine was transferred several times. However, Denison bought the mine in 2007 with the intent to resume mining operations. ER 95; ER 137, ¶34 (Amended Complaint); ER 121, ¶34 (BLM Answer); ER 111, ¶34 (Denison Answer).

II. THE RECENT URANIUM BOOM AND REACTION

In the mid-2000s, the uranium market rebounded. This resulted in a rush to develop uranium in Northern Arizona, as thousands of new mining claims were filed and exploration and mining activities proposed. ER 228 (improved market "created a flurry of mining exploration in northern Arizona"); see ER 276; ER 289; ER 294. In addition to Arizona 1, Denison has plans to commence mining at two other mines and explore several uranium deposits in the immediate vicinity of Arizona 1. ER 137-38, ¶¶34-35 (Complaint); ER 121, ¶¶34-35 (BLM Answer); ER 111, ¶¶34-35 (Denison Answer).

Strong opposition to resumed uranium mining activities resulted. County, state and tribal officials as well as two large regional water districts expressed

concerns about impacts to Grand Canyon National Park, its watershed, public health and safety, and tourism. ER 294 (Coconino County Resolution); ER 289 (Arizona Governor letter); ER 288 (Arizona Game and Fish letter expressing "concerns regarding the potential impact to wildlife and wildlife habitats through proposed uranium developments on lands in proximity to Grand Canyon National Pak"); ER 233 & ER 395 (Tribal resolutions); ER 277, 282 (Southern Nevada Water Authority and Metropolitan Water District of Southern California letters). The U.S. Geological Survey (USGS) summarized the concerns as follows:

> Uranium mining near the park could result in radioactive materials and heavy metals being added to surface waters and groundwater that flow into Grand Canyon National Park and the lower Colorado River.

ER 228.

The threat posed by uranium mining also galvanized federal officials into action. In 2008 and 2009, Arizona Congressman Grijalva introduced legislation -- called the Grand Canyon Watersheds Protection Act -- to protect the Grand Canyon and its watershed from uranium mining, including the public lands where Arizona 1 is located. ER 300. In 2008, under the authority of FLPMA, 43 U.S.C. § 1714(e), the U.S. House of Representative Committee on Natural Resources issued an Emergency Resolution requiring the Secretary of Interior to "withdraw" approximately one million acres surrounding Grand Canyon from mining activities, which also included Arizona 1. ER 275. A "withdrawal" is the

withholding of federal lands from mining settlement, sale, location, or entry under the Mining Law to maintain other public values. 43 C.F.R. § 2300.0-5(h). The Natural Resources Committee made several finding to support the Emergency Resolution:

> (1) the international demand for uranium has escalated dramatically, and there are more than 1,100 uranium mining claims within five miles of Grand Canyon National Park;
>
> (2) the management of public lands near Grand Canyon National Park has direct impacts on sensitive habitat, endangered species, groundwater, air quality, archeological resources, recreational opportunities and the health and safety of Park visitors and residents in the area;
>
> (3) uranium is radioactive when mined, producing radium, thorium and radon gas, and that exposure to these elements is known to cause cancer, kidney damage, and birth defects in humans; and,
>
> (4) previous uranium mining operations near Grand Canyon National Park have left a legacy of debilitating illness and death among Native Peoples in the area, and resulted in contaminated soil and ground water that remains unremediated.

ER 275-76.

Rather than withdrawing these sensitive lands in response to the Emergency Resolution, the Secretary of Interior took a more deliberative approach to protecting lands surrounding Grand Canyon National Park. On July 21, 2009, based on the authority vested in FLPMA, 43 U.S.C. §§ 1714(a) & (b)(1), Secretary Salazar issued a two-year segregation order and a proposed rule to permanently withdraw the same one million acres from mining activities. 74 Fed. Reg. 35887

(July 21, 2009). A "segregation" is "the removal for a limited period, subject to valid existing rights, of a specified area of the public lands from the operation of the public land laws, including the mining laws." 43 C.F.R. § 2300.0-5(m). This decision -- known as the "Segregation Order" -- was made after "carefully considering the issue of uranium mining near Grand Canyon National Park" to "protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining," and to allow time for "various studies and analyses, including appropriate [NEPA] analysis" that will "support a final decision on whether or not to proceed with a withdrawal." 74 Fed. Reg. 35887; ER 237-38. In a press release announcing the Segregation Order, the Secretary noted his decision was necessary to "ensure that we are developing our nation's resources in a way that protects local communities, treasured landscapes, and our watersheds[.]"ER 237. The Segregation Order applies to lands where Arizona 1 sits. ER 194.

III. BLM'S APPROVAL OF RESUMED MINING AT ARIZONA 1

When approached by Denison to restart Arizona 1, BLM did not require a new approval of a plan of operations, nor did the agency undertake any supplemental evaluation of the mine's environmental impacts. However, BLM did take certain approval actions from 2007-09 that were necessary for mining to resume. In particular, Denison was required to provide an adequate bond for

reclamation activities at Arizona 1, secure a new air permit because the 1988 Clean Air Act permit covering radon gas emissions for Arizona 1 had expired, and receive BLM permission to use materials for maintenance work on the primary access road. ER 235; ER 278; ER 280; ER 291; ER 302; ER 307. Upon acquiring Arizona 1, Denison intended to begin mining operations in late 2007 or early 2008 under the 1988 Plan. ER 312 (Denison informing BLM that "mining activities will begin at Arizona 1 Mine in the third quarter of 2007; however, it is not anticipated that ore will be hauled from the Mine until early 2008"); ER 337 (announcing in press release that "Denison is planning on restarting operations at Arizona 1 this year to complete the shaft and begin mining in 2008"). However, mining was delayed for two years until BLM provided its approvals.

SUMMARY OF ARGUMENT

Uranium mining is causing irreparable harm to the Center's interests and to the Grand Canyon environment. Mining will deplete and contaminate groundwater. Groundwater in the region provides base flows for the Colorado River and thus drinking water for millions of people in the southwest. Groundwater is also the foundation for Grand Canyon National Park's natural resources, including its seeps and springs, wildlife, and wildlife habitat. Uranium mining at Arizona 1 is also a hazard to the endangered California condor because condors are attracted to waste ponds as a drinking source and its structures as

perches to hunt for food. Uranium mining activities also cause irreparable harms to Indian Tribes and their cultural resources and archeological sites, and preclude access to sacred places on the Grand Canyon's North Rim.

FLPMA requires that BLM approve a plan of operations before mining may commence on public lands. Once approved, plans of operations remain in effect, provided, however, mining activities are occurring. In 1988, BLM approved a plan for the Arizona 1 uranium mine. Sometime between 1990 and 1992, mining operations at Arizona 1 ended. Accordingly, under FLPMA, the 1988 Plan of Operations for Arizona 1 is no longer in effect and BLM must provide a new approval of a plan before mining resumes. Because public land mining is prohibited absent an approved and effective plan of operations, BLM has "unlawfully withheld" compliance with FLPMA under 5 U.S.C. § 706(1) of the Administrative Procedure Act (APA).

In the event FLPMA does not require a new BLM approval of a plan of operations because the 1988 Plan of Operations remains in effect, NEPA mandates BLM to undertake a supplemental environmental analysis of Arizona 1.[1] NEPA supplementation is required because mining operations under the 1988 Plan were never completed and additional BLM approvals were required to resume mining

[1] The Center notes that a new BLM approval of a plan of operations for Arizona 1 would necessarily involve compliance with all applicable environmental laws, including NEPA, the Endangered Species Act, the National Historic Preservation Act, and FLPMA's regulations governing mines in withdrawn areas.

operations. Moreover, twenty-two years after the 1988 EA, not surprisingly, there is significant new information concerning the environmental impacts of a uranium mine on public lands adjacent to Grand Canyon National Park. Under NEPA, BLM must thus analyze and disclose to the public these environmental impacts in a supplemental EA or EIS. BLM's failure to do so constitutes agency action "unlawfully withheld" under 5 U.S.C. § 706(1) of the APA.

STANDARDS OF REVIEW

To secure preliminary injunctive relief, a plaintiff "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." Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 374 (2010). In the Ninth Circuit, courts review preliminary injunction motions on a sliding scale, such that if the hardships tip decidedly in plaintiffs' favor, "serious questions" on the merits is sufficient. Alliance for Wild Rockies v. Cottrell, 2010 WL 2926463, __ F.3d __ (9th Cir. July 28, 2010).

This Court reviews the grant or denial of a preliminary injunction for an abuse of discretion. Lands Council v. McNair, 537 F.3d 981, 986 (9th Cir. 2008). However, the district court's interpretation of the underlying legal principles and conclusions of law are reviewed de novo. S.W. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003); Alliance for Wild Rockies v. Cottrell, 2010 WL 2926463 *3. Moreover, "when a district court denies a preliminary injunction because there is no likelihood of success on the merits, we review its decision de novo" Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 980 (9th Cir. 1993). Here, the district court only addressed the merits of the Center's two claims and did not address the other equitable requirements for a preliminary injunction. ER 1-13. Accordingly, this Court's review is de novo.

The Court reviews BLM's inactions pursuant to the APA's "unlawfully withheld" standard. 5 U.S.C. § 706(1); see id. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). Where a federal agency is required by law to take a discrete agency action, the APA provides relief. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61-62 (2004) ("[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."). Here, FLPMA and NEPA impose discrete mandatory duties on BLM in connection with the Arizona 1 mine -- (1) to provide a new approval of a plan of operations before

mining operations resume at Arizona 1 and (2) to prepare a supplemental NEPA analysis on the 1988 Plan of Operations.

ARGUMENT

I. A PRELIMINARY INJUNCTION SHOULD ISSUE BECAUSE THE BALANCE OF HARMS TIPS SHARPLY IN THE CENTER'S FAVOR

A. Arizona 1 Is Causing Irreparable Harm To The Center's Environmental, Public Health And Cultural Interests

Irreparable harm from mining activities at Arizona 1 is presently occurring because mining operations have commenced. See Winter, 129 S.Ct. at 374.[2] Arizona 1 is currently irreparably harming groundwater, Grand Canyon National Park, sacred sites, archeological sites and resources, and the California condor. The Secretary of the Interior in adopting the Segregation Order recognized that uranium mines like Arizona 1 are not "adequately constrain[ed]" and thus "could result in permanent loss of significant values and irreplaceable resources at the site." 74 Fed. Reg. 35887/3. In Alliance for Wild Rockies, this court ruled plaintiffs were likely to be irreparably injured by logging in the National Forest where they recreate. Alliance for Wild Rockies v. Cottrell, 2010 WL 2926463 *7-8 (9th Cir. July 28, 2010). In another case, this Court recognized that development project would cause irreparable harm because "once the desert is disturbed, it can never be restored." Save Our Sonoran v. Flowers, 408 F.3d 1113, 1126 (9th Cir.

[2] The district court did not consider the Center's irreparable harms or the other equitable factors.

2005). Because members of the Center recreate, live, and worship where Arizona 1 is located and where its impacts are realized (see ER 26-90), harms from Arizona 1 are similarly irreparable. Indeed, the Center's injuries are irreparable because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. v. Village of Gambell, 480 U.S. 531, 545 (1987). Moreover, as this Court has held, irreparable environmental injury follows from a NEPA violation, which is detailed below. S. Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of Interior, 588 F.3d 718, 728 (9th Cir. 2009) (finding "likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high").

Uranium mining at Arizona 1 is likely introducing radioactive pollution to Grand Canyon National Park and the seeps and springs that feed the Colorado River and tributaries. This contamination occurs because uranium is found within breccia pipes, which "are pathways for surface and groundwater" and "intercept precipitation, runoff, and groundwater in perched water-bearing zones and can direct that water deeper into the subsurface." ER 192. The USGS recently explained that "digging into breccia pipes . . . can mobilize the uranium, causing it to be carried by water moving through the rock strata into the Redwall-Muav aquifer and other aquifers, which eventually discharge into seeps and springs." ER

228. The National Park Service similarly recognized that "caves and other karst features within the redwall limestone may act as conduits to transport contaminants from distant sites to impact park resources." ER 241. Independent university scientists have similarly warned that uranium mining will cause significant adverse impacts to groundwater resources. ER 221; ER 273-74 (UNLV scientist noting "[e]xploitation of this deposited uranium, therefore, impacts the crucial zone of recharge to the groundwater systems that feed the springs, and in turn, on which many of the ecosystems of the region depend"); ER 285-86 (Northern Arizona University scientist warning mining activities cause uranium elements to become "mobile through the aquifer and eventually discharge at springs impacting the human uses of water of these springs"). The importance of groundwater was explained in a 2005 study: "the groundwater flow system suppl[ies] base flow to the Colorado River and rare desert spring ecosystems, drinking water to Arizona tourists and residents, and cultural meaning to tribal communities in and around Grand Canyon." ER 340.

The irreparable harms caused by Arizona 1 are evidenced by past uranium mining in the region. In March 2010, the USGS documented that groundwater samples taken at locations near previously-active mines in the vicinity of Arizona 1 had uranium concentrations above the legal limit for drinking water.

> Fifteen springs and 5 wells in the region contain concentrations of dissolved uranium that exceed the U.S. Environmental Protection Agency maximum contaminant level for drinking water and are related to mining processes.

ER 219; ER 215 (samples taken near Arizona 1). The USGS reported that "[m]ine shaft and sump samples were located on mining property on the Kanab plateau [Arizona 1's location] and, unsurprisingly, have elevated dissolved uranium concentrations." ER 212; ER 215 (detailing 2009 sampling locations, including sites down-gradient from Arizona 1).

In addition to groundwater contamination, past uranium mining has also contaminated the soils and intermittent streams and washes near Arizona 1. In the 1980s, BLM had approved the Hack, Pigeon, Kanab North, and Pinenut mines, which all closed in the late 1980s or early 1990s and are near Arizona 1. ER 23. The USGS prepared a study in 2010 that "reviews existing information and presents new data that examines the remnant effects of uranium mining and reclamation on soils and stream sediments in and around selected mine sites." ER 157. The USGS documented "elevated radioactivity . . . at all sites." Id. For example, the study states that "[t]wo sediment samples collected at one site in the wash just below Hack 1 Mine contained consistently elevated amounts of the elements in which the ore-bearing Grand Canyon breccia pipe are typically enriched." ER 162 ("These high element concentrations are consistent with the geochemistry of ore and waste rock from Hack mine operations."). The study

details high concentrations of uranium in the soils adjacent to roads. ER 169 ("The proximity of these two samples to traces of roads indicates dust from [ore-hauling] trucks may contribute to these elevated uranium concentrations"). USGS also found that the prevailing winds move radioactive dust from the mines sites. ER 172 ("the authors observed winds gusts pick up fine sediments from the surface of the mine site and carry it eastward"). Notably, even though these mines closed long ago, their adverse impacts to the environment are continuing decades later. See also ER 223 (UNLV professor noting "[t]he Orphan Mine shut down in the late 1960s and early 1970s, yet decades later high uranium was showing up in the springs below the mine site")

Arizona 1 mining is also likely to irreparably harm the California condors. The condor is an endangered species listed under the Endangered Species Act (ESA) that was introduced to the area in 1996 by the U.S. Fish and Wildlife Service (FWS) to help it recover. 32 Fed. Reg. 4001 (1967); 61 Fed. Reg. 54044 (Oct. 16, 1996). The condor's range is large and includes the Arizona 1 mine site. ER 241 ("The endangered California condor utilize the [Segregation Area's] North Parcel for feeding and rearing activities."); ER 536A-7 ("condors use the northwest mining withdrawal area as a foraging site and as a travel corridor"). According to both FWS and the Park Service, condors are attracted to mine sites like Arizona 1 because they use waste pits for water and head frames as perching posts for

hunting. ER 241 (condors "are known to be attracted to construction activities and other disturbance activities . . . putting these animals at risk"); ER 536A-7 (condors are harmed "by the consumption of mining waste water and contaminated carrion"); ER 399 ("the area of the Orphan Mine poses a threat to the California condor"). As a result, the contamination resulting from Arizona 1 is likely to irreparably harm the California condors.

There is widespread concern over harm to groundwater and Grand Canyon National Park resources from uranium mining. In July 2009, the Secretary of the Interior, who oversees all Interior agencies including BLM, called a "time-out" on mining one-million acres of public lands surrounding the Park. 72 Fed. Reg. 35887. Secretary Salazar explained that the two-year segregation and proposed 20-year withdrawal was needed to protect Colorado River drinking water and Grand Canyon National Park resources. ER 237-38 (identifying threats to drinking water for Phoenix, Los Angeles, San Diego, Tucson and Las Vegas); 74 Fed. Reg. 35887.

Meanwhile, two of the largest water districts in the country -- the Southern Nevada Water Authority and the Metropolitan Water District of Southern California -- voiced opposition to uranium mining because of potential impacts to their water supply in the Colorado River. The Southern Nevada Water Authority wrote the Interior Department, expressing the need for "the preservation of water

quality on the Colorado River," which "represents approximately 90 percent of Southern Nevada's municipal water supply." ER 277. The water agency voiced its concerns because of the "increasing number of uranium mining claims . . . in the vicinity of the Grand Canyon National Park," past contamination in the Colorado River, and the fact that treatment for uranium pollution is "both technologically challenging and expensive." Id. The Metropolitan Water District of Southern California also "relies on high quality Colorado River supplies" for "18 million people." ER 282. The Metropolitan Water District highlighted that the "mining of radioactive material near a drinking water source may impact the public's confidence in the safety and reliability of the water supply." Id. Both water agencies expressly requested that there be a full public process evaluating the environmental impacts of uranium mining before operations commence. ER 277 (SNWA "request[ing] that Interior carefully evaluate the implication for water quality in the Colorado River before authorizing mining operations within its watershed"); ER 283 (MWD requesting "any federal authorization of mineral exploration or mining in areas near the Colorado River or its tributaries to be contingent on a comprehensive environmental impact analysis, including identification of specific measures taken for source water protection, with full public review from all affected stakeholders, including Metropolitan").

In addition, state, local and tribal governments have identified the degradation of Grand Canyon National Park and the region's water supply as reasons to prevent uranium mining in the area. The Coconino County Board of Supervisors passed a Resolution on February 5, 2008 "opposing uranium development on lands in the proximity of the Grand Canyon National Park and its watersheds." ER 294. The County recognized that "Grand Canyon National Park is an economic engine whose 5 million visitors per year contribute significantly to the economy of Coconino County" and that prior uranium operations "have contaminated creeks and aquifers providing public drinking water." Id. On March 6, 2008, former Arizona Governor Janet Napolitano requested that the Secretary of the Interior withdraw all federal lands surrounding the Grand Canyon from uranium mining. ER 289. Concerned about "economic, cultural and environmental repercussion" and the lack of an "overall environmental impact analysis" on uranium activities around the Park, the Governor noted the "high level of public concern." Id. In 2005, the Navajo Nation passed legislation banning all uranium mining on its tribal lands bordering Grand Canyon National Park and the Hualapai Tribe passed a similar resolution in 2009. ER 395(Navajo Legislation); ER 233(Hualapai Tribe Resolution).

In addition, members of the Kaibab Paiute Tribe will suffer irreparable harm because Arizona 1 operations preclude access to sacred sites. Mt. Trumbull Road

is the only access road for hauling uranium ore to and from Arizona 1. It is also the only available road for Kaibab Paiute tribal members to use to access Toroweap Point and other places where they pray and take part in ceremony and song to remember their ancestors. ER 86, ¶9, ER 88 ¶13 (Rogers Decl.); ER 75-76, ¶¶3-5 (Jake Decl.); ER 80, ¶¶4, 5 (Homer Decl.). Increased truck traffic -- at least 12 daily roundtrips by 25-ton ore trucks -- and the frequently poor road conditions on Mt. Trumbull Road, which passes through Kaibab Paiute tribal lands, prevent access.

Understandably, the dubious legacy of uranium mining in the region, as detailed above, has left people scared to live and pass-by mines like Arizona 1. See Cano v. Everest Minerals, 362 F.Supp.2d 814 (W.D. Tex. 2005) (seeking compensation for cancer allegedly resulting from radiation exposure to uranium ore trucks). For years, uranium mining companies promised native peoples that there was nothing to fear. However, "previous uranium mining operations near Grand Canyon National Park . . . have left a legacy of debilitating illness and death among Native Peoples in the area and resulted in contaminated soil and ground water that remains unremediated." ER 76, ¶6 (Jake Decl.).[3] And, as the recent

[3] Additional irreparable harm to archaeological resources and sacred sites has come to light. However, the Center cannot detail these harms until the Court rules on a pending Motion to Seal so as to avoid theft and vandalism. Pursuant to Circuit Rule 27-13, on July 19, 2010, the Center filed and served a Motion to Seal several declarations and an additional record. The Center's July 19, 2010 Motion

2010 USGS reports show, radioactive groundwater, soils, and dust remain in the area from prior mines. ER 151-219.

B. Neither BLM Nor Denison Will Suffer Irreparable Harm From A Preliminary Injunction

Denison has claimed that a preliminary injunction will result in economic harm. Economic harm, however, is not irreparable, especially in the context of a preliminary injunction where such alleged harms are temporary. Save Our Sonoran, 408 F.3d at 1124-25; S. Fork Band Council, 588 F.3d at 728 (finding economic injuries temporary); S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 472 F.3d 1097, 1101 (9th Cir. 2006) (finding "there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation"); Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 738 (9th Cir. 2001) ("loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment"). And, where there is a threat of irreparable environmental harm, "more than pecuniary harm must be demonstrated" to avoid a preliminary injunction. N. Alaska Envtl. Ctr. v. Hodel,

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to Seal was filed in support of an Emergency Motion for Injunction Pending Appeal that was dismissed without prejudice; however, the Court did not rule on the Center's Motion to Seal. Thus, in support of this appeal, the Center is again filing today a Motion to Seal the declarations and the specific information discussed therein.

803 F.2d 466, 471 (9th Cir. 1986) (finding irreparable environmental harm outweighed competing harm to miners despite potential for "real financial hardship"); Save Our Sonoran, 408 F.3d at 1124-1125 (affirming preliminary injunction because, while developer "may suffer financial harm," without injunction "unlawful disruption to the desert is likely irreparable").

Further, any financial impacts must be considered in context. Denison is an international mining corporation, with mines all over the world. Its financial well-being is not dependent on Arizona 1 moving forward without delay and any temporary economic losses can be offset.

Moreover, administrative burdens on BLM to review and approve a plan of operations or prepare a supplemental NEPA document do not outweigh the threat of irreparable environmental harm. Am. Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983) (finding "harm to Inyo [County]'s planning processes was not comparable to the harm enjoining the Plan would cause to the [environment] and the public interest").

Accordingly, an injunction until the district court rules on the merits will not cause irreparable injury to BLM or Denison.

C. The Public Interest Favors A Preliminary Injunction

Preserving the environment is in the public's interest. Sierra Club. v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007) ("[t]he preservation of our

environment, as required by NEPA … is clearly in the public interest."); Alliance for Wild Rockies, 2010 WL 2926463 *10 ("public interest in preserving nature and avoiding irreparable environmental injury"). Here, the public has an interest in protecting the iconic Grand Canyon National Park and the water supply for the millions of people in the southwest's largest cities. See Natural Resources Defense Council, 241 F.3d at 739 (recognizing importance of preserving Glacier Bay National Park).

Indeed, in the Segregation Order, Secretary Salazar recognized that the public's interests are threatened by uranium mining on lands adjacent to Grand Canyon National Park. 74 Fed. Reg. 35887 (explaining purpose of Segregation Order is to "protect the Grand Canyon watershed"); ER 237-38 (DOI Press release identifying impacts to National Park, tourism, local economies, and water supply). The Secretary explained the Segregation Order as a "time out" in an effort to "gather the best science and input from the public, members of Congress, tribes, and stakeholders." ER 237. He further remarked "it is imperative that we fully understand the impacts to the land and water of the region before moving forward with mining and mill site activities." Id.

In addition, ensuring compliance with federal environmental laws is in the public's interest. This Court has made clear that:

> Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal

> projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest.

S. Fork Band Council, 588 F.3d at 728; Natural Resources Defense Council, 241 F.3d at 737-38 (precluding environmentally-damaging project to proceed without NEPA compliance because that "runs contrary to very purpose of the statutory requirement"); High Sierra Hikers Ass'n v. Blackwell, 390 F3d. 630, 642 (9th Cir. 2004) ("In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action."). The same is true concerning FLPMA -- to preserve the public's interest in environmental and cultural resources. See Alliance for Wild Rockies, 2010 WL 2926463 *10 ("While the public interest is most often noted in the context of NEPA cases, we see no reason why it does not apply equally to violations of ARA [Appeals Reform Act]").

In sum, the balance of harms and public interest tip decidedly in favor of issuing a preliminary injunction enjoining all mining operations at Arizona 1.

II. THE CENTER IS LIKELY TO SUCCEED ON THE MERITS

A. The District Court Applied The Wrong Legal Standard

The Ninth Circuit applies a sliding scale to evaluate preliminary injunction motions. The Supreme Court rejected a portion of the sliding scale test: a party cannot merely demonstrate the "possibility" of irreparable harm, but instead must show irreparable harm is at least "likely" to occur. Winter, 129 S.Ct. at 374. Nonetheless, if the balance of hardships tips decidedly in favor of the plaintiff,

courts must determine whether there are "serious questions" going to the merits. Alliance for Wild Rockies. 2010 WL 2926463 *7.

The district court's analysis of the Center's FLPMA and NEPA claims was limited to whether the Center is "likely to succeed on the merits." ER 8:9-10; ER 13 ("Plaintiffs have not shown they are likely to succeed on the merits of claims one and two."). The court did not assess, as it must, whether the claims raise "serious questions." Alliance for Wild Rockies. 2010 WL 2926463 *7. The court's opinion amply shows, however, that the serious question test was satisfied with respect to the FLPMA claim. See, e.g., ER 6:9-10 ("Despite these ambiguities, the Court concludes that BLM's interpretation of the regulations more likely is correct."); ER 5:27 ("BLM's interpretation of the regulation[s] is also problematic."); ER 6 ("the court concludes that BLM's interpretation is more consistent with the overall regulatory scheme than Plaintiffs' interpretation"); ER 8 ("The Court need not accept BLM's broad reading of the word 'operations' to reach this conclusion."). Because the balance of harms tips sharply in the Center's favor, the district court's failure to apply the "serious questions" test constitutes reversible legal error. See Alliance for Wild Rockies, 2010 WL 2926463 *7.

B. BLM Is Violating FLPMA By Not Requiring Denison To Obtain A New Approval Of A Plan Of Operations

To implement FLPMA's unnecessary or undue degradation standard, BLM developed regulations for mining in 1980, which were revised in 2000. 45 Fed.

Reg. 78902 (Nov. 26, 1980); 65 Fed. Reg. 69998 (Nov. 21, 2000). These 3809 Regulations require that a mining company prepare and submit to BLM for approval a plan of operations for mines impacting 5 acres of public land. 43 C.F.R. § 3809.10(c), § 3809.11(a), § 3809.21(a), § 3809.412. Plans must contain several components: a description of operations; a general schedule of operations; plans for access roads; a reclamation plan; an interim management plan; and a monitoring plan. Id. § 3809.401(b). A plan of operations may end for a variety of reasons, including a BLM decision to suspend or revoke a plan, a BLM decision to terminate of plan, or a mining company's decision to cease operations. Id. § 3809.423; § 3809.424(a)(3).

1. The 1988 Plan Of Operations Is Ineffective

Under the plain language of 43 C.F.R. § 3809.423, the 1988 Plan for Arizona 1 is no longer in effect. Generally, an approved plan of operations will remain valid for the duration of mining activities. However, one of the purposes of FLPMA's 2000 regulatory revisions was to ensure that plans of operations do not remain effective indefinitely. 64 Fed. Reg. 6422, 6439 (Feb. 9, 1999). Section 43 C.F.R. § 3809.423 thus sets forth two scenarios where an approved plan becomes ineffective.

> Your plan of operations remains in effect as long as you are conducting operations, unless BLM suspends or revokes your plan of operations for failure to comply with this subpart [3809 regulations].

43 C.F.R. § 3809.423 (emphasis added). In the first scenario, a plan becomes ineffective when "operations" cease. Id.[4] "Operations" are defined to include a broad array of mining activities:

> all functions, work, facilities, and activities on public lands in connection with prospecting, explorations, 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, or other means of access across pubic lands for support facilities.

Id. § 3809.5. Conducting operations, therefore, means active and ongoing functions, work, facilities, and activities. When a company decides on its own volition to stop exploration, mining, or reclamation activities and is no longer "conducting operations," a plan of operations becomes ineffective.

At Arizona 1, there is no dispute that mining operations ceased long ago. As BLM and Denison confirm, Arizona 1's prior owner decided to close the mine when uranium prices dropped. ER 2:10-11; ER 133, ¶24 (Complaint); ER 122, ¶24 (BLM admitting "for 15 years, the Mine did not produce uranium ore in commercial quantities"); ER 278 (BLM's letter to Arizona Governor: "These mines

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[4] Under this provision, a plan also becomes ineffective when BLM decides to "suspend or revoke" an approved plan of operations upon finding that an operator is not complying with the 3809 Regulations. 43 C.F.R. §§ 3809.423; see also § 3809.601 & § 3809.602 (detailing suspension and revocation procedures).

are not currently in operation and have not operated since the early 1990s."); ER 336-37 (Denison press release stating it "is planning on restarting operations at Arizona 1 this year to complete the shaft and begin mining in 2008."); see also ER 17 (Mining Safety Health Administration datasheet indicating no worker hours were logged at Arizona 1 until 2007); ER 326 (2007 AGFD Report noting "possible renewed production by Denison Resources" at Arizona 1). As a result, based on the plain language of 43 C.F.R. § 3809.05 and § 3809.423, the 1988 Plan for Arizona 1 is not effective because the mining company stopped conducting operations in 1992.

Because the 1988 Plan is no longer intact, BLM must provide a new approval of a plan of operations before Denison may reopen Arizona 1. See 43 C.F.R. § 3809.10(c); § 3809.11(a); § 3809.605(b). BLM has not done so and thus Arizona 1 is operating under the ineffective 1988 Plan, in violation of FLPMA's regulations.

The district court reasoned that no FLPMA provision explicitly states that a new approval must be provided before mining operations resume after years of non-operation. ER 5 ("the regulations never state that a new plan must be approved before operations resume."); ER 6 ("There is simply no requirement in the regulations that a new plan of operations must be approved after a temporary closure."). Yet, FLPMA's regulations make clear that mining on public lands may

only occur with a valid BLM-approved plan of operations. 43 C.F.R. § 3809.412 ("You must not begin operations until BLM approves your plan of operations and you provide the financial guarantee required"); id. § 3809.10(c) ("operator must submit a plan of operations and obtain BLM's approval"); id. § 3809.11(a) (plan approval required "before beginning operations"); id. § 3809.605(b) (prohibiting operations before "receiv[ing] an approve plan of operations"). Accordingly, if a plan becomes ineffective due to non-operations under § 3809.423 (the situation at Arizona 1), is "suspended or revoked" by BLM for non-compliance with the 3809 Regulations under § 3809.423, or is "terminated" by BLM under § 3809.424(a)(3), operations cannot proceed unless BLM provides a new approval of a plan of operations. The district court's reasoning was flawed.[5]

That a plan of operations must include an interim management plan (IMP) that identifies actions to be undertaken during periods of non-operations does not save the 1988 Plan from the plain language of 43 C.F.R. § 3809.423. An IMP is required under 43 C.F.R. § 3809.401(a)(5) and identifies those actions needed to avoid unnecessary or undue degradation when a mine is no longer in operation. The district court found that because non-operations under § 3809.423 would

[5] Whether the company submits for BLM-approval the "old" plan of operations, a "modified" version of a plan, or a "new" plan is irrelevant. See ER 5, 6. What is relevant is that the 1988 Plan is no longer in effect and in order to proceed with mining operations at Arizona 1, BLM must provide a new approval of a plan of operations before mining commences.

render the entire plan of operations ineffective, including the IMP, the Center's argument must fail. ER 5:18-26. However, the court's reasoning is at odds with the regulations.

When a mining company chooses to stop "conducting operations," two things happen under the regulation's plain language. First, as detailed above, the plan of operations is no longer in effect. 43 C.F.R. § 3809.423. Second, the mining company is required to implement an IMP. Id. § 3809.424(a)(1). Section 3809.424(a)(1) provides: if "you stop conducting operations for any period of time," "you must follow your interim management plan." Id. § 3809.424(a)(1). Accordingly, even though a plan of operations is no longer in effect under § 3809.423, section 3809.424(a)(1) ensures that the mining company implements its IMP. This makes sense under §§ 3809.423 and 3809.424(a)(1) because implementing an IMP only occurs when the mining company "stop[s] conducting operations" -- an event that also renders a plan ineffective. Accordingly, the district court's concern that the IMP would not get implemented under the Center's interpretation of the regulations is misplaced.

BLM previously suggested that taking actions under the IMP was "conducting operations," which means the 1988 Plan was still in effect under § 3809.423. There are several problems with this argument. First, the regulatory definition of operations does not include interim management. While the

definition broadly defines operations and even includes reclamation activities, noticeably absent from the definition are interim management actions. See 43 C.F.R. § 3809.5; see also Russello v. U.S., 464 U.S. 16, 23 (1983) ("it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). Conducting interim management is not, by definition, conducting "operations."

Second, construing operations to include interim management is at odds with § 3809.424(a)(1). According to that provision, implementing an IMP only occurs when the company has "stop[ped] conducting operations." Conducting "operations" and conducting interim management actions, therefore, are mutually exclusive, as only one can occur at any one time.

Third, even if the definition of operations included interim management, such actions stopped long ago at Arizona 1. The IMP for Arizona 1 contained a list of measures:

> Nearly all mobile equipment and a portion of the fixed equipment would be removed from the Project Area. Fans would be removed and the ventilation shaft capped with perforated steel plates welded in place to allow natural ventilation but to prevent access to the workings. The buildings, headframe, and hoist would be left in place but secured and maintained in the same manner as a short-term closure.

ER 533-34. All of these actions have already occurred. Because the mining company stopped "conducting [these interim management plan] operations," the 1988 Plan is no longer effective under 43 C.F.R. § 3809.423.[6]

The district court also relied on § 3809.424(a)(3), reasoning that BLM could not, under this provision, "terminate" a plan of operation if it was no longer in effect under § 3809.423. However, the court's reasoning goes too far. Under the court's rationale, BLM would similarly be precluded from "terminating" a plan of operations under 43 C.F.R. § 3809.424(a)(3) if, for example, the plan had already been "suspended or revoked" under § 3809.423 due to non-compliance with the 3809 Regulations. 43 C.F.R. § 3809.423 (stating plans of operations are valid "unless BLM suspends or revokes your plan of operations for failure to comply with this subpart"). Stated another way, applying the district court's reasoning, BLM also could not suspend or revoke a plan under § 3809.423 because that too would foreclose BLM's ability to terminate a plan under § 3809.424(a)(3).

Moreover, the district court's interpretation § 3809.424(a)(3) ignores that provision's unique language. That is, the authority to "terminate" occurs after

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[6] That a mine may be "temporarily closed" is not relevant to deciding whether the 1988 Plan is in effect under 43 C.F.R. § 3809.423. A mine that has been temporarily closed may reopen after seeking and obtaining approval of a new plan of operations. The plain language of 43 C.F.R. § 3809.423, however, makes clear that a previously-approved plan is no longer in effect when an operator ceases "conducting operations," whether temporary or otherwise.

BLM finds that "operations are inactive for 5 consecutive years" and completes a mandatory review. Id. § 3809.424(a)(3) (emphasis added). The meaning of "inactive" in § 3809.424(a)(3) does not mean the same thing as not operating in § 3809.423, which is the triggering event that renders a plan ineffective. An "inactive" mine is one that "is not operating (mining, exploring or reclaiming), but is following its interim management plan." 65 Fed. Reg. 69998, 70055. Accordingly, because an "inactive" mine is also a mine that is "not operating," all aspects of the plan governing "operations" are no longer in effect and only the IMP component remains. In harmonizing these provisions in the 3809 Regulations, what BLM is able to terminate under § 3809.424(a)(3) if operations are "inactive for five consecutive years" is necessarily limited to the IMP component of a plan of operations.[7]

The district court found it appropriate to defer to BLM's interpretation of the 3809 Regulations. ER 7. But there was no BLM interpretation to defer to. Instead, government lawyers wrote a brief opposing the Center's motion for preliminary injunction wherein an interpretation was offered for the first time. However, BLM itself never applied the regulations to the 1988 Plan or previously adopted a policy interpreting these regulations. Accordingly, the Court should not defer to a BLM

[7] It is notable that at Arizona 1, BLM's ability to terminate the 1988 Plan under this provision never applied because BLM never conducted the review required by 43 C.F.R. § 3809.424(a)(3), despite the fact that Arizona 1 was closed and has not been operating since 1992.

interpretation offered solely during litigation. See Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto., 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's post-hoc rationalizations for agency action."); Nat'l Ass'n of Homebuilders v. Norton, 340 F.3d 835, 847 (9th Cir. 2003) ("We cannot defer to the FWS' argument on appeal . . . because the FWS did not make such a finding in the Listing Rule.").

In any case, agency "deference is warranted only when the language of the regulation is ambiguous." Christensen v. Harris County, 529 U.S. 576, 588 (2000) (emphasis added); Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1219 (9th Cir. 2002). Here, the plain language of § 3809.423 is not ambiguous. It plainly states that a plan is effective provided the mining company is "conducting operations." Moreover, BLM's interpretation of § 3809.423 -- wherein a plan remains effective even if no one is conducting operations for 17 years -- is "plainly erroneous and inconsistent with the regulation" because it renders this provision meaningless. See Long Island Care v. Coke, 551 U.S. 158, 171 (2007); Bennett v. Spear, 520 US 154, 173 (1997) (interpretation must "give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section"); U.S. v. Bonilla-Montenegro, 331 F.3d 1047, 1051 (9th Cir. 2003) (finding courts "avoid a statutory construction that would render another part of the same statute superfluous"). Notably, neither the district court

nor BLM have explained how their interpretation gives any meaning to § 3809.423.

In summary, the intent behind 43 C.F.R. § 3809.423 was to ensure that plans of operations do not continue in perpetuity. 64 Fed. Reg. at 6439 (purpose was to eliminate prior expectation that "plan of operations [] remain in effect indefinitely"). Yet, under BLM's position, mines with a very old plans of operations -- like the 1988 Plan at issue here -- could remain dormant for decades and simply resume without any review of their operations to reflect current technological or environmental conditions. While BLM's position allows mining companies to react to fluctuations in the uranium market, it does not similarly recognize changes in the environment or relevant technologies, or adhere to plain language and intent found in 43 C.F.R. § 3809.423.

C. BLM Violated NEPA By Not Preparing A Supplemental EA Or EIS

Congress enacted NEPA to ensure that federal agencies (1) take a "hard look" at all environmental impacts of their decisions, and (2) disclose and provide an opportunity for public comment on such environmental impacts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 350 (1989). Federal agencies must thus prepare and circulate an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Agencies may first prepare an EA to assess whether a project may have significant

impacts and an EIS is thus required. 40 C.F.R. § 1501.4(c); Nat'l Parks & Conservation Ass'n, 241 F.3d at 730-31. If an EIS is deemed unnecessary, agencies must detail the reasons why the impacts are insignificant in a "finding of no significant impact" (FONSI). 40 C.F.R. § 1508.13.

NEPA regulations require that agencies prepare a "supplemental" EIS or EA when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). As the Ninth Circuit has ruled, "[t]he agency must be alert to new information that may alter the results of its original environmental analysis." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557-58 (9th Cir. 2000).

1. BLM Engaged In Major Federal Action By Providing Additional Approvals For Arizona 1

It is undisputed that BLM approval of a mining plan of operations is a major federal action under NEPA. See 40 C.F.R. § 1508.18(a). Indeed, in 1988, BLM prepared an EA for Arizona 1's Plan of Operations and found no significant environmental impacts. ER 404-499; ER 500-511. However, BLM's duty to comply with NEPA did not end with the 1988 EA because additional BLM approvals were required before the resumption of mining operations at Arizona 1.

The Supreme Court's decision in Marsh governs BLM's failure to comply with NEPA's duty to supplement. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). In Marsh, the Army Corps of Engineers had not

completed constructing a dam -- the agency action at issue -- and there remained agency action to occur. As a result, the court ruled that the Corps was required to prepare a supplemental NEPA analysis on the dam's environmental impacts. Id. at 367, 373. As the court reasoned,

> It would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Id. at 391.

At Arizona 1, uranium mining never commenced despite the fact that BLM provided its initial approval in 1988 and prepared the 1988 EA and FONSI. ER 311 ("[N]o ore has been produced from the Arizona 1 mine."). Denison purchased Arizona 1 in 2007 with the intention of restarting operations. ER 311, 312; ER 337. However, because the mine had been closed for almost two decades, additional BLM approvals were necessary before ore production could begin. Accordingly, as in Marsh, there remained federal agency action to occur. See Friends of the Clearwater, 222 F.3d at 559 (where action not yet been completed, agency has "a continuing duty to gather and evaluate new information relevant to the environmental impacts of its actions").

BLM's recent approvals between 2007 and 2009 -- posting an adequate reclamation bond, satisfying federal and state environmental laws, and using public

land resources to construct and maintain an access road -- triggered the duty to prepare a supplemental NEPA document. The requirement to post a reclamation bond is part of BLM's approval process for mining on public lands. See 43 C.F.R. § 3809.500. In 1988, BLM required Energy Fuels Nuclear to post a reclamation bond upon approving the 1988 Plan. When Denison informed BLM of its intent to resume operations, BLM "required" Denison to amend the reclamation bond. ER 145, ¶58 (Complaint); ER 122, ¶58 (BLM Answer admitting "BLM required Denison to post a new reclamation bond" before restarting operations); ER 114, ¶58 (Denison admitting same requirement); ER 291 (BLM 2008 bonding decision stating "[t]he amount of the financial guarantee required is based on the following reclamation measures."); ER 280 (BLM explaining "[t]he bond and financial documents have been examined, found satisfactory, and are therefore accepted effective April 7, 2008"); ER 281 (BLM's "determin[ation] that the amount appropriate for the cost of surface reclamation for these operations is $377,800."). In fact, responding to a request from the Arizona Governor, Interior assured that "before operations resume, the BLM will review the reclamation bond to ensure that it is adequate." ER 278-279. Accordingly, there remained federal agency action to occur because approving a new bond was a BLM action necessary for mining to proceed at Arizona 1.

In addition to the bonding requirement, BLM is required to ensure that Arizona 1 avoids "unnecessary or undue degradation." 43 U.S.C. § 1732(b). The unnecessary and undue degradation standard applies to all plans of operations and requires BLM to ensure compliance with "other Federal or State laws related to environmental protection." 43 C.F.R. § 3809.415(a); id. § 3809.5 (definition of 'unnecessary or undue degradation'). Relevant here, BLM prohibited Denison from operating Arizona 1 until there was compliance with the Clean Air Act and Denison secured a permit for radon gas emissions. The Environmental Protection Agency (EPA) issued an air permit in 1988 for Arizona 1, but that permit expired when operations ceased. ER 401 ("If the mine becomes inactive, the Approval expires."). Accordingly, "BLM required Denison" to obtain a new air permit before mining could begin. ER 145, ¶58 (Complaint); ER 122, ¶58 (BLM Answer admitting "[b]efore Denison could renew operations at the Arizona 1 Mine, BLM required Denison to . . . secure an air permit" from Arizona Department of Environmental Quality or EPA); ER 114, ¶54 (Denison admitting same); ER 278-79 ("Before operations resume, BLM . . . will communicate to the operator the need to obtain all necessary Federal, State, and local permits before activities commence."). BLM thus approved resumed operations at Arizona 1 after requiring that Denison demonstrate it was avoiding unnecessary and undue degradation by obtaining an air permit.

The other BLM approval for Arizona 1 concerned the access road. Mt. Trumbull Road is a dirt road that had not been used for mining activities since the early 1990s. As a result, repairs and maintenance were necessary to accommodate the large and heavy trucks hauling uranium-ore from Arizona 1 to Denison's processing mill in Utah. To avoid the expense of securing road materials from long-distances, Denison sought BLM approval to use gravel found on BLM-lands in the Arizona Strip. ER 302 ("Denison is currently working with the BLM to obtain approval for a [BLM gravel] borrow area."); ER 307 ("BLM approval of the borrow area and road improvement activities will be provided to the County prior to initiation of any work on the road."). In approving Denison's use of materials for access road work, BLM undertook additional federal action.

BLM made clear that its additional approvals were required for Arizona 1 to operate. In response to an inquiry from the Governor of Arizona, the Secretary of Interior wrote:

> [FLPMA] regulations state that mining and milling operations cannot start until all health, safety, and environmental permits have been issued and an adequate reclamation bond has been accepted.

ER 278 (emphasis added). BLM similarly informed EPA:

> our jurisdiction would be predicated on whether the operation was meeting the unnecessary or undue degradation standard of our mining regulations. If it meets it, it can continue. If it does not (e.g. for lack of any state, county or local permits) then we would assume our authority to ensure compliance.

ER 231. It is notable that Denison could not simply move forward with operations under the 1988 Plan. Indeed, Denison intended to resume operations in late 2007 or early 2008 (ER 312;ER 337), but had to wait until December 2009 to secure all additional BLM approvals.

Because BLM undertook further federal agency action by providing these various approvals for Arizona 1, the Supreme Court decision in SUWA and the Ninth Circuit ruling in Cold Mountain v. Garber do not apply -- cases the district court relied upon. In SUWA, the Supreme Court concluded that supplemental NEPA was not required after BLM approved its programmatic-level management plan for an entire unit of public land. SUWA, 542 U.S. at 72-73. Once approved, no additional agency actions were needed for the land management plan. In Cold Mountain, this Court concluded that supplemental NEPA was not required after the Forest Service issued a special use permit to the State of Montana for a bison capturing facility. 375 F.3d 884, 894 (9th Cir. 2004). The facility had been approved and constructed, and no additional approvals were required. Here, in contrast, Denison could not reopen the mine unless and until BLM provided additional agency approvals. In this respect, BLM's approvals for Arizona 1 are comparable to the Army Corps' remaining dam construction in Marsh. As a result, BLM's compliance with NEPA in connection with these approvals would have

"ensure[d] that the agency [did] not act on incomplete information only to regret its decision after it is too late to correct." Marsh, 490 U.S. at 371.

2. Significant New Information And Changed Circumstances Require BLM To Prepare A Supplemental NEPA Document

New circumstances and information are "significant" under the factors set forth in 40 C.F.R. § 1508.27. Marsh, 490 U.S. at 371-73 (1989). NEPA's significance test is a "low threshold." Klamath-Siskiyou Wildlands Ctr. v. Broody, 468 F.3d 549, 562 (9th Cir. 2006). If the new information "may be significant," NEPA requires agencies to supplement its NEPA analysis. See Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149, 1150 (9th Cir. 1998); Sierra Club, 510 F.3d at 1018. Here, the new information that warrants a supplemental EA or EIS includes: (1) cumulative impacts from other nearby uranium mines, (2) impacts to lands protected under the 2009 Segregation Order, (3) impacts to groundwater resources, including Grand Canyon National Park's seeps, springs as well as Colorado River water supply, and (4) impacts to the endangered California condor. See 40 C.F.R. § 1508.27(b).

It is not surprising that there is significant new information concerning Arizona 1's environmental impacts. The 1988 EA was prepared 22 years ago and is stale. As EPA succinctly offered, "BLM ha[s] to revise the NEPA analysis after []so many years ha[ve] passed." ER 230. NEPA's implementing regulations, as

developed by the Council of Environmental Quality, anticipated these types of scenarios:

> [I]f the proposal has not yet been implemented . . . EISs that are more that 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

46 Fed. Reg. 18026 (Mar. 23, 1981).[8] BLM's NEPA Handbook similarly recognizes that the passage of time is likely to warrant supplemental NEPA. ER 297 ("Substantial changes in the proposed action may include changes in the . . . timing of a proposed action that are relevant to environmental concerns"). Because mining operations were anticipated to commence in 1988 and last for 10 years (ER 501), the 1988 EA did not assess Arizona 1's environmental impacts beginning in 2010 and continuing through 2020. In short, the 1988 EA is outdated as a mechanism to alert BLM and the public of Arizona 1's environmental impacts.

a. Cumulative Impacts From Uranium Mining

NEPA requires BLM to evaluate new information concerning Arizona 1's "cumulative impacts." 40 C.F.R. § 1508.27(b)(7). Cumulative impacts are the impacts of "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." Id. § 1508.7. A cumulative impacts assessment ensures related

[8] Since 1988 EA, not only has BLM not prepared a supplement NEPA document, but the agency has also not determined whether a supplemental NEPA analysis is required for Arizona 1.

actions and impacts are reviewed comprehensively and not piecemealed to avoid preparing an EIS. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 897 (9th Cir. 2002).

In two respects, there is significant new information concerning Arizona 1's cumulative impacts. First, whereas uranium mining in the Arizona Strip was slowing down in 1988 and BLM's EA found "little probability" of additional mining activities in the area (ER 490), today there is a uranium boom throughout the Arizona Strip. ER 276 (noting "international demand for uranium has escalated dramatically, and there are more than 1100 uranium mining claims with five miles of Grand Canyon National Park"); ER 294 ("more than 2000 uranium mining claims have been filed since 2003"). BLM and Denison itself confirmed the company's intent to explore, develop, and mine the EZ1, EZ2, DB1, WHAT and Moonshine Springs uranium deposits in the immediate vicinity of Arizona 1. ER 138, ¶35 (Complaint); ER 121, ¶35 (BLM admission); ER 111, ¶35 (Denison's admission); ER 337A (press release stating Denison "intends to initiate the necessary permitting required to develop these deposits"); ER 337 (Denison press release stating it will be moving forward with "permitting for the EZ1 and EZ2 deposits"). It is indisputable that new exploration and uranium mining activities, including Denison's, are "reasonably foreseeable" and were not consider in the 1988 EA.

Second, because several mines have closed since the 1988 EA, new information is now available regarding the actual impacts resulting from five local mines and their inadequate reclamation measures. At the time of the 1988 EA, these mines were at various stages of development or reclamation. ER 449-450. Twenty-two years later, a USGS study "presents new data that examines the remnant effects of uranium mining and reclamation on soils and stream sediments." ER 157. This new information shows higher levels of radiation from uranium mining and the failure of the reclamation measures implemented. Id. (comparing elevated radioactivity at mine sites with finding "[v]ery little radiation above background concentrations was found at the unmined Kanab South site"); id. (reporting "[e]levated radioactivity . . . at all [mined] sites"); ER 172 (documenting blowing radioactive dust from old mine site); ER 169 (finding "dust from trucks may contribute to these elevated uranium concentrations"). In addition to this comprehensive USGS report, BLM recently conducted field trips to old mine sites in the Arizona Strip that provide new information about reclamation successes and failures. ER 239; ER 220 ("Afterwards, the group visited the reclaimed Hack Canyon and Hermit mines to examines the site and discuss the success on reclaiming the breccia pipe uranium mines on the Strip."). Accordingly, the cumulative impact from now-completed uranium mining is significant new information that must be assessed in a supplemental NEPA document.

b. 2009 Segregation Order

The Secretary of Interior's July 21, 2009 decision to preserve the status quo on lands surrounding the Grand Canyon National Park is also significant new information. The Segregation Order proposed to permanently withdraw from mining almost one million acres of public lands adjacent to the Park for up to 20 years. 74 Fed. Reg. 35887. It also called an immediate two-year "time out" to allow BLM to study the potential impacts of uranium mining in a comprehensive EIS. Id.; ER 238 (EIS to be prepared "under the leadership of the Bureau of Land Management"). The Segregation Order's purpose is "to protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining." Id.

The Secretary issued the Order because existing regulatory processes do "not adequately constrain nondiscretionary uses" and, as such, uranium mining "could result in permanent loss of significant values and irreplaceable resources at the site." 74 Fed. Reg. 35887/3 (emphasis added). According to the Secretary, the Segregation Order was warranted because uranium mining threatens the (1) Park's "4.4 million visitors each year," (2) "numerous rare, endemic, and specially protected plant and animal species," (3) "vast archeological resources and sites of spiritual and cultural importance to American Indians," and (4) water supply for "agricultural, industrial, and municipal users, including the cities of Tucson,

Phoenix, Las Vegas, Los Angeles, and San Diego." ER 237-38. The Park Service supported the Segregation Order, expressing "a number of concerns relative to [Grand Canyon National Park] resource impacts from uranium mining and exploration." ER 240-41 (identifying significant impacts to Park hydrology, vegetation, cultural resources, wilderness, and views).

The Segregation Order constitutes a change in land status and is significant new information that requires BLM to conduct supplemental NEPA. See Klamath-Siskiyou Wildlands Ctr., 468 F.3d at 560 (changing protections for red tree voles in logging project area required SEIS); Friends of the Clearwater, 222 F.3d at 558-59 (requiring SEIS due to new sensitive species designations and because standards upon which original EIS relied were consequently inadequate). The new land use designation applies to Arizona 1. Yet, Arizona 1 mining operations will destroy the exceptional resources values that warranted the 2-year segregation and proposed 20-year withdrawal, thus undermining the very purpose of the Segregation Order.

Moreover, the Segregation Order -- as well as Congress' 2008 Emergency Withdrawal and proposed Grand Canyon Watersheds Protection Act -- highlight the fact that uranium mining next to Grand Canyon National Park has become "highly controversial." See 40 C.F.R. § 1508.27(b)(4); California v. Norton, 311 F.3d 1162, 1176 (9th Cir. 2002). In addition to federal officials and legislators,

State, local and tribal governments have also identified the degradation of Grand Canyon National Park as well as the adverse impacts to the region's water supply as reasons to prevent -- or at least thoroughly study -- uranium mining in the area. ER 294 (Coconino County recognizing "Grand Canyon National Park is an economic engine whose 5 million visitors per year contribute significantly to the economy of Coconino County" and that prior uranium operations "have contaminated creeks and aquifers providing public drinking water"); ER 289 (Governor describing "high level of public concern"); ER 395 (Navajo Resolution); ER 233 (Hualapai Tribe Resolution). This new controversy over uranium mining and its impacts to Grand Canyon and the Colorado River is significant and warrants a supplemental EA or EIS.

c. Groundwater and Grand Canyon's Seeps and Springs

New information concerning impacts to groundwater, Grand Canyon National Park's seeps and springs, and Colorado River water supply is also significant. See 40 C.F.R. § 1508.27(b)(2) (impacts to public health and safety"); id. at § 1508.27(b)(3) (impacts to "parklands"). The 1988 EA concluded that there will be no impacts to these resources because, according to BLM's old analysis, groundwater moves very slowly and the rock layers surrounding the mine shaft are impenetrable. ER 429-30, 477-79.

Since the 1988 EA, there is significant new information demonstrating that uranium mining adversely impacts aquifers and groundwater flow paths that result in the creeks, springs, and seeps found in Grand Canyon National Park. It is also now known that breccia pipes are conduits that facilitate groundwater recharge and that groundwater moves much quicker than previously understood.

The evidence of such significant impacts is well-documented. In 2009, the USGS reported that water quality samples taken from mine sites near Arizona 1 found groundwater contamination. The USGS Report summarized its findings:

> Fifteen springs and 5 wells in the region contain concentrations of dissolved uranium that exceed the U.S. Environmental Protection Agency maximum contaminant level for drinking water and are related to mining processes.

ER 219. In a separate report, the USGS explained: "there is concern that digging into the breccia pipes . . . can mobilize the uranium, causing it to be carried by water moving through the rock strata into the Redwall-Muav aquifer and other aquifers, which eventually discharge into seeps and springs." ER 228. The Park Service similarly revealed "caves and other karst features within redwall limestone may act as conduits to transport contaminants from distant sites to impact park resources." ER 241; ER 199 (breccia pipes and other features "provide pathways by which dissolved minerals may reach the flow system"). A 2005 study reported that "water discharging though the aquifer is relatively young and susceptible to

rapid impacts from land-use activities on the Kaibab Plateau." ER 390; see also ER 273-74; ER 285-86 (noting impacts to "human uses of water of these springs").

Impacts from specific mining operations have also been documented. In 1994, Arizona 1 was required to obtain a State of Arizona Aquifer Protection Permit. ER 269. This is significant because a permit is only required when there are discharges "of a pollutant from a facility either directly to an aquifer . . . in such a manner that there is a reasonable probability that the pollutant will reach an aquifer." A.R.S. at § 49-201(12.). This permit is not required if "there will be no migration of pollutants directly to the aquifer." Id. § 49-241(A).[9] Accordingly, because a state permit is required, Arizona 1 will cause the discharge of pollutants to the aquifer.

Nearby, uranium mining caused the Park Service to issue a warning in 2007 to park visitors that many of the Grand Canyon National Park surface waters are polluted, including waters just east of Arizona 1 in Kanab Creek.

> Streams where radionuclides have been found include the LCR [Little Colorado River], the Paria River, Havasu, Kanab and Lava Chuar creeks, and Pumpkin Springs.

ER 338 ("Drinking and bathing in these waters is not advisable"). The Park Service also discovered elevated uranium levels on the South Rim of the Grand

[9] Notably, Denison's Aquifer Protection Permit does not require groundwater monitoring for Arizona 1. ER 251 ("Routine groundwater monitoring is not required under the terms of this permit.").

Canyon at Horn Creek and nearby springs, where the Orphan uranium mine -- abandoned in early 1970s -- is now a Superfund site. ER 223. Impacts to groundwater, Grand Canyon National Park's seeps and springs, and Colorado River water is significant new information.

d. California Condor

Under NEPA's regulations, impacts to an ESA-listed species are presumed to be significant. 40 C.F.R. § 1508.27(b)(9). BLM's NEPA Handbook similarly provides "[n]ew circumstances or information that trigger the need for supplementation might include the listing under the Endangered Species Act of a species that was not analyzed in the EIS." ER 298.

In 1996, FWS introduced California condors to the Arizona Strip area to provide for the recovery of this species. 61 Fed. Reg. 54044 (Oct. 16, 1996). Because the reintroduction occurred in 1996, the 1988 EA did not consider the mine's impacts to "one of the world's rarest and most imperiled species." Id.

According to the Park Service and FWS, condors are known to be present in the vicinity of Arizona 1, on lands within the Segregation Order's northwestern parcel. ER 241 ("[t]he endangered California condor utilize the [Segregation Area's] North Parcel for feeding and rearing activities"); ER 536A-7 ("condors use the northwest mining withdrawal area as a foraging site and as a travel corridor"). Condors range across large landscapes. 61 Fed. Reg. at 54045 ("Typical foraging

behavior includes long distance reconnaissance flights"); id. ("Condors maintain wide-ranging foraging patterns throughout the year, an important adaptation for a species that may be subjected to unpredictable food supplies"); id. ("Most California condor foraging occurs in open terrain").

These endangered birds are attracted to mine sites, and mining activities harm this endangered species. ER 241 (condors "are known to be attracted to construction activities and other disturbance activities . . . putting these animals at risk"); ER 399 ("Biologists feel as though the area of the Orphan Mine poses a threat to the California condor"); ER 536A-7 (condors harmed "by the consumption of mining waste water and contaminated carrion"); ER 536A-8 ('The California condor has demonstrated behavior that make it particularly susceptible to exposure to contaminated waters"). Accordingly, the condor's introduction to the area is significant new information that requires BLM to assess such impacts in connection with the 1988 Plan.

CONCLUSION

For the foregoing reasons, the Court should reverse and order the district court to enjoin mining activities at Arizona 1 until the case is resolved on the merits.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28--2.6, the Center is unaware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

I certify that this brief contains no more that 14,000 words in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2010 I filed this Opening Brief using the Ninth Circuit's ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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