No. 10-16513

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

v.

DENISON ARIZONA STRIP LLC AND DENISON MINES (USA) CORP.,
Defendant-Intervenor-Appellees.

Appeal from the United States District Court for the District of Arizona
No. 3:09-cv-08207-DGC

RESPONSE BRIEF OF DEFENDANT-INTERVENOR-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Defendant-Intervenor-Appellees Denison Arizona Strip LLC and Denison Mines (USA) Corp. state that they both are wholly-owned by Denison Mines Holdings Corp., which is wholly-owned by Denison Mines Corp., a publicly held corporation.

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STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in denying Appellants Center for Biological Diversity's, Grand Canyon Trust's, Sierra Club's, the Kaibab Band of Paiute Indians of the Kaibab Indian Reservation's, and the Havasupai Tribe's Motion for Preliminary Injunction.

INTRODUCTION

Plaintiff-Appellants Center for Biological Diversity, *et al*. ("Center") allege that U.S. Bureau of Land Management ("BLM") violated the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.* ("FLPMA"), and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), and their implementing regulations by allowing Defendant-Intervenor-Appellees Denison Mines (USA) Corp. and Denison Arizona Strip LLC (together "Denison") to operate the Arizona 1 Mine ("AZ1") pursuant to the mining plan of operations ("MPO") BLM approved in 1988. Five months after filing its initial Complaint, the Center moved for a preliminary injunction, which was denied for failure to show a likelihood of success on the merits. The Center now appeals that decision. While the appeal was pending, the Center moved both the District Court and this Court for an injunction pending appeal. Those requests also were denied.

The touchstone of injunctive relief is irreparable harm. The Center has not provided the Court with any reason to conclude that it likely will suffer immediate, irreparable harm due to operations at AZ1. Instead, the Center has provided information about possible environmental impacts in the region from past mining operations (not AZ1) and invites the Court to make assumptions about possible impacts from AZ1 based on that information. That is speculation, not a showing that irreparable harm is likely. The extraordinary relief of shutting down

Denison's business and putting people out of work cannot legally rest on possibilities and speculation; an injunction is not warranted while the District Court considers this case on the merits.

The Center suggests that because BLM approved the AZ1 MPO over twenty years ago, operations at AZ1 are out of touch with modern environmental standards and concerns. Nothing could be farther from the truth. BLM's regulations require AZ1 to comply with current federal and state laws related to the protection of the environment and cultural resources, including related to water quality and endangered species. AZ1 is in compliance with these standards and its authorizations thereunder, and the Center has not demonstrated otherwise. These laws and agency authorizations are not static, but instead have changed as environmental and cultural concerns have changed. This ensures that long-term projects, like AZ1, comply with modern regulatory requirements.

Finally, it is important to distinguish this case from the typical injunction scenario in which a new project is being constructed pursuant to a newly-minted agency authorization and new impacts to the environment are imminent. AZ1 was fully constructed in the early 1990s, and its impacts to the environment fully evaluated by BLM; Denison has been actively mining AZ1 since December 2009.

STATEMENT OF THE CASE

The Center filed a Complaint in November 2009 alleging that: (1) under BLM's FLPMA regulations, the AZ1 MPO is no longer effective and, as a result, BLM is obligated to approve a new MPO for AZ1 before mining can occur; and (2) assuming the AZ1 MPO has remained valid, that BLM complete a supplemental NEPA analysis. ER 144-45 ¶¶ 57-67.[1] In April 2010, the Center moved for a preliminary injunction to enjoin mining operations at AZ1, which the District Court denied on June 17, 2010, for failure to show a likelihood of success on the merits. *Id*. 1-13. This appeal followed.

Thereafter, the Center sought an injunction pending appeal from the District Court, which was denied on August 11, 2010, for the same reason. (DCDkt.102). On August 16, 2010, the Center filed an emergency motion under Circuit Rule 27-3 for an injunction pending appeal in this Court. (Dkt.17). On August 31, 2010, a two-judge panel denied that motion. (Dkt.26 at 1 citing *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960 (9th Cir. 2010)).

[1] ER is the Center's Excerpts of Record, which Denison cites where possible. "SER" is Denison's and BLM's joint Supplemental Excerpts of Record.

STATEMENT OF FACTS

The Arizona 1 Mine

AZ1 is a uranium mine located within ten unpatented mining claims in Sections 22 and 23, T36N, R5W, of Mohave County, Arizona (the "Unpatented Mining Claims"). SER 35 ¶ 6. It is located approximately thirty-five miles south of Fredonia, Arizona, and approximately six and one-half miles north of the Grand Canyon National Park. ER 475. Denison owns the Unpatented Mining Claims, which were located pursuant to the General Mining Law of 1872, 30 U.S.C. § 22, *et seq.* ("Mining Law") and in full compliance with the rules governing the location and exploration of unpatented mining claims. SER 35 ¶¶ 4, 6. The Unpatented Mining Claims have been properly maintained continuously since their location through the performance of required work, payments of necessary fees, and filing of applicable paperwork. *Id.* ¶ 7. Their validity is not at issue in this matter.

The mine consists of a uranium ore body that is in a geologic formation known as a breccia pipe. Breccia pipes are typically about 300 feet wide and up to 3,000 feet in depth. ER 319, 432-33; SER 83-85. Uranium minerals generally are located in a very limited area of a breccia pipe, that typically is deeper than 1,000 feet below the ground surface, which is the case for AZ1. ER 319, 432-33; SER 83-85. To access the uranium minerals, a headframe was erected and a vertical

shaft was driven approximately 1,200 feet down, adjacent to the breccia pipe.[2] ER 408-11; SER 36 ¶ 14. Horizontal tunnels or adits were then driven into the uranium ore body. SER 36 ¶ 14. Uranium ore is mined and transported to the surface, where it is stored temporarily and then shipped via truck to a facility near Blanding, Utah for processing and milling. Denison does not process or mill any ore at AZ1. *Id.* ¶ 15.

AZ1's area of operations at the surface consists of approximately 19.4 acres. ER 412, 501.[3] It is surrounded by a six foot tall fence, and access is controlled through a single entrance. SER 36 ¶ 17. Structures include the shaft, office, hoist house, containment pond,[4] waste rock storage area, topsoil storage area, and temporary ore stockpiles. ER 412. The area of operations was constructed to specifications developed by engineers and environmental professionals to insure

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[2] The Center asserts as "fact" that the shaft penetrates small aquifers and underground pathways through which groundwater purportedly moves and eventually spills into Grand Canyon National Park and the Colorado River and its tributaries. Opening Brief of Appellents at 5 (Dkt.14) ("CtrBr."). The Center offers no proof of these alleged facts, and does not rely on information specific to AZ1 to support these assertions. *Id.*

[3] The Center's assertion that the AZ1 site is 120 acres is incorrect. *Id.*

[4] The containment pond is a lined pond designed primarily to catch storm water from the area of operation. It is also authorized to contain any water that may be pumped from underground workings at the mine. *See* ER 248-49; SER 240. The pond is designed to handle a 500-year, 24-hour stormwater event, with sufficient freeboard. ER 248, 250-51, 263-64; SER 240-41. Thus, contrary to the Center's assertion, the containment pond is not a "large uncovered waste pit." CtrBr. at 5.

that all of the structures meet applicable rules and regulations. AZ1 is fully constructed and operating. SER 36-37 ¶¶ 10, 17, 19.

The 1988 Plan of Operations, Decision Record, and Environmental Assessment

On September 11, 1984, Energy Fuels Nuclear, Inc. ("EFN") submitted a plan of operations to BLM for uranium exploration activities at AZ1. *Id.* 36 ¶ 9. BLM approved that plan on October 4, 1984, after a review during which BLM prepared a decision record (DR-84-165) based upon an environmental assessment (81-208). *Id.* EFN subsequently submitted a mining Plan of Operations for AZ1 in January of 1988 for ore extraction and mining activities (the "AZ1 MPO"). *Id.* BLM approved the AZ1 MPO in a decision record (AS-010-88-004) dated May 9, 1988 (the "Decision Record") based upon an environmental assessment (AZ-010-88-004A) dated May 9, 1988 (the "EA"). *Id.*; SER 59 ¶¶ 5-6. The Decision Record was not challenged or appealed.

The EA relied upon scientific studies, data, and reports that relate specifically to AZ1 and its impacts on the environment. SER 59-60 ¶¶ 6-8, 242-514. These studies included, among other materials: "Radiological Assessment of the Arizona 1 Project," Dr. John M. McKlveen – Radiation and Environmental Monitoring, Inc. (Jan. 1988); "Hydrologic Evaluation of the Proposed Arizona 1 Uranium Mine," Eneco Tech, Inc. (Jan. 1988); "Air Quality Impact Analysis of the Arizona 1 Mine," Eneco Tech, Inc. (Jan. 1988); and, "Potential Impacts of Mining

on Ground Water Resources – Arizona 1 Mine Site," Canonie Environmental Services Corporation (Jan. 1988). ER 498-99; SER 242-514. The Center did not, and has never, challenged the conclusions of, or data, in any of these studies, which evaluated the impacts of AZ1 to air, groundwater, soil, and human health.

The EA also relied upon several existing BLM authorities, including the Pinenut Environmental Assessment and Decision Record; Hermit Environmental Assessment, Appendix Document, and Decision Record; and IBLA Decision in the Southwest Resource Council Administrative Appeal (IBLA 86-1217, 96 IBLA 105, Mar. 10, 1987). ER 498-99. The Center also did not, and has never, challenged the validity or conclusions of any of these documents and authorities.

The Air Permit

On August 31, 2009, the Arizona Department of Environmental Quality ("ADEQ") issued Class II Air Quality Permit No. 46700 to Denison for AZ1 (the "Air Permit"). ADEQ issued the Air Permit after it conducted a thorough scientific evaluation of air impacts from AZ1 and completed a public participation process. The Air Permit authorizes Denison to construct and operate AZ1 pursuant to its terms and conditions, which require Denison to comply with all applicable state and federal air emissions requirements, including for radon, and ensure that Denison does not adversely impact the environment. SER 114-51. Denison is in compliance with the Air Permit, and there is no allegation to the contrary. *Id.* 36 ¶

16, 60 ¶ 14. The Center participated in the permitting process for the Air Permit, but never challenged its validity.

The Aquifer Protection Permit

On August 3, 1994, ADEQ issued Aquifer Protection Permit No. P-102008 for AZ1, which was amended on March 28, 2009 ("APP"). ER 247-72. The APP was issued after ADEQ conducted a thorough scientific evaluation of AZ1 and completed a public participation process. In addition to ADEQ, the APP was reviewed by BLM, EPA, the U.S. Fish & Wildlife Service, the Arizona Department of Water Resources, the Arizona Game & Fish Commission, the Arizona Land Department, Environmental Resource Unit, the Arizona Mine Inspectors Office, and the Mohave County Health Department. SER 239. As with the Air Permit, the Center participated in the APP permitting process, but never challenged its validity. Denison is in compliance with the APP. SER 36 ¶ 16.

The APP authorizes Denison to construct and operate AZ1 pursuant to its terms and conditions, which ensure that Denison does not adversely impact groundwater at AZ1. ER 247. Relevant to the Center's allegations, the APP requires Denison to dewater the mine sumps and working shafts to ensure minimum water accumulation. Denison is required to conduct permeability tests on rock samples from the bottom of the shaft, to ensure that permeabilities do not exceed prescribed levels. If they do, Denison is required to line the mine sumps

with bentonite clay, or otherwise seal any identified feature that may convey fluid out of the mine shaft. ER 249.

The only significant source of groundwater near the mine is the Redwall-Muav aquifer, which is at 3,000 feet below ground surface. The bottom of the mine shaft is at 1,600 feet below ground surface – 1,400 feet above the aquifer, through solid rock. ER 429-30; SER 240. When EFN conducted exploration borings at AZ1, it did not encounter any indication of groundwater in formations adjacent to the AZ1 breccia pipe at the depth of the mine shaft, or above that depth. SER 240. Nevertheless, the expert environmental agencies realized that there may be a possibility for some groundwater inflow into the shaft during operations, and thus required that such inflows be collected in AZ1's mine sumps and pumped to the collection pond, so as to pose no threat to groundwater in the area. *See id.*; ER 249.

Financial Assurance

Under BLM's regulations, Denison is required to maintain financial assurance for AZ1 in the form of bonds in the amounts of $377,800 and $255,785 in favor of BLM and ADEQ, respectively. These bonds cover the estimated cost to complete reclamation activities at the site (*i.e.*, removal of all structures, closure of the shaft, backfilling of waste rock, recontouring, and revegetation) should Denison be unable to do so. The financial assurance is up to date and maintained

by Denison. SER 2-3, 39 ¶ 39; *see* 43 CFR §§ 3809.500-.511.

Access to AZ1

AZ1 is in a remote location. *Id.* 45 ¶ 7, 42 ¶ 6; ER 521 (view of AZ1 from the west). To access it, employees must travel on State Highway 389, then turn onto Mt. Trumbull Road and travel for approximately 29.1 miles, and then turn onto a short unnamed, unpaved road for about 6.25 miles until reaching AZ1. SER 45 ¶ 8. The maintenance of Mt. Trumbull Road, an unpaved, county road, is the responsibility of Mohave County, Arizona. The County, however, does not perform regular or routine maintenance on the road. *Id.* ¶ 10; 42 ¶ 10. Therefore, prior to restarting active mining operations, Denison performed substantial road rehabilitation activities on Mt. Trumbull Road and the unnamed six mile access road to AZ1. *Id.* 45 ¶ 11. Denison spent approximately $165,000 performing these activities. Further, to ensure that employees and contractors can continue to access AZ1 on a daily basis, and consistent with the AZ1 MPO and Decision Record, Denison regularly performs maintenance on the access roads. Denison anticipates spending $355,000 annually to perform this work. *Id.* ¶ 12. Due to Denison's road work, its employees and contractors are able to travel safely on all of these access roads to AZ1, including Mt. Trumbull Road, on a daily basis. *Id.* ¶¶ 11-15, 48-57 (photographs depicting Denison's maintenance activities and the condition of the road), 42 ¶¶ 12-13, 68-69 ¶¶ 10-12.

California Condors

BLM evaluated whether AZ1 had any impact on endangered or threatened species in the EA. It found that no such species were present in the area. ER 441. The EA also states that there are no direct or indirect anticipated impacts to any threatened or endangered species or category one species as a result of operations at AZ1. *Id*. at 487. The Center alleges that AZ1 may impact California Condors, which were reintroduced in Northern Arizona in 1996. CtrBr. at 18-19. Denison's employees have never seen a Condor at AZ1, nor have they seen any carrion of large animals at the mine, which serve as food for Condors. SER 46 ¶¶ 19-20, 61 ¶¶ 20-21, 42 ¶¶ 13-14. The EA demonstrates that the environment at AZ1 is not suitable for the Condor. ER 441-42. A biological survey conducted on behalf of Denison in 2007 and 2009 for Denison's nearby EZ1/EZ2/WHAT mining project similarly found no sign of the Condor in or around that project.
SER 61 ¶ 16, 92-113.

Impacts of Injunction on Denison

EFN conducted active mining operations at AZ1 from 1988 to the early 1990s. Due to a severe drop in uranium prices, active mining operations were no longer supportable and EFN put AZ1 on inactive status. *Id*. 36 ¶ 10. Denison acquired AZ1, the Unpatented Mining Claims, and the AZ1 MPO from EFN and its affiliates in May 1997 in connection with a larger purchase of all of EFN's

portfolio on the Arizona Strip and other assets. *Id*. 35 ¶ 6, 37 ¶ 21. In approximately 2005, the price of uranium rebounded to a level that supported active mining operations at AZ1. Thereafter, Denison began active mining at AZ1 consistent with the plan and methods outlined in the AZ1 MPO. *Id*. 37 ¶ 18. Denison and EFN (whose investments Denison purchased) spent over $25,000,000 developing, permitting, and mining AZ1. *Id.* ¶ 22. Denison relied upon BLM's authorization of the AZ1 MPO when it acquired AZ1 and when spending its time, resources, and money returning the mine to active operations. Prior to doing so, Denison confirmed with BLM that the AZ1 MPO was valid. *Id*. ¶ 23.

Denison expects AZ1 to produce up to approximately 109,500 tons of ore and 850,000 pounds of uranium, and at current uranium prices, to generate in excess of $50,000,000 in revenue. *Id*. ¶ 24. If the Center is successful in obtaining an injunction, Denison may lose its investment in returning the mine to active operations, and the opportunity to obtain revenue (including the return of its investment) in excess of $50,000,000. *Id*. ¶ 25. Being unable to operate will also diminish the market value of the Unpatented Mining Claims significantly. *Id*. If enjoined and unable to obtain revenue, Denison would be forced to return AZ1 to inactive status. The ramp-down process is time consuming and costly. Denison expects it would cost approximately $925,000 to ramp down, and, in turn, would cost Denison approximately $850,000 in annual care and maintenance while AZ1

is inactive. If Denison loses its window of opportunity, it may never mine AZ1 and may lose its significant investment. *Id*. 38 ¶ 30.

Additionally, uranium production from AZ1 is critical for Denison to meet its contractual obligations to utilities over the next two years. *Id.* 37 ¶ 26. Denison is required to make these deliveries from U.S. production. *Id.* All of Denison's other U.S. production is contractually committed, and Denison has no other production available to replace production from AZ1 if an injunction is entered. *Id.* If Denison defaults, it may be subject to suit for contractual damages. *Id*. 38 ¶ 27. Further, if Denison defaults on a contracted delivery, its business reputation as a reliable supplier of uranium will be severely harmed, making it very difficult to obtain future uranium sales contracts. *Id*. ¶ 28. This would have a substantial, negative impact on Denison. *Id.*, *see also id*. 39 ¶ 38.

Denison employs thirty-seven people in Arizona either at or in support of operations at AZ1. *Id*. 38 ¶ 31. If forced to shut down, Denison would have to layoff most if not all of these employees, who thereby would be adversely impacted. *Id.* This would also have a negative impact on the local communities in Mohave County where AZ1 is located, and in nearby Kane County, Utah. *Id.*, 64 ¶ 8, 66 ¶ 2. Due to necessary layoffs, Denison also will likely lose some highly skilled employees. *Id*. 38 ¶ 31. Denison also has several contractors who perform work at AZ1. If forced to shut down, these contractors would not perform work

for Denison and would be negatively impacted. *Id.* ¶ 32. Further, if forced to shut down, Denison would pay less in federal, state, and local taxes. *Id.* ¶ 33. This would have an adverse impact on all levels of government and the local communities in the region. *Id.* 38 ¶ 33, 64 ¶ 8. Enjoining active mining operations at AZ1 would have several actual, substantial, negative impacts on Denison and the public. *Id.* 39 ¶ 38, 64 ¶ 8, 66 ¶ 2.

SUMMARY OF THE ARGUMENT

The Center has failed to establish any of the four factors to necessary to obtain injunctive relief. The Center failed to demonstrate that it is likely to suffer immediate, irreparable harm from operations at AZ1. Instead, it has proffered information about possible environmental impacts in the region from past mining operations generally, and speculates about possible impacts from AZ1 based on that information. That does not meet the Center's burden to obtain the extraordinary relief of shutting down Denison's business and putting people out of work. Such speculative harm also pales in comparison to the actual and immediate harm that would befall Denison, its employees and contractors, the local communities near AZ1 and its operations, and the public should an injunction be granted. Finally, as for the reasons set forth in the District Court's opinion and BLM's response brief, the Center has failed to show a likelihood of success on the merits.

STANDARD OF REVIEW

The Court reviews the denial of a motion for preliminary injunction for an abuse of discretion. Conclusions of law are reviewed *de novo*, while findings of fact are reviewed for clear error. If the District Court identified the correct legal standard, the Court must "determine if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010) ("[A]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.") (internal quotations and citations omitted).

Injunctive relief is extraordinary; to obtain it, the Center must establish that it is likely to succeed on the merits, that it will be irreparably harmed absent relief, the balance of harms tips in its favor, and an injunction is in the public interest. *Winter*, 129 S. Ct. at 375; *Alliance*, 613 F.3d at 964, 967-68.[5]

There is no presumption that an injunction is a proper remedy in environmental cases. Courts must determine that an injunction "*should* issue under

[5] As discussed in Section III.B, the Center did not argue below that the "serious question" test survived *Winter*, or that it met that test, and thus, has waived such arguments. In any event, as discussed herein, they have not satisfied either the traditional or "serious question" test.

the traditional four-factor test" in *Winter*. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 544-46 (1987). A violation of NEPA or FLPMA does not compel the issuance of an injunction. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995).

On the merits, when interpreting an agency's duly promulgated regulations pursuant to statutory mandate, the agency's interpretation of such regulations is controlling unless clearly erroneous. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Homes Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2010 U.S. App. LEXIS 16439, at *22 (9th Cir. Aug. 9, 2010). Deference under *Long Island* is warranted particularly when, as in this case, the agency's interpretation is contemporaneous with its promulgation and found in the preamble to the rule. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 797 (9th Cir. 2003); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 445-47 (4th Cir. 2003); *see Sierra Pac. Power Co. v. EPA*, 647 F.2d 60, 65-66 (9th Cir. 1981).

In determining whether BLM should have supplemented its NEPA documents, its decision must be upheld unless it is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78

(1989); *Conservation Cong. v. U.S. Forest Serv.*, 2010 U.S. App. LEXIS 5437, at *3, 12-13 (9th Cir. Mar. 16, 2010). This is a highly deferential standard under which BLM's actions are presumed valid, and under which the Center bears the burden of proof. *Lands Council v. Vaught*, 198 F. Supp. 2d 1211, 1237 (E.D. Wash. 2002) (citing *Preston v. Heckler*, 734 F.2d 1359, 1372 (9th Cir. 1984)).

ARGUMENT

I. The Center Has Not Demonstrated It Likely Will Suffer Irreparable Harm in the Absence of an Injunction.

To establish a likelihood of irreparable harm, the Center proffers the following: (1) documents discussing uranium levels in regional groundwater, surface water, and soils allegedly from past uranium mining in the region; (2) a Notice of Proposed Withdrawal issued by the Secretary of the Interior and statements from certain regional water authorities and local governments voicing their concerns about new mining on land in northern Arizona; (3) possible harm to California Condors because they live in the Arizona Strip region; (4) the alleged inability of tribal members to access sacred sites due to increased truck traffic and poor conditions on Mt. Trumbull Road; and, (5) materials regarding alleged harms to archeological sites and resources lodged under seal, which were not before the District Court when it denied the Center's motion. CtrBr. at 14-22.

The Center has presented no evidence of actual, immediate, irreparable harm to itself (or its members) from operations at AZ1. Instead, the Center asks the

Court to assume or infer a "likelihood of irreparable harm" from AZ1's operations based on information about the *possible* impacts to regional resources from uranium mining generally. The Center's proffer falls well short of the showing required for injunctive relief. *Winter*, 129 S. Ct. at 375-76 (the "'possibility' standard is too lenient . . . . Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). This is particularly true in light of the undisputed fact that AZ1 is in compliance with its permits and applicable standards designed to ensure the protection of environmental and cultural resources, and that all the evidence and scientific studies *specific to AZ1* demonstrate that its operation has no significant impact on human health and the environment.

A. Groundwater and Surface Water

The Center claims that AZ1 is likely introducing radioactive pollution into the Grand Canyon and the groundwater that feeds the Colorado River. CtrBr. at 15-18. To support this claim, the Center relies on a United States Geological Survey ("USGS") report, statements by the National Park Service ("NPS"), and statements and papers by university professors and students. *Id*. None of these documents evaluate, or even purport to evaluate, discharges, if any, from AZ1 to

any water source. Instead, the Center cites these sources for the general proposition that breccia pipes can act as pathways for the downward migration of perched surface and groundwater, and that digging into breccia pipes might mobilize uranium and cause it to be carried to aquifers that eventually discharge into seeps and springs. *Id*. at 15. The Center provides no information tying this general proposition to AZ1. It relies upon a quote from the USGS stating that fifteen springs and five wells in the *region* contain uranium concentrations above EPA drinking water standards and that such levels are related to historic mining processes. *Id*. at 16-17.

The value of this information is limited, if not irrelevant, when determining whether the Center will suffer immediate, irreparable harm based on operations at AZ1. In particular, the USGS report is based on historic groundwater data and a few samples taken during 2009 in some areas of the Arizona Strip (*i.e.*, the region of northern Arizona above the Colorado River). ER 218. As the Center is aware, active mining did not start at AZ1 until December 2009. *See* CtrBr. at 6, 9-10, 29-30. Thus, the USGS report does not, and could not, establish immediate irreparable harm to groundwater from AZ1. More important is the report's language regarding its conclusions and usefulness; the report states that the data analyzed are only good for: "evaluating the effects of legacy mining in the region; providing baseline information for uranium in groundwater; and comparing

subbasin mining activities in the Kanab Creek Basin in northern Arizona." ER 218. It makes no conclusions regarding possible impacts to groundwater from AZ1. Indeed, the report concludes: "Observation of groundwater-chemistry relations between concentration and mining condition (no mining activity, active mines on standby, or reclaimed mine areas) *were limited and inconclusive*." ER 219 (emphasis added). One cannot make a finding that irreparable impacts are imminent when the report relied upon admits its findings on the relationship between groundwater conditions and mining activities are "limited and inconclusive," particularly when the report did not evaluate the mine in question.

The Center's claims become even more speculative when held up against the fact that Denison is operating under, and is in compliance with, the APP, which is designed to ensure that AZ1's operations do not adversely impact groundwater. ER 247; SER 36 ¶ 16, 45 ¶ 5, 60 ¶ 10. In particular, the issue the Center is raising (*i.e.*, the potential seepage of perched groundwater from mines to aquifers and seeps and springs) was considered by ADEQ, EPA, and a host of other expert agencies when crafting and approving the APP. SER 239-41. Those agencies found that the only significant source of groundwater near the mine is the Redwall-Muav aquifer, which is at 3,000 feet below ground surface. The base of the mine shaft is 1,600 feet below ground surface—1,400 feet of solid rock above groundwater. SER 239-41; ER 477-79. Indeed, exploration borings at AZ1 did

not encounter any indication of groundwater in formations adjacent to the AZ1 breccia pipe at the depth of the mine shaft and above that depth. SER 240-41; ER 481. If there is little to no water in the area to inflow into the mine to be perched, the risk of such water seeping down through unidentified cracks and into local water sources is minimal at best.[6] SER 481 ("[t]otal inflow into the mine is expected to be low," and limited to "water trapped in fractures and voids within the [breccia] pipe throat"), 484 (describing mine operations as a "zero seepage condition" because any water from factures and voids that drains into the mine is pumped out, and the factures and voids dry up quickly because they "do not receive any recharge from outside the breccia pipe").

Nevertheless, the expert agencies realized the possibility for some groundwater inflow into the shaft during operations, and that such inflow could be perched and might make its way to water sources in the area. SER 240-41. Therefore, the APP requires Denison to collect any such inflow in the mine sumps and to pump it to the collection pond to ensure minimum water accumulation in the

[6] These conclusions are consistent with BLM's conclusions regarding potential impacts to groundwater from AZ1 in the EA. BLM concluded that the potential for any direct impacts to groundwater was "negligible," and that because of the impermeable strata separating the base of AZ1 from groundwater and seepage rates, any indirect impact was "insignificant." ER 477-79 (estimating that it would take from 2,300 to 82,000 years for water to seep through the 1,400 feet of impermeable strata between AZ1 and groundwater). The findings in the EA were never challenged.

mine shaft, thereby eliminating any threat to water sources in the area. *See id*. Further, Denison is required to conduct permeability tests on rock samples from the bottom of the shaft, to ensure prescribed levels of permeability are not exceed. If they are, Denison is required to line the mine sumps with bentonite clay, or otherwise seal any identified feature that may convey fluid out of the mine shaft. ER 249.[7]

The Center's reliance on a quote from the USGS report that "unsurprisingly" found elevated uranium concentrations on mining property on the Kanab plateau is likewise of limited value when evaluating impacts from AZ1. *See* CtrBr. at 17. The samples for these concentrations were not taken from AZ1, but instead were from *inside the mine shaft* of a mine more than fifty miles away from AZ1. ER 206, 212.

The Center makes reference to a passage in the USGS report regarding the prevailing winds in the region and the possibility of impacts from radioactive dust emissions. CtrBr. at 18 (citing ER 172). In addition to being a general statement about dust emissions in the region, this passage is about dust from closed mines,

[7] The NPS document cited by the Center regarding breccia pipes asserts the need for further study regarding groundwater impacts from mining, but like the USGS report, does not demonstrate immediate, irreparable harm from AZ1, much less even address AZ1. Instead, it provides general information regarding groundwater pathways and the potential movement of uranium. The same is true for the cited statements from university teachers and students.

not AZ1. *Id.* In addition, the report's conclusion is contrary to BLM's findings regarding such emissions from operations at AZ1. ER 481-82 (finding that radioactive dust emissions at AZ1 were less than the natural airborne releases from uncontrolled facilities, and on the order of 600 times less than the emissions limit in a comparable radioactive emissions regulations; "In summary there would be no significant radiogenic impact on the environment from the release of radon gas or dust from the mine site."). Further, AZ1's Air Permit prescribes emission limits for radon, particulate matter, and fugitive dust emissions from on-site and mobile sources, and Denison is in compliance with such requirements. SER 36 ¶ 16, 134-36, 138, 142-45.

Ultimately, the information relied on by the Center regarding potential regional impacts to ground and surface water is general and, by its own terms, speculative and inconclusive. It provides no information regarding impacts from AZ1.[8] This is not enough to carry the Center's burden, particularly in light of AZ1's compliance with applicable state and federal standards, including the APP,

[8] Thus, the Center's citation to passages from the USGS report and a University of Nevada-Las Vegas professor's paper regarding potential impacts from the Hack, Orphan, Pigeon, Pinenut, and Kanab North mine likewise provide no information about impacts from AZ1. As the Center notes, these mines closed long ago, and as such, were not subject to current environmental law. Further, elevated levels of uranium near mines do not necessarily imply contamination due to mining activities, but could very likely be due to natural background levels of uranium, which is typically elevated in such areas. *See* ER 436 (discussing natural levels of uranium in the air, soils, and water on the Arizona Strip)

which is designed to protect against precisely the harm the Center is claiming. *Winter*, 129 S. Ct. at 375-76 (a possibility of harm is not enough; irreparable injury must be *likely* without an injunction); *O'Shea v. Littleton*, 414 U.S. 488, 500-02 (1974) (no injunction to prevent the possibility of some remote future injury); *Solidus Networks, Inc. v. Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("[S]peculative injury cannot be the basis for a finding of irreparable harm."); *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief."); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (movant must point the Court to specific events or occurrences, not generalities).

B. Notice of Proposed Withdrawal and Other Concerns About Uranium Mining in the Region.

The Center claims that it will suffer immediate irreparable harm because there "is widespread concern" regarding impacts to the region and the Grand Canyon National Park from uranium mining. CtrBr. at 19-21. Concern by others for an issue cannot demonstrate a likelihood of immediate, irreparable harm to the Center. Nevertheless, the Center cites, among other things, the Secretary of the Interior's Notice of Proposed Withdrawal ("Notice"). The Notice makes no

mention of AZ1 or its potential impacts on the environment. 74 Fed. Reg. 35,877 (July 21, 2009). Instead, the Notice is "subject to validly existing rights," including Denison's right to operate AZ1. *Id.* This is consistent with the fact that the Notice is merely a proposal to withdraw certain federal lands from new, future hardrock exploration and mining claims (not solely claims related to uranium mining) currently being considered by the Department of the Interior, and does not yet represent the agency's position about future exploration or mining on the Arizona Strip, much less about impacts from AZ1 or any other mine. *Id.*[9]

The Center's citation to the "voiced concerns" of water authorities in Nevada and California also provides no information regarding impacts from AZ1.[10] Those authorities merely asked the Secretary of the Interior to allow a full public process evaluating the environmental impacts of new uranium mining that might be authorized by the Secretary in the future in or near locales within their watersheds. CtrBr. at 20 (citing ER 277). The Secretary obliged them in the Notice.

Proposals regarding whether to allow new mining claims on the Arizona

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[9] While the Department of the Interior considers this proposal, however, no new mining claims will be approved in the areas subject to the proposed withdrawal. 74 Fed. Reg. 35,877.

[10] The comments from and actions by local government officials also provide no information regarding impacts from AZ1; they merely voice concerns or declare

Strip, voiced concerns, and political positions taken by third-parties do not provide support for the Center's claim of immediate, irreparable harm from AZ1, an existing mine that would not be subject to the terms of the Notice, even assuming it was not a mere proposal.

C. California Condor

The Center claims that AZ1 is likely to irreparably harm the California Condor. To support this claim, it states that: the Fish & Wildlife Service reintroduced the Condor into northern Arizona in 1996; the Condor's range includes the region in which AZ1 is located; Condors are known to be attracted to construction activities; and, Condors are harmed by the consumption of contaminated mining waste water and carrion. CtrBr. at 18-19. As with the rest of their evidence, nothing cited demonstrates that AZ1 itself is causing immediate and irreparable harm to Condors, much less to the Center. Instead, they relay the general concerns about Condors and mining, including the thoughts of a biologist about possible threats to Condors at another mine. *See* ER 399 (stating that the biologist "feel[s] as though the area of the Orphan Mine poses a threat to the California condor"); CtrBr. at 19.[11] Ultimately, as with its arguments regarding

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positions on a withdrawal of certain lands subject to the nation's mining laws. CtrBr. at 21 (citing ER 233, 289, 294-95).

[11] The Orphan Mine is located near a cliff face, the Condor's ideal habitat, on the South Rim of the Grand Canyon, approximately fifty overland miles southeast of AZ1.

impacts to ground and surface water, the Center's information, construed liberally, shows only that impacts to Condors from a mining operation are possible. But a possibility of harm does not meet the Center's burden to show that irreparable harm from AZ1 is likely. *Winter*, 129 S. Ct. at 375-76; *see supra* cites at 25.

The Center's allegation that AZ1 is irreparably harming Condors is inconsistent with the AZ1-specific evidence before the Court. That evidence demonstrates that no Condors have been seen at AZ1, have not been injured there, and that the mine site does not contain Condor habitat or food. Specifically, Denison employees that work at AZ1 on a regular basis have never seen Condors or carrion there. SER 42 ¶¶ 13-14, 46 ¶¶ 19-20, 61 ¶¶ 18-21.[12] Further, Denison conducted a biological survey in the area near AZ1, which concluded that there were no protected species, including the Condor, in the area. *Id*. 61 ¶ 16, 92-113.

Without more, the Center's "conclusory allegations [based on mere possibilities] are insufficient to establish irreparable harm." *Solidus Networks*, 502 F.3d at 1099; *see Winter*, 129 S. Ct. at 375-76.

D. Mt. Trumbull Road

The Center claims its members suffer irreparable harm due to an inability to access sacred sites. This claim is based on alleged increased truck traffic and

[12] The absence of carrion at AZ1 makes sense given that the site is surrounded by a fence, with access controlled at a single gate. SER 36 ¶ 17.

alleged poor road conditions on Mt. Trumbull Road. CtrBr. at 21-22. Mt. Trumbull Road is a 29.1 mile unpaved, dirt county road. Because Mohave County does not perform regular maintenance on it, Denison does, as the road is the sole access to AZ1. SER 42 ¶ 11, 45 ¶¶ 7-10. Prior to restarting active mining, Denison spent $165,000 to rehabilitate the road, and it spends approximately $355,000 annually to maintain it. SER 45 ¶¶ 11-12. Due to Denison's maintenance activities, its employees and contractors are able to pass the entire road on a daily basis. *Id*. 42 ¶¶ 7-12, 46 ¶¶ 13-14; 61 ¶ 24, 68-69 ¶¶ 9-12. Pictures of the road in both temperate and inclement weather also demonstrate that the road is maintained in good condition. SER 45 ¶ 9, 48-57. The evidence shows that Denison's activities have made the road better, not worse, and that it is a passable county road.

Regarding traffic, there are twelve daily round trips by trucks hauling ore from AZ1 to Denison's processing facility in Utah. CtrBr. at 22. This is three times *less* than the number of daily round trips evaluated by BLM in the EA, which BLM found to create no significant impact to human health and the environment. *See* ER 473 (allowing 36 daily round trips). The Center has produced no evidence demonstrating a significant impact due to this traffic.[13] Traffic (if a few additional

[13] The Center cites to certain declarations suggesting that historic uranium mining in the region has left Native Peoples fearful of uranium mining, and that current mining creates fears of radioactive contamination in the area. CtrBr. at 22 (citing

trucks on a 29 mile road can be considered traffic) is at most an inconvenience, not irreparable harm. *W. Ala. Quality of Life Coal. v. FHA*, 302 F. Supp. 2d 672, 684 (S.D. Tex. 2004) (temporary impacts from project, including traffic, are "inconveniences," not irreparable harm); *Park County Res. Council v. BLM*, 638 F. Supp. 842, 846 (D. Wyo. 1986) (traffic is a minor inconvenience, not irreparable harm).

E. Post-Decision Materials Lodged Under Seal

On July 20, 2010, the Center filed a motion to seal certain materials lodged with this Court pertaining to alleged harms to archeological sites and resources. (Dkt.10). This Court granted that motion in part, directed the Clerk to lodge the materials under seal, and permitted BLM to lodge materials responsive to the materials lodged by the Center. All lodged materials were referred to this panel for whatever consideration it deems appropriate. (Dkt.26). In its Opening Brief, the Center stated that "[a]dditional irreparable harms to archeological resources and sacred sites from Arizona 1 have recently come to light," and directed the Court to its materials lodged under seal. CtrBr. at 22 n.3. The Center has filed no argument supporting this claim of irreparable harm.

Under Federal Rule of Appellate Procedure 10(a) and Circuit Rule 10-2, the

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ER 75-76, 80, 88). BLM fully evaluated the radiological effects of AZ1 in the EA, including possible impacts related to hauling ore by truck, and concluded there would be no significant impact therefrom. ER 436-38, 480-86.

Court should afford the Center's materials lodged under seal no consideration. It is undisputed that these materials were not presented to the District Court when it made its decision that is the subject of this appeal. Instead, they were submitted to the District Court nearly a month after it denied the Center's Motion for Preliminary Injunction, and two days after it filed its notice of appeal.[14] (DCDkt.81). As such, they should not be considered part of the record on appeal. *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077-78 (9th Cir. 1988) ("Papers submitted to the district court *after* the ruling that is challenged on appeal should be stricken from the record on appeal."); *see United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979) (same); *Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 594 (9th Cir. 2002) (following *Krishner* and holding that only documents actually "filed with the district court" are part of the record on appeal; striking from the record on appeal portions of depositions not actually filed with the district court); *Morrison v. Hall*, 261 F.3d 896, 900 n.4 (9th Cir. 2001) (following *Walker* and denying request to enlarge appellate record with material not filed with district court).

To the extent the Court considers the Center's lodged materials, Denison urges the Court to find any allegations of harm to archeological sites and resources refuted by the materials lodged by BLM.

[14] The Center did not seek reconsideration based on these materials.

II. The Balance of the Harms and Public Interest are Squarely in Denison's Favor.

A. The Balance of Hardships Favors Denison.

Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S. Ct. at 376 (citation omitted). Here, in determining whether to grant injunctive relief, the Court must balance (1) the Center's claim of harm, which is based on possible regional harms to the environment from historic mining activities at other sites and requires the Court to speculate as to what impacts to the environment and the Center, if any, are occurring based on current operations at AZ1, with (2) the significant and undisputed adverse financial, contractual, reputational, property rights, and other harm that injunctive relief will have on Denison, its employees, contractors, and the local communities, particularly in light of the uncontroverted scientific studies, reports, permits, and evidence demonstrating AZ1 is not harming the Center or the environment. *See id*. (finding it "pertinent" to the balancing test that defendants' activity is not new, and the environmental impacts therefrom are not unknown or unstudied). The balance of hardships tips sharply in Denison's favor.

Injunctive relief will have serious financial, contractual, reputational, property rights, and other impacts on Denison, which has spent considerable time and resources acquiring, permitting, developing, and operating AZ1. To date,

Denison and its predecessor have spent in excess of $25,000,000. SER 37 ¶ 22. Denison relied upon BLM's authorization of the AZ1 MPO when acquiring, developing, and permitting AZ1. *Id*. ¶ 23. AZ1 should produce up to approximately 109,500 tons of ore and 850,000 pounds of uranium, which will provide a return in excess of $50,000,000 in revenue. *Id*. ¶ 24. If the Court enjoins Denison's operations, Denison will be forced to shut down AZ1 and return the mine to inactive status. Denison will incur approximately $925,000 to perform this task, and it will cost Denison approximately $850,000 per year to care for and maintain AZ1. If an injunction is issued, Denison will also lose the opportunity to capitalize on current uranium market prices and generate revenue. *Id*. 37-38 ¶¶ 25, 29-30. If Denison loses its window of opportunity, it may never mine AZ1 and may lose its significant investment. *Id*. 37, 39 ¶¶ 25, 36.

If forced to return the mine to standby status, Denison will also be forced to layoff most, if not all, of its thirty-seven employees connected with operations at AZ1. In doing so, Denison will most likely lose these experienced, trained individuals to the marketplace. This will harm Denison because it will lose institutional knowledge and skilled employees, and will have to expend resources to hire and train new employees if and when AZ1 returns to active operations. *Id*. 38 ¶ 31. As discussed below, this will have significant impacts on the employees, their families, and the communities in which they live.

Additionally, production from AZ1 is critical for Denison to meet its contractual obligations to deliver uranium to electric utilities over the next two years. *Id.* 37 ¶ 26. Denison is required to make these deliveries from U.S. production, and may be forced to default on its contractual obligations if production from AZ1 is not available. *Id.* All of Denison's other U.S. production is contractually committed, and Denison has no other production available to replace production from AZ1 if an injunction is entered. *Id.* If Denison defaults on a contracted delivery, it may be subject to lawsuits for damages, and it will suffer reputational harm, making it difficult to obtain future uranium sales contracts. This would have a substantial, negative impact on Denison. *Id*. 37-38 ¶¶ 26-28, 38.

The actual harm to Denison outweighs the speculative harm alleged by the Center. The harm to Denison is real, looming, and is more than merely financial. This harm is irreparable; Denison faces the loss of valuable human resources, property rights, the value of and ability to exercise those rights, and damage to its reputation with no viable means of repairing such harms. Conversely, the Center has presented the Court with mere possibilities and sheer speculation regarding potential regional impacts. Its alleged harms are general complaints about potential impacts from historic uranium mining generally – not specific and likely injuries to them or the environment that is attributable to AZ1. Moreover, the

Center's allegations of harm are rebutted by scientific studies relied upon in the EA that specifically address all impacts from AZ1.[15] The Center has not challenged the conclusions of or data in any of these studies. Further, it has not challenged or alleged a violation of the APP, which contains requirements that ensure AZ1 is not adversely impacting groundwater. Nor has it introduced evidence to rebut Denison's and BLM's evidence that Condors are not being, and have not been injured by operations at AZ1. The studies, permits, and evidence demonstrate that there is no harm to the Center or the environment. The balance of hardships tips sharply in Denison's favor. *See Amoco Prod.*, 480 U.S. at 545-46 (significant and likely unrecoverable financial losses to oil company tips balance of harm in favor of defendant-company); *see also Lands Council v. McNair*, 537 F.3d 981, 1004-05 (9th Cir. 2008) (following *Amoco* and finding that balance of the harms did not tip sharply in movant's favor when a timber company would be forced to layoff twenty-seven employees, there would be economic harms to the local community, and the public also had an interest in many benefits from the project, including preventing job loss).

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[15] SER 242-514 ("Radiological Assessment of the Arizona 1 Project", Dr. John M. McKlveen – Radiation and Environmental Monitoring, Inc. (Jan. 1988); "Hydrologic Evaluation of the Proposed Arizona 1 Uranium Mine," Eneco Tech, Inc. (Jan. 1988); "Air Quality Impact Analysis of the Arizona 1 Mine," Eneco Tech, Inc. (Jan. 1988); and, "Potential Impacts of Mining on Ground Water Resources – Arizona 1 Mine Site," Canonie Environmental Services Corporation (Jan. 1988)).

B. Mining at AZ1 is in the Public's Interest.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-77 (citations omitted). In this case, continued mining at AZ1 is in the public's interest.

Denison employs thirty-seven people in Arizona either at or in support of AZ1. SER 38 ¶ 31. If forced to shut down, Denison would have to layoff most if not all of these employees, who would be adversely impacted, along with their families. *Id.* Denison also has several contractors who perform work at AZ1. If forced to shut down, these contractors would not perform work for Denison and would be negatively impacted, along with their families. *Id.* ¶ 32. This would have a negative economic and social impact on the local communities in Mohave County, and nearby Kane County, Utah.

If forced to shut down, Denison would pay less in federal, state, and local taxes. These consequences would have an adverse impact on all levels of government and to local communities. *Id.* ¶¶ 31-33; 64 ¶ 8, 66 ¶ 2. It also may prevent Denison from meeting its contractual obligations to deliver uranium from U.S. production to utilities, which in turn may adversely affect the supply of power, contrary to the public interest. SER 37-38 ¶¶ 26-28. Similarly, enjoining mining and reducing the domestic production of uranium will have adverse effects

on national security. *See* SER 38 ¶ 28, 70-71. Likewise it would interfere with the public's interest in mining, which is embodied by Congress's determination that federal lands be "managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber." 43 U.S.C. § 1701(7), (8), (12). *Amoco Prod.*, 480 U.S. at 545-46 (the public's interest in oil exploration on federal lands was not superseded by an environmental statute, particularly when the exploration statute, like FLPMA, provided mechanisms to reconcile exploration with competing environmental interests). The public interest does not favor an injunction. *Winter*, 129 S. Ct. at 376-77; *Lands Council supra*.

III. The Center Has Not Shown a Likelihood of Success on the Merits.

A. BLM's Interpretation of its Regulations is Controlling.

BLM's interpretation of its Part 3809 regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Homes Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2010 U.S. App. LEXIS 16439, at *22 (9th Cir. Aug. 9, 2010). The Center conceded the applicability of this standard before the District Court,[16] but now claims that BLM's interpretation of its regulations is a *post hoc* rationalization, and thus deserves no deference. CtrBr. at 35-36. The Center is wrong, and the cases it cites are inapplicable.

BLM's interpretation that an MPO does not automatically terminate upon the suspension of active mining was not first articulated in response to the Center's lawsuit. BLM interpreted its Part 3809 regulations contemporaneously with their promulgation. *See, e.g.*, 65 Fed. Reg. 69,998, 70,053 (Nov. 21, 2000) (rejecting comments that MPO's should have set durations and stating that a "plan of operations is good for the life of the project as described in the plan"). Courts regularly defer to contemporaneous interpretations set forth in preambles. *Sierra Pac. Power Co. v. EPA*, 647 F.2d 60, 65-66 (9th Cir. 1981); *see also Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 446-47 (4th Cir. 2003). BLM's interpretation in 2000 is consistent with its position taken upon the first promulgation of its Part 3809 regulations in 1980. 45 Fed. Reg. 78,902, 78,909 (Nov. 26, 1980).

Even if BLM's interpretation of its regulations first came in the form of a brief in this case (and it does not), it would still warrant deference under *Long Island* because the Center has provided no reason to suggest (and there is none) that the interpretation does not reflect BLM's fair and considered view of the regulations, and not some *post hoc* rationalization. *Long Island*, 551 U.S. at 171

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[16] *See Ctr. for Biological Diversity v. Salazar*, No. 09-8207, Transcript at 15-16 (June 11, 2010) ("Transcript") (DCDkt.92).

(following *Auer v. Robbins,* 519 U.S. 452, 462 (1997)); *see Home Builders*, 2010 U.S. App. LEXIS 16439, at *22.

The Center's reliance on *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance*, 463 U.S. 29 (1983), and *National Ass'n of Homebuilders v. Norton*, 340 F.3d 835 (9th Cir. 2003), is misplaced. Both cases involve an agency's attempt in its litigation brief to avoid a finding that it was arbitrary and capricious because it did not articulate a rational connection between the facts found and the choice made in a decision document. *See, e.g.*, *McFarland v. Kempthorne*, 545 F.3d 1106, 1112-13 (9th Cir. 2008). There is no such claim here; this is a failure to act case, not an arbitrary and capricious agency action case. *See* Center's Reply Brief in Support of Motion for Preliminary Injunction at 3, 12 (asserting that its FLPMA and NEPA claims are "failure to act" claims) (DCDkt.66). Thus, *Motor Vehicles* and *Norton* have no application here.

The District Court properly deferred to BLM's interpretation of its own regulations, and it should be affirmed.

B. The Center Waived Application of the Serious Questions Test, and in Any Event, Has Not Satisfied It.

The Center also claims that the District Court erred by not assessing whether the Center raised "serious questions" on the merits. CtrBr. at 26-27 (citing *Alliance*, 613 F.3d at 967-68). Unlike the litigants in *Alliance*, the Center never argued that the "serious question" test survived *Winter*. Further, as the District

Court stated in its denial of the Center's Motion for Injunction Pending Appeal: "Plaintiffs did not ask the Court to apply the 'serious questions' test" and "have not sought reconsideration of the Court's preliminary injunction based on the 'serious questions' standard after *Alliance for the Wild Rockies*, nor do they argue that the standard should be applied in deciding whether to enter an injunction pending appeal." (DCDkt.102). Having failed to raise this argument below, it is waived. *Ritchie v. United States*, 451 F.3d 1019, 1026 n.12 (9th Cir. 2006).

Even assuming the Court entertains the Center's untimely *Alliance* argument, the "serious question" test does not help them. Initially, under that test the Center must still establish a likelihood of irreparable harm. *Alliance*, 613 F.3d at 964-65, 968 (applying *Winter*). As discussed, the Center has made no such showing, and thus, the Court's inquiry is at an end. Further, because the Center's claim of harm is based on speculation and assumptions, and the harms to Denison, its employees, contractors, and local communities are real, serious, and immediate, the balance of the harms does not tip in their favor, much less "sharply" in their favor. *Id*. at 965, 970. Finally, the Center does not raise "serious questions" on the merits.

The Center does not argue that it raised a serious question on its NEPA claim, CtrBr. at 27, and thus, that argument is waived. As to its FLPMA claim, the Center's assertion that it raised a serious question is based on a couple of isolated

statements made by the District Court. *Id*. Ultimately, however, the District Court agreed with BLM's interpretation of its regulations, and held that because the regulations were ambiguous on the question presented, BLM's interpretation was controlling because it was not clearly erroneous or inconsistent with the regulations. ER 6-7 ("the Court finds BLM's interpretation to be consistent with the regulations as a whole and BLM's original intent" of the regulations, and "does not find that BLM's interpretation of the mining regulations is plainly erroneous or inconsistent with the regulations. BLM's interpretation therefore controls").

Because the regulations are ambiguous on the question presented and the Court must defer to BLM's interpretation "unless plainly erroneous or inconsistent with the regulations," the Center has a difficult task to raise a "serious question." Indeed, the Center makes no real attempt to do so; instead, it argues that the "controlling unless clearly erroneous" standard does not apply because, it claims, the plain language of BLM's regulations "is not ambiguous." CtrBr. at 36. As noted, however, the Center conceded the applicability of the "controlling unless clearly erroneous" standard before the District Court and should not now be heard to argue that BLM's regulations are unambiguous. *See* Transcript at 15-16. In any event, the Center is incorrect; the District Court's discussion of BLM's regulations makes clear that on the issue presented the regulations are not clear. ER 5-7.

The District Court's thoughtful and comprehensive analysis of BLM's

regulations demonstrates that BLM's interpretation is not plainly erroneous or inconsistent with the regulations. *Id*. 3-8. The Center has not demonstrated otherwise. It merely proffers its own interpretation of the regulations. CtrBr. at 28-24. The Center's interpretation of BLM's regulations, however, is irrelevant under *Long Island*; the focus of the inquiry is solely on the validity of the agency's interpretation.

To avoid duplication, Denison hereby incorporates by reference BLM's arguments on the merits in their response brief addressing the Center's FLPMA and NEPA claims.[17]

IV. Even Assuming BLM Violated NEPA, the Court Should Not Enjoin Denison if it Finds that the AZ1 MPO is Valid.

The requirements of NEPA apply to the actions of federal agencies, not private parties. 42 U.S.C. § 4332. For that reason, typically "the federal government is the only proper defendant in an action to compel compliance with NEPA." *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1105 (9th Cir. 2007). In turn,

[17] Denison notes that the Center's construction of BLM's regulations would produce the absurd and unfair result that any time active mining was temporarily suspended, even for a very short period, the MPO would terminate, thereby necessitating an entire new approval process. There is no evidence that BLM ever intended such a result, and it should be rejected. *Lubke v. City of Arlington*, 455 F.3d 489, 496 (5th Cir. 2006) (rejecting reading of regulations that produced absurd results); *Maceren v. Dist. Dir., INS*, 509 F.2d 934, 941 (9th Cir. 1975) (rejecting interpretations that produce unjust, unreasonable, or absurd results); *see Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) (absurd results should be avoided if interpretations consistent with the intent of the drafter are available).

the use of a court's injunction power typically is limited to enjoining the actions of federal agencies. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992) (affirming denial of an injunction against a nonfederal party under NEPA); *Biderman v. Morton*, 497 F.2d 1141, 1147 (2d Cir. 1974).

Nonfederal parties, however, can be enjoined under NEPA in three limited circumstances: (1) federal involvement in a nonfederal project is so interrelated that the nonfederal project constitutes a single project for purposes of NEPA, (2) a nonfederal actor receives federal funds, or enters into a partnership or joint venture with a federal agency, or (3) a nonfederal permit applicant cannot proceed without prior approval from a federal agency, and that agency unlawfully gave approval due to a NEPA violation. *Fund for Animals*, 962 F.2d at 1397 (citing, among other cases, *Biderman*). After an agency has properly approved a nonfederal actor's authorization request under NEPA and the applicable substantive law, the nonfederal party cannot be enjoined from undertaking the authorized activity, even if additional NEPA action is required in the future. *See North Carolina v. City of Va. Beach*, 951 F.2d 596, 604-05 (4th Cir. 1991) (reversing grant of injunction preventing construction over portions of a project properly approved by the U.S. Army Corps of Engineers, despite the fact that FERC had yet to conduct its NEPA review over other portions of the project).

In this case, if the Court finds that the AZ1 MPO is valid under BLM's

regulations, it is undisputed that Denison has the proper approval and authority from the relevant federal agency to proceed with operations at AZ1. This approval was granted in 1988 and its validity was unchallenged. Thus, this case is unlike the cases in which a nonfederal permit applicant is enjoined from proceeding with its project because the necessary permit it obtained from a federal agency was invalid due to a NEPA violation. In those cases, the reason courts enjoin the nonfederal party from proceeding due to a federal agency NEPA violation is because "they obviously would be acting unlawfully and [otherwise] subject to injunction." *Biderman*, 497 F.2d at 1147.

In cases like this one, however, if the AZ1 MPO is valid, BLM no longer has "go-ahead" power over Denison's actions. BLM exercised its "go-ahead" power when it approved the AZ1 MPO in 1988.[18] To be sure, BLM has authority to ensure that Denison is complying with the terms of the AZ1 MPO and BLM's regulations. 43 CFR §§ 3809.600-.605. But nothing in BLM's regulations, FLPMA, or NEPA gives BLM or this Court the power to stop Denison from operating under, and in compliance with, its valid AZ1 MPO based on a violation of NEPA committed by BLM. At most, assuming BLM violated NEPA for failing to supplement its EA, and assuming BLM found and subsequently determined that

[18] *Biderman*, 497 F.2d at 1147-48 (labeling the authorization a nonfederal party must obtain from a federal agency prior to proceeding with a project "go-ahead" power).

Denison's operations presented the possibility of producing unnecessary or undue degradation of public land, BLM could require Denison to modify the AZ1 MPO to prevent such unnecessary or undue degradation. *Id*. § 3809.431(b).

Therefore, Denison may lawfully proceed with its mining project under its valid AZ1 MPO regardless of whether BLM violated NEPA by not supplementing its EA. *Fund for Animals, Inc.*, 962 F.2d at 1397 (refusing to enjoin nonfederal party because the pre-conditions to apply a NEPA injunction to a nonfederal party were not met); *Biderman*, 497 F.2d at 1148 & n.19 (absent the pre-conditions for NEPA injunctive relief, and any other federal "go-ahead" power, an injunction for a NEPA violation will not issue against a nonfederal party; the nonfederal defendants "remain outside the ambit of federal injunctive relief").

CONCLUSION

For the forgoing reasons, the Court should affirm the District Court's denial of the Center's Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED this 21st day of September, 2010.

GALLAGHER & KENNEDY, P.A.

By:/s/ Bradley J. Glass

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CERTIFICATE OF COMPLIANCE

I certify that this brief of Defendant-Intervenor-Appellees is in 14-point Times New Roman font and complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 10,814 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendant-Intervenor-Appellees state that they are unaware of any related cases pending before this Court.

CERTIFICATE OF SERVICE

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

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

DATED this 21st day of September, 2010.

GALLAGHER & KENNEDY, P.A.

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