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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Unless this Court directs the district court to enter a preliminary injunction, the Arizona 1 uranium mine is likely to destroy the values that make Grand Canyon National Park a special and iconic place. The best available information, including recent studies and reports, demonstrate that Arizona 1 will: contaminate groundwater and deplete the National Park's springs and waterfalls; poison California condors that were introduced to the area to promote their recovery; destroy archaeological resources and cultural sites; and preclude Appellants' access to places of religious significance. The Bureau of Land Management (BLM) approved Arizona 1 in 1988. After initial approval, the mine was closed for 17 years and sold to a new operator. As a result, the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) require BLM to update its approval and consider new information about the environmental impacts from uranium mining next to Grand Canyon National Park. BLM has failed to do so.

ARGUMENT

I. ARIZONA 1 IS LIKELY TO CAUSE IRREPARABLE HARM

BLM does not dispute that the environmental harms identified -- to Grand Canyon National Park and its natural resources, groundwater, water supply from the Colorado River and its tributaries, the endangered California condor,

archaeological resources, and cultural sites -- are "irreparable." Indeed, as the Supreme Court and Ninth Circuit have ruled, "[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. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987); Alliance for the Wild Rockies v. Cottrell, 2010 WL 3665149, *9 (9th Cir. Sept. 22, 2010).

Instead, to rebut Appellants' evidence of irreparable harm, BLM and Intervenor Denison Mines suggest that, although Arizona 1 mining operations have commenced, the harms are "speculative." BLM at 32-35; Denison at 18-20. Based on Winter v. Natural Res. Def. Council, 129 S.Ct. 365 (2008), which ruled that the "possibility" of irreparable harm is not enough for a preliminary injunction, BLM argues Appellants lack evidence that Arizona 1 has caused irreparable harm.[1] Under BLM's argument, however, a plaintiff could never establish irreparable harm until a project begins and evidence is secured showing the challenged project has, in fact, caused harm. However, Winter did not adopt this elevated standard and the "likely to occur" standard remains. See Cottrell, 2010 WL 3665149, at *4.

Accordingly, under the applicable standard, Appellants have demonstrated that irreparable injury is "likely" to occur from uranium mining at Arizona 1. See

[1] Denison claims Appellants will not suffer the irreparable harms identified. Denison at 25, 27. Appellants supporting declarations demonstrate otherwise. ER 26, ER 36, ER 67, ER 74, ER 79, ER 83; see Cottrell, 2010 WL 3665149, *8-9 (finding plaintiffs irreparably harmed where they recreate).

S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 472 F.3d 1097, 1100 (9th Cir. 2006) (if project "may significantly degrade some human environmental factor, injunctive relief is appropriate"). Appellants have presented the best available science as evidence, which shows that where there has been uranium mining near the Grand Canyon, there is groundwater contamination and elevated levels of surface radiation. See, e.g., ER 194 (finding that uranium mining is causing violations of drinking water standards) ER 338 (Park Service warning "[d]rinking and bathing in these waters is not advisable"); ER 223 (noting groundwater and springs contamination materialized decades after mine closed).

Evidence of impacts from nearby uranium mines illustrates Arizona 1's likely harms. Several uranium mines near Arizona 1 operated in the late 1980s and early 1990s and used the same techniques to extract uranium from breccia pipes as that being used at Arizona 1 now. ER 517; ER 449-50; see ER 23 & 25 (maps). BLM approved these mines in the mid-to-late 1980s, the same time it approved the 1988 Plan of Operations for Arizona 1. Id. A 2010 report by the U.S. Geological Survey (USGS) shows radioactive contamination of groundwater, water wells, and surface soils in the immediate vicinity of Arizona 1. ER 215; ER 157, 162, 169, 172. The USGS attributes this contamination to uranium mining. ER 219 (violations of drinking water standard "are related to mining process"); ER 228 & 241 (USGS and Park Service detailing groundwater threats). While BLM

repeatedly notes none of this evidence documented impacts from Arizona 1 (BLM at 32) -- which was impossible because mining at Arizona 1 commenced after these studies -- BLM fails to articulate why this evidence is inapplicable to Arizona 1 or why the same impacts will not occur at Arizona 1. BLM cannot demonstrate that the region's geology or mining techniques at other nearby uranium mines are different than at Arizona 1. Indeed, the evidence documenting the irreparable harms is not from an open pit gold mine in Nevada, but from recent breccia pipe uranium mining next to Grand Canyon National Park.[2]

Whereas BLM complains that available evidence is not specific to Arizona 1, it ignores the fact that the State of Arizona determined Arizona 1 is likely to pollute groundwater. Under Arizona law, a groundwater permit is only required if "there is a reasonable probability that the pollutant will reach an aquifer." A.R.S.§ 49-201(12) (emphasis added); § 49-241(A) ("any person . . . who owns or operates a facility that discharges shall obtain an aquifer protection permit from the director"). Conversely, a permit is not required if "the director determines that the

[2] In contrast to Denison's argument dismissing information derived from nearby mining operations, Arizona's groundwater permit does rely on such information. SER 240 ("Although the quantity of the potential mine inflow [at Arizona 1] is unknown, Energy Fuels Nuclear has supplied data regarding mine inflows from other similar facilities in the region.") (emphasis added). Arizona 1's Plan of Operations and 1988 EA also draw comparisons to nearby mines. ER 517-18; ER 408 (projecting mine's duration "[b]ased on experience with similar deposits").

facility will be designed, constructed and operated so that there will be no migration of pollutants directly to the aquifer." Id. § 49-241(B). In 1994, the State required Arizona 1 to obtain an Aquifer Protection Permit, which was updated in 2009. ER 269, 247-68. Accordingly, the State necessarily determined that there is a "reasonable probability" that uranium from Arizona 1 will be discharged into aquifers -- aquifers that feed the Colorado River and provide drinking water for millions of people.

Meanwhile, BLM and Denison have shown an aversion to obtaining relevant information about Arizona 1's impacts. BLM's 1988 Plan contained no groundwater monitoring requirement and Arizona's Aquifer Protection Permit specifically states "[r]outine groundwater monitoring is not required." ER 251. And, as detailed below, BLM is vehemently opposed to a supplemental NEPA document wherein an updated assessment of Arizona 1's impacts could be prepared. This, despite NEPA's purpose to obtain information about Arizona 1's environmental impacts -- and avoiding uninformed decision-making -- before it is too late. See Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1166 (9th Cir. 2003) (NEPA's purpose is avoiding uninformed decision-making); National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001) ("Where an EIS is required, allowing a potentially environmentally damaging

project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement").

Notably, the Segregation Order -- issued by the Secretary of Interior and covering Arizona 1 -- undermines BLM's claim that environmental harms are speculative and not likely to occur.[3] Just months before Arizona 1 commenced operations, the Secretary found that impacts from uranium mines are so significant that he decided to (1) halt all new mining operations on lands adjacent to Grand Canyon National Park for two years, and (2) prepare an environmental impact statement (EIS) to assess the impacts. 74 Fed. Reg. 35887 (July 19, 2009); ER 237-38; ER 228 (detailing reason for BLM's announcement to prepare EIS); 74 Fed. Reg. 43152 (Aug. 26, 2009). The Secretary took these dramatic steps because existing regulatory mechanisms do "not adequately constrain nondiscretionary uses," and uranium mining, therefore, will "result in permanent loss of significant values and irreplaceable resources at the site." 74 Fed. Reg. at 35887 (emphasis

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[3] BLM and Denison dispute that the Segregation Order prohibits Arizona 1. BLM at 34; Denison at 6. Whether the Segregation Order prohibits Arizona 1 is beside the point. The Secretary's findings in support of the Order demonstrate that Appellants' irreparable harms are not speculative, but are likely to result if uranium mining proceeds.

Moreover, Arizona 1 is properly viewed as a new mine -- and subject to the Segregation Order -- because it did not go into production until after the Order was issued. But even if Arizona 1 is a pre-existing mine, application of the Order's exception for mines holding "valid existing rights" requires a specific showing based on a "mineral examination report," which never occurred for Arizona 1. See 43 C.F.R. § 3809.100; U.S. v. Coleman, 390 U.S. 599, 600, 602 (1968) (identify tests for demonstrating valid existing rights).

added).[4] Moreover, the decision to prepare an EIS means, under applicable NEPA standards, that the impacts from uranium mining "may be significant." See Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) ("plaintiff need not show that significant effects will in fact occur, raising substantial questions whether a project may have a significant effect is sufficient") (emphasis in original).

The Secretary specifically concluded that uranium mining would cause significant harm to the Grand Canyon watershed. 74 Fed. Reg. 35887 (Order's purpose is "to protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining"); ER 237 ("time-out" needed to "protect[] local communities, treasured landscapes, and our watersheds"). The USGS explained the need for the Segregation Order as follows:

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

ER 228. The USGS elaborated that "there is concern that digging into breccia pipes . . . can mobilize the uranium, causing it to be carried by water moving through he rock strata into the Redwall-Muav aquifer and other aquifers, which eventually discharge into seeps and springs" in the Colorado River and Grand

[4] BLM's litigation argument that existing "stricter environmental controls" sufficiently protect Grand Canyon's environment (BLM at 32) is undermined by the Secretary's findings in the Segregation Order. 74 Fed. Reg. at 35887.

Canyon National Park. Id. Millions of people downriver depend on this water. ER 275; ER 277; ER 282 (water districts' opposition premised on polluting water supply to area's largest cities).

In short, the same evidence that supports the Secretary's Segregation Order and its broad prohibition against all uranium mining in the region also supports a preliminary injunction against Arizona 1. The evidence of likely harms is based not only on uranium mining in the 1970s -- the Superfund site caused by the Orphan Mine (BLM at 32), but also on the five mines in the vicinity of Arizona 1 and the recent new information on the region's natural resources.[5]

BLM claims its 1988 EA demonstrates Arizona 1 will cause no impacts to groundwater. BLM at 33. Perhaps if BLM has prepared a new environmental analysis for renewed mining operations that offered this conclusion, this contention would have some legitimacy. However, because it is 22 years old, the 1988 EA contains outdated information and, as a result, must be "reexamined" pursuant to the NEPA guidelines (46 Fed. Reg. 18026) and supplemented according to BLM's NEPA Handbook. ER 297-98. Further, the 1988 EA's findings have been proven false. For example, new information reveals that the rock strata in the region is not

[5] BLM claims that evidence set forth in a National Park Service memorandum indicates that Appellants' harms are speculative, not likely. BLM at 33. Yet, the Secretary relied on the Park Service's April 6, 2009 findings to support the Segregation Order. See ER 240 (NPS discussing mining impacts to "proposed parcel withdrawal areas").

impermeable and groundwater does not move slowly, as the EA reflected. ER 390 (finding groundwater "susceptible to rapid impacts from land-use activities"); ER 241 (NPS finding "conduits [] can transport contaminated water quickly from a mining site to the park's springs").

BLM's "speculative" argument concerning California condors similarly fails. BLM at 34-35; Denison at 27-28. All available evidence -- from the U.S. Fish and Wildlife Service and National Park Service -- indicates Arizona 1 is "likely to cause" irreparable harm to condors. ER 536A-7 (finding condors threatened by "toxicological poisoning caused by the consumption of mining waste water and contaminated carrion" in "northwest mining withdrawal area," where condors forage and use as "travel corridor"); ER 399. In supporting the Segregation Order, the Park Service reported:

> condors utilize the North Parcel [where Arizona 1 is located] for feeding and rearing activities. They are known to be attracted to construction activities and other disturbance activities (e.g. Orphan Mine site reclamation within Grand Canyon) and would likely be attracted to other activities, putting these animals at risk.

ER 241 (emphasis added).

BLM argues no condors are present at Arizona 1 based on Denison's survey at three other uranium deposits -- known as EZ1, EZ2, and WHAT. BLM at 35. However, these three sites have not yet been developed. Consequently, there should not be any adverse impacts at this time because condors are attracted to

mine structures for perching and wastewater ponds for drinking water, which are not present there. ER 241, ER 399, ER 536A at 7.

Tribal members have testified that Arizona 1 prevents access to their sacred sites both due to the industrial use of Mt. Trumbull Road (up to 12 daily roundtrips by 25-ton uranium ore-hauling trucks (ER 530)) and because past uranium mining has been hazardous to public health. ER 86, ER 88, ER 80, ER 75-76 (describing "legacy of debilitating illness and death among Native peoples in the area"); see also FER 1-2 (2010 EPA settlements resulting from uranium contamination of tribal lands). In response, BLM and Denison do not suggest these harms are not caused by Arizona 1, but that Denison is maintaining the access road. BLM at 35; Denison at 28-30. The road may be maintained, but a Hobson's choice persists nonetheless: either visit areas of religious and cultural significance despite the threat of radioactivity, or not take part in ceremony and prayer. Given this "stark choice," tribal members have decided not to visit sacred sites or visit less often. See Am. Trucking Ass'ns v. City of L.A., 559 F.3d 1046, 1057 (9th Cir. 2009); Nelson v. NASA, 530 F.3d 865, 881 (9th Cir. 2008) (harm irreparable when faced with "stark choice -- either violation of their constitutional rights or loss of their jobs"). Moreover, declarations filed under seal further demonstrate that direct harms to cultural resources from resumed mining activities are not just likely, but real and ongoing.

II. THE BALANCE OF HARMS TIPS SHARPLY IN APPELLANTS' FAVOR

Denison's alleged financial injuries are not irreparable. Save Our Sonoran v. Flowers, 408 F.3d 1113, 1124-25 (9th Cir. 2005); S. Fork Band Council v. Dep't of Interior, 588 F.3d 718, 728 (9th Cir. 2009) (finding economic injuries temporary). Moreover, "more than pecuniary harm must be demonstrated" when there is likely irreparable environmental harm. N. Alaska Envtl. Ctr. v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986).

Denison's evidence of financial injury is inadequate. It is based on conclusory assertions in declarations, where absolutely no details are provided to support these unsubstantiated claims. Moreover, some costs were allegedly incurred long ago, and thus are unrelated to a preliminary injunction. See Denison at 33 (costs of acquisition and securing approvals). Further, revenues delayed due to a preliminary injunction are temporary, not irreparable. See S.E. Alaska Conservation Council, 472 F.3d at 1101 (finding "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"); Cottrell, 2010 WL 3665149, at *11 (finding "risk that the project will not occur at all is speculative"). Meanwhile, Denison started up mining operations after this lawsuit was filed, such that any injury stemming from contractual breaches or its hiring of employees are of its own making. See Desert Citizens

Against Pollution v. Bisson, 231 F.3d 1172, 1187 (9th Cir. 2000); People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 100 (9th Cir. 1974).[6]

III. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The public interest is served by preserving the environment, particularly the iconic Grand Canyon National Park, and ensuring BLM complies with the law. Sierra Club. v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007); S. Fork Band Council, 588 F.3d at 728; see, e.g., Babbitt, 241 F.3d at 739 (finding "Glacier Bay Park is too precious an ecosystem for the Parks Service to ignore significant risks to its diverse inhabitants and its fragile atmosphere"). As the Secretary of Interior and Park Service have determined, Grand Canyon National Park and its natural resources are threatened by uranium mining. 74 Fed. Reg. 35887; ER 240-46. Further, uranium mining threatens the "economic engine" of Coconino County. ER 294. An injunction also serves the purpose of FLPMA. 43 U.S.C. § 1701(a)(8) ("protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values"). Neither BLM nor

[6] Denison's reference to contracts with electrical utilities is misleading. Denison at 34. These contracts are between the utilities and Denison's uranium mill in Utah, not with Arizona 1 directly. Recent Denison reports show a surplus of uranium ore being stockpiled at its Utah mill site and thus processing uranium ore extracted from Arizona 1 is being delayed regardless of an injunction. FER 5. Moreover, the utility contracts are with Korean, not U.S., utilities. FER 15; FER 21-22 ¶ 10.

Denison dispute that preserving the environment and Grand Canyon National Park or ensuring compliance with law are in the public interest.

Although mining at Arizona 1 sat dormant for 17 years and Denison waited over two years after purchasing Arizona 1 to begin mining, it argues an injunction will delay employment for 37 people. Denison at 36. However, Denison could hire these or other contractors to prepare a new EA/EIS or plan of operations -- if FLPMA and NEPA compliance is ordered -- and could also hire these people to work on one of Denison's EZ1, EZ2 and WHAT projects or the Pinenut mine. See ER 526 (Pigeon Mine employees used at Arizona 1); ER 235 (restarting Pinenut). Denison's blanket assertion that an injunction would mean less government revenues lacks any supporting details. See Denison at 36.

IV. APPELLANTS ARE LIKELY TO SUCCEED ON MERITS OR, ALTERNATIVELY, HAVE RAISED SERIOUS QUESTIONS[7]

A. BLM's 1998 Approval Of Arizona 1 Is No Longer In Effect, Requiring BLM To Provide A New Approval Before Mining Occurs

BLM has a mandatory duty under FLPMA to prevent UUD on public lands. 43 U.S.C. § 1732(b); Sierra Club v. Hodel, 848 F.2d 1068, 1090-92 (10th Cir.

[7] Denison -- but not BLM -- argues Appellants waived their "serious questions" argument by not raising it below. Denison at 39-40. However, Cottrell was the first time this court affirmed the validity of the "serious questions" part of the sliding scale test after Winter, and Cottrell was decided after the district court denied a preliminary injunction. Denison's waiver argument fails due to this change in the law. See Randle v. Crawford, 604 F.3d 1047, 1056 (9th Cir. 2010).

1988) (rejecting BLM's argument that its duty to "prevent UUD" under FLPMA is discretionary). BLM's UUD duty involves approving plans of operations that satisfy the applicable requirements in the 3809 Regulations before mining occurs. 43 C.F.R. § 3809.1 ("The purposes of this subpart are to: (1) Prevent unnecessary or undue degradation of public lands . . ."); 43 C.F.R. § 3809.10(c) (requiring approved plan before mining), id. 3809.11(a) (same). Absent such an approval, BLM violates its mandatory UUD requirement and the 3809 Regulations. See Center for Biological Diversity v. Dept of Interior, 2010 WL 3704200, at *10 (9th Cir. Sept. 23, 2010) (noting how BLM fulfills its mandatory duty to prevent UUD duty, in part, by not allowing mining to occur without approval of currently valid plan of operations). Accordingly, BLM's claim that it does not have a "mandatory duty to require Denison to seek approval of a new MPO" (BLM at 26) is contrary to its UUD mandate under FLPMA and the 3809 Regulations.

Under the 3809 Regulations, BLM's 1988 approval of Arizona 1 is no longer valid. Energy Fuels Nuclear -- Arizona 1's original operator -- secured BLM approval in 1988. Soon thereafter, in 1992, the company made a business decision to stop conducting operations. An approved plan of operations remains in effect "as long as you [the operator] are conducting operations." 43 C.F.R. § 3809.423. The express purpose of this FLPMA regulatory provision is to ensure plans do not "remain in effect indefinitely." 64 Fed. Reg. 6422, 6439 (Feb. 9, 1999). Between

1992 and December 2009, it is undisputed that no "operations," as defined in 43 C.F.R. § 3809.05, occurred at Arizona 1. The plain language of § 3809.423 and § 3809.5 thus renders Arizona 1's 1988 Plan ineffective. Because FLPMA's overarching mandate to avoid "unnecessary or undue degradation" prohibits mines like Arizona 1 absent an approved plan, BLM must provide a new approval if mining is to occur at Arizona 1.

Recognizing the meaning of § 3809.423 in plain on its face, BLM looks elsewhere to ensure the 1988 Plan survives. In particular, the agency offers tortured interpretations of the definition of "operations," points to other provisions of the 3809 Regulations, and falls back on "agency deference." Before addressing these specific arguments, Appellants highlight two overarching problems with BLM's interpretation. The first problem -- and one that dooms the agency's position -- is that it renders § 3809.423 meaningless. See Bennett v. Spear, 520 U.S. 154, 173 (1997); U.S. v. Bonilla-Montenegro, 331, F.3d 1047, 1051 (9th Cir. 2003). Indeed, nowhere does BLM give meaning to § 3809.423's clear language that a plan of operations remains in effect "as long as you are conducting operations." The other problem is that BLM's interpretation would allow a plan of operations "to remain in effect indefinitely" -- the very result BLM was trying to avoid in promulgating § 3809.423. See 64 Fed. Reg. at 6439 (purpose of §

3809.423 is to ensure plans do not "remain in effect indefinitely"). BLM's opposition brief confronts neither problem.

BLM's interpretation of "operations" is not supported by the definition's language. See BLM at 19. BLM repeatedly claims "operations" is broadly defined in § 3809.05, yet fails to identify what part of the "broad" definition could have covered the long period of inactivity that occurred at Arizona 1 from 1992 to 2009. BLM also summarily claims the definition is not limited to "active and ongoing" mining operations. See id. This argument fails on two fronts. First, the definition specifically identifies activities that are tied to ongoing mining. "Functions, work, facilities, and activities" must be conducted" in connection with [1] prospecting, [2] exploration, [3] discovery and assessment work, [4] development, [5] extraction, and [6] processing minerals." 43 C.F.R. § 3809.05 (emphasis added). And, "all other reasonably incident uses" must relate to "the construction of roads, transmission lines, pipelines, and other means of access across public lands to support facilities." Id. Moreover, the plain language of this later clause employs the active word "uses," and the record undisputedly shows that neither Denison nor its predecessor conducted any "uses" when Arizona 1 was closed for 17 years. Second, to the extent the definition is not clear on this point, § 3809.423 is. Only active operations ensure a plan remains in effect because § 3809.423 states that the operator has to be "conducting" operations.

BLM contends that 17 years of non-operations is nonetheless "conducting operations" under § 3809.423 because the 1988 Plan contained an "interim management plan" (IMP). BLM at 20-21. The plan's content does not save the 1988 Plan. Notably, the definition of "operations" does not include implementing an IMP, even if an IMP must be included in a plan. See 43 C.F.R. § 3809.05.[8]

Moreover, § 3809.424(a)(1) undermines BLM's argument. This provision requires an operator to implement an IMP when it "stops conducting operations." 43 C.F.R. § 3809.424(a)(1) ("you must follow your interim management plan"). However, § 3809.424(a)(1) has no purpose if "conducting operations" includes IMP implementation because then the triggering event to implement an IMP -- "stop conducting operations" -- would never occur. Id.; see ER 5-6. For the same reason, § 3809.423 would also be rendered meaningless if "conducting operations" included IMP implementation, as that would allow plans of operations to continue indefinitely.

BLM's reliance on snippets from a Federal Register notice does not support its argument. That "operations" is defined broadly to cover various mining activities -- from cradle-to-grave (BLM at 19) -- is not in dispute. But when those cradle-to-grave activities totally cease for 17 years, the plan is no longer effective

[8] As previously noted and not rebutted, if "conducting operations" includes IMP implementation notwithstanding the definition of operations, Arizona 1's IMP ceased being implemented long ago. ER 533-34.

under § 3809.423. Further, to the extent a plan is "good for the life of the project" (id.), that assumes the project is ongoing, and is not one that ceased for an indefinite period of time. Appellants do not dispute that had Arizona 1 been in active operation since approval, the 1988 Plan would continue to govern Arizona 1 until operations concluded.

BLM claims that a plan cannot be rendered ineffective automatically under § 3809.423 because that would be "inconsistent with the detailed process for terminating an MPO" by BLM when an operator is found "not in compliance with its MPO." BLM at 24-25. There are two main problems with this contention. First, there is no inconsistency. A conflict would exist only if Appellants were arguing that the 1988 Plan terminated automatically when an operator was "not in compliance with its MPO." But the issue here is not about non-compliance with a plan of operations. Rather, § 3809.423 applies because operations ceased long ago. Second, the "detailed process" is not necessary when a plan is rendered ineffective under § 3809.423.[9] A plan -- like Arizona 1's 1988 Plan -- is ineffective

[9] BLM cites various regulations claiming there is a process for "terminating" a plan of operations. BLM at 24-25. BLM's use of the term "terminate" in not precise. None of the provisions BLM cites involve terminating a plan of operations. Rather, § 3809.601(a) & (b) concern issuing noncompliance or suspensions orders, and § 3809.602 addresses revocation actions. These provisions and the referenced procedures are invoked when an operator is violating the plan of operations or the 3809 Regulations, which is not the issue here. The only reference in the regulations to "terminating" a plan is found in § 3809.424(a)(3), although there are no procedures associated with termination. 43 C.F.R. § 3809.424(a)(3).

based on a decision by an operator, not BLM. As a result, the purpose of due process procedures is not served when an operator decides to close a mine.

BLM's call for deference is unavailing. BLM at 25. "Deference to an agency's interpretation of its regulation is warranted only when the regulation's language is ambiguous." Wards Cove Packing v. Nat'l Marine Fish. Serv., 307 F.3d 1214, 1219 (9th Cir. 2002) (emphasis in original). The language of § 3809.423 is not ambiguous and BLM fails to identify ambiguity in this provision. This provision plainly states that a plan of operations is no longer effective when an operator stops "conducting operations." Moreover, BLM's interpretation of § 3809.423 leads to an absurd result. See ONRC v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996). It equates 17 years of non-operations at Arizona 1 with "conducting operations." See Boose v. Tri-County Metro. Transp. Dist. of Oregon, 587 F.3d 997, 1005 (9th Cir. 2009) ("Because the Secretary's interpretation conflicts with the plain language of the regulation, it is not controlling"); NWF v. NMFS, 542 F.3d 917, 931-32 (9th Cir. 2008) (noting "textual interpretations that give no significance to portions of the text are disfavored").

Terminating a plan may occur if a mine is "inactive," defined as a mine not operating but adhering to its IMP. 65 Fed. Reg. 69998, 70055 (Nov. 21, 2000). The purpose of terminating a plan is for BLM to "direct final reclamation and closure." 43 C.F.R. § 3809.424(a)(3). Moreover, under § 3809.424(a)(3), what BLM is terminating is necessarily limited to the plan's IMP because, based on the plain language of § 3809.423 and § 3809.424(a)(1), only the IMP remains when a mine is "inactive."

BLM claims its current interpretation is not a post hoc rationalization because it was set forth in the Federal Register notice announcing the 3809 Regulations. BLM at 25-26. But the preamble in the Federal Register does not comport with BLM's interpretation. It does not suggest of § 3809.423 should be given no meaning or that a plan of operations continues in effect indefinitely when operations cease. To the contrary, the 1999 Federal Register notice states that the purpose of § 3809.423 was to ensure plans do not "remain in effect indefinitely." 64 Fed. Reg. at 6439. Moreover, BLM fails to identify when this provision has been applied since its adoption -- to Arizona 1 or any other mine. That BLM has done nothing over 17 years other than monitor the Arizona 1 mine site once a year (BLM at 26) is not evidence that BLM interpreted or applied § 3809.423 to Arizona 1. See Defenders of Wildlife v. Norton, 258 F.3d 1136, 1146, n. 11 (9th Cir. 2001) (no deference when provision not applied).

B. BLM Failed To Comply With NEPA And Undertake A Supplemental Environmental Review

FLPMA tasks BLM with the stewardship of public lands surrounding Grand Canyon National Park. FLPMA requires BLM to manage these lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values." 43 U.S.C. § 1701(a)(8). It is also a national policy for BLM to manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals,

food, timber, and fiber." Id. at § 1701(a)(12). As has been made evident by this case, however, BLM proposes to fulfill this multiple-use mandate and manage these lands without knowing and disclosing to the public the environmental impacts of Arizona 1.

BLM assessed the impacts of Arizona 1 in 1988. Regardless of the adequacy of the 1988 EA, however, things have changed 21 years later.[10] To recover the endangered California condor, the Fish and Wildlife Service introduced this imperiled bird to the region in 1996. In 2009, due to threats posed by uranium mining in the region, the Secretary called a "time-out" on new uranium mining in order to conduct a comprehensive evaluation of the potential impacts to Grand Canyon National Park and consider whether any mining should occur on these lands. Meanwhile, to protect the water supply for millions from contamination, two of the largest water districts in the country took action by opposing uranium mining without adequate study. USGS studies completed in 2010 confirm that past uranium mining in the immediate vicinity of Arizona 1 and in the region has

[10] BLM boasts that Appellants have not challenged that 1988 EA, implying it must be adequate. BLM at 9, n.3. BLM overstates the adequacy of that document. Appellants cannot challenge the 1988 EA under the applicable statue of limitations. But that technicality should not be construed to mean that the 1988 EA complies with NEPA. See, e.g., ER 235 (Appellants' email critical of BLM's decision to prepare 1988 EA "rather than more detailed environmental impact statement"). Regardless, the relevant question is whether that EA is outdated and stale for reasons that have nothing to do with whether it was adequate in 1988, but because its findings are contradicted by new information developed over the last 21 years.

contaminated surface and ground water, and the lands where mining is conducted. Despite this new information that requires a supplemental EA or EIS (40 C.F.R. § 1502.9(c)(1)(ii)), BLM is shirking its stewardship responsibilities, preferring to pretend this information does not exist. See 40 C.F.R. § 1500.1(b) (NEPA requires "high quality" information and "accurate scientific analysis").

1. Additional BLM Approvals Were Both Required And Provided To Begin Uranium Mining At Arizona 1

In its response brief, BLM refuses to confront the fact it has provided additional approvals for Arizona 1.[11] Although BLM approved a plan of operations for Arizona 1 in 1988, that approval was not sufficient for Denison to begin mining. Portions of BLM's 1988 approval were no longer valid and new approvals were required, signifying that BLM's approval of Arizona 1 was not completed in 1988. Indeed, BLM expressly "admit[ted]" that [b]efore Denison could renew operations at the Arizona 1 Mine, BLM required Denison to post a new reclamation bond and secure an air permit." ER 145 ¶ 58 (Complaint) & 122 ¶

[11] BLM's statement that no federal agency action "remains to occur" (BLM at 28) is misleading. BLM has taken additional approvals of Arizona 1 that require supplemental NEPA prior to the mine resuming operations in late 2009. BLM also claims there is no "ongoing" federal agency action. BLM at 29, 31. Whether BLM's actions are "ongoing" is irrelevant, as the agency's additional approvals provided in between 2007 and 2009 triggered the duty to supplement. See ONRC v. U.S. Forest Service, 445 F.Supp.2d 1211, 1222 (D. Or. 2006) (correctly recognizing issue not whether agency action "ongoing," but if there "remains action to occur").

58 (Answer). Further, the Secretary candidly admitted these additional approvals were required before mining could commence. ER 278 ("[FLPMA] regulations state that mining . . . operations cannot start until all health, safety, and environmental permits have been issued and an adequate reclamation bond has been accepted."); id. at 278-79 ("Before operations resume, the BLM will review the reclamation bond to ensure it is adequate and will communicate to the operator the need to obtain all necessary Federal, State, and local permits"); see also ER 235 ("We have recently updated the reclamation bonds . . . Once the company received their operating permits from ADEQ they may commence operations").

Notably, these recent approval actions were the same approvals BLM provided in connection with approving the 1988 Plan. This is because BLM's approval process for a plan of operations under the 3809 Regulations requires an approval of reclamation bond (43 C.F.R. § 3809.401(d), § 3809.414), and ensuring mining activities avoid UUD by securing all applicable permits. Id. § 3809.411(b), § 3809.411(d), § 3809.415(a), § 3809.05, 65 Fed. Reg. at 70042 ("BLM must ensure its actions (. . . and activities it authorizes) comply with all applicable Federal, State, tribal, and local" laws). BLM required a new air permit before mining could begin because the Clean Air Act (CAA) permit that Energy Fuels Nuclear obtained in 1988 became invalid when the mine closed. See ER 400-02 (EPA's 1988 CAA permit provides: "If the mine becomes inactive, the Approval

expires."); ER 16A at 4 (EPA finding "The 1988 Approval is no longer valid or in effect because of the long period of inactivity of the mine and because of the transfer of ownership.").[12] BLM's briefing offers no explanation as to how these same approval actions were needed to approve the 1988 Plan, but are now not approval actions.

Moreover, BLM fails to acknowledge that Denison could not mine under the 1988 Plan. Denison purchased the mine in early 2007. The company informed BLM of its intention to begin mining immediately. A September 6, 2007 letter to BLM states: "Phase two mining activities will begin at the 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 312; ER 336-37 (Denison March 20, 2007 press release informing shareholders that it "is planning on restarting operations at Arizona 1 this year to complete the shaft and begin mining in 2008"). But Denison could not begin mining operations in 2008 because additional BLM approvals were required. Indeed, mining did not commence at Arizona 1 until December 2009, after BLM provided its additional approvals.

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[12] Although BLM required Denison to secure an air permit from the State before mining commenced, BLM did not undertake this approval action with much care. As EPA explained and the CAA regulations make clear, Arizona lacked authority under the CAA to issue a permit covering radon gas emissions. ER 16A at 4 ("ADEQ's September 2009 permit is not a valid authorization to the requirements of 40 C.F.R. 61.08 because ADEQ is not delegated to implement 40 C.F.R. Part 61, Subpart B"); 40 C.F.R. § 60.04(c)(9)(i) (Arizona's delegated program does not include radon gas emissions).

BLM claims its actions between 2007 and 2009 were merely inspection and monitoring actions. BLM at 29.[13] Appellants do not dispute that BLM has, since approving the Plan in 1988, monitored the mine site. However, these are not the approval actions that triggered to duty to supplement the 1988 EA. BLM's monitoring reports attached to the Declaration of Scott Florence (SER 2 ¶ 5) have nothing to do with reclamation bonding, ensuring Denison has secured all required permits, or BLM approving Denison's use of gravel for road maintenance. ER 302, 307.

BLM's effort to distinguish Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989), fails. The agency states there are "critical factual distinctions between this case and Marsh." BLM at 30. NEPA, however, applies both to actions "conducted" by federal agencies, like building a dam, as well as to actions "regulated or approved by federal agencies," like Arizona 1. 40 C.F.R. § 1508.18(a). BLM claims that in Marsh, dam construction had not been completed whereas its approval actions for Arizona 1 took place in 1988. See BLM at 30. But as in Marsh, BLM's actions had not been completed. As detailed above, BLM had to provide additional approvals beyond the 1988 Plan before mining could begin at

[13] BLM seems to imply that it has been taking enforcement actions against Arizona 1 in recent years, which are not subject to NEPA. BLM at 16, 29. Appellants do not dispute that enforcement actions are not subject to NEPA, but question exactly what enforcement actions BLM is referencing. Regardless, this issue is a red herring -- suffice to say NEPA supplementation is not based on a BLM enforcement action.

Arizona 1. BLM further notes that the ultimate disposition of Marsh was that NEPA supplementation was not required. BLM at 30, n. 10. This is a true, but irrelevant fact to the current dispute. NEPA supplementation was not required in Marsh because the new information did not rise to the required "significance" level, not because the Army Corps was not undertaking additional agency action. See Marsh, 490 U.S. at 378-85.[14]

In sum, after the 1988 Plan was approved, there remained federal agency action to occur. Indeed, the record demonstrates that Denison could not begin operations until BLM approved the restart of Arizona 1 operations.[15]

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[14] BLM's recognition that agencies must comply with NEPA "before taking that action" is of no relevance. See BLM at 27-28. Although NEPA attaches before an agency approves or undertakes an action, NEPA is not limited to initial project approval. The duty to supplement necessarily means there was an initial NEPA document, like the 1988 EA for Arizona 1.

[15] BLM argues in a footnote that an agency's NEPA document is not a "final agency action," precluding Appellants' supplemental NEPA claim. BLM at 30, n.11. This contention fails at several levels. Appellants' NEPA claim asserts a failure to take an agency action under 5 U.S.C. § 706(1), as opposed to challenging a final agency action. This is permissible to establish APA jurisdiction because "agency action" includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (emphasis added). Moreover, this claim satisfies SUWA because it challenges a discrete agency action that BLM is required to take -- supplemental NEPA for the 1988 Plan. See Norton v. SUWA, 542 U.S. 55, 64 (2004); see Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558-59 (9th Cir. 2000).

2. Significant New Information Exists

As detailed in Appellants' opening brief, BLM must undertake a supplemental NEPA review because new information about Arizona 1's impact "may be significant." See Thomas, 137 F.3d at 1149-50. Based on this NEPA threshold, significant new information exists concerning Arizona 1's cumulative impacts and its impacts to Grand Canyon National Park, groundwater, water supply, the California condor, and the Segregation Order. Opening Br. at 45-54; compare 73 Fed. Reg. 60233 (Oct. 1, 2008) (Forest Service notice of preparing EIS due to significant impacts associated with less intrusive uranium exploration project). BLM does not specifically dispute that there is significant new information. BLM at 31. Instead, the agency refers to its response on irreparable harms, suggesting with out support that the likelihood of irreparable harm standard for a preliminary injunction is the equivalent of the low NEPA threshold for supplementing an EA or EIS. See Thomas, 137 F.3d at 1149-50 ("substantial questions whether a project may have a significant effect is sufficient").

CONCLUSION

Appellants respectfully request that the Court direct the district court to enjoin mining activities at Arizona 1 until the case is resolved on the merits.

Respectfully submitted,

Dated: October 5, 2010

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

I certify that this brief contains 6,933 words in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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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