IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. : 12-15412

TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA,
TIMBISHA SHOSHONE TRIBE,
WESTERN SHOSHONE DEFENSE PROJECT,
GREAT BASIN RESOURCE WATCH,

Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Appellees,

AND

BARRICK CORTEZ, INC.,

Defendant-Intervenor-Appellees,

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Appellants, Te-Moak Tribe of Western Shoshone Indians of Nevada, the Timbisha Shoshone Tribe, the Western Shoshone Defense Project, and Great Basin Resource Watch have no parent companies, no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

Appellants, the Te-Moak Tribe of Western Shoshone Indians of Nevada ("Te-Moak Tribe"), the Timbisha Shoshone Tribe ("Timbisha Tribe"), the Western Shoshone Defense Project ("WSDP"), and Great Basin Resource Watch ("GBRW")(collectively, "the Tribes") challenge the federal Bureau of Land Management ("BLM's") approvals of Barrick Cortez Inc.'s ("Barrick") Cortez Hills Project ("Project"), a large open pit, cyanide-leach gold mine on Mt. Tenabo, a mountain sacred to many Western Shoshone Indians and in particular to the Te-Moak Tribe and Timbisha Tribe and their members. In this appeal, the Tribes challenge the decision of the district court to deny, in whole or in part, the Tribes' Motions for Summary Judgment ("SJ Motions"), which sought to overturn the BLM's actions.

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the action arose under the laws of the United States including: the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Federal Land Policy Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and their implementing regulations.

Jurisdiction of the Court of Appeals

This appeal is taken from the district court's two Orders, and Final Judgment, denying in whole or in part the Tribes' two SJ Motions. Excerpt of Record ("ER") 1-22. This Court has jurisdiction to review the district court's final orders and judgment under 28 U.S.C. § 1291.

Finality of Judgment and Timeliness of Appeal

The district court issued its Order denying in part the Tribes' first Motion for Summary Judgment on August 25, 2010. ER 12-22. No Judgment was issued at that time, because as a result of the district court's granting in part of the Tribes' first Motion, the court ordered BLM to prepare a Supplemental Environmental Impact Statement pursuant to NEPA. This partial remand necessitated additional BLM review, the filing of the Tribes' Supplemental Complaint and second Motion for Summary Judgment, and further briefing. On January 4, 2012, the court issued its final Order denying in full the Tribes' second Motion for Summary Judgment. ER 4-11. A Final Judgment issued the same day. ER 3. The Tribes' Notice of Appeal challenging the two Summary Judgment Orders and the Final Judgment was filed on February 27, 2012. ER 1-2. Pursuant to Fed. R. App. P. 4(a)(1)(B), this Appeal is thus timely.

STATEMENT OF ISSUES

1. Whether BLM violated its duty under FLPMA to "prevent unnecessary or undue degradation" to public lands, as well as its duties pursuant to the Presidential Executive Order on Sacred Sites, E.O. 13007, to protect identified Native American Sacred Sites, by approving the Project's massive and permanent damage to the lands, surface and ground waters, and cultural and religious uses and resources of the Mt. Tenabo Sacred Site. As approved by BLM, the Project will: (1) dewater the aquifer and remove over 16.35 billion gallons of water from Mt. Tenabo, via a network of groundwater pumping stations; (2) blast and excavate a massive mining pit to a depth of approximately 2,000 feet into the side of Mt. Tenabo; and (3) construct a series of mine waste piles, cyanide-leach processing dumps, and other facilities covering over 6,500 acres on Mt. Tenabo.

Despite repeated submittals of documentary evidence by the Tribes attesting to the religious and spiritual uses of the Project site, and to the importance of these resources at the Project site, BLM unilaterally determined that the Project site was not used for religious purposes and had no religious significance for the Tribes and tribal members – thus failing to prevent the destruction of these resources and refusing to provide any mitigation for their loss – in violation of FLPMA and the Sacred Sites Executive Order.

2. Whether BLM violated its duties under NEPA to fully review the impacts to these resources, and to fully consider mitigation of the Project's impacts – especially to ground and surface waters and Western Shoshone religious and spiritual uses and values in these waters. BLM failed to correct the errors in its initial review of the Project, which the Ninth Circuit had previously found contained an "inadequate study of the serious effects of exhausting water resources." BLM's plan to "mitigate" against these depletions ignored ground waters altogether, and for its meager review of surface waters, ignored Western Shoshone values and uses of these waters – analyzing mitigation for only livestock, irrigation, and wildlife resources.

3. Whether the district court erred in denying in whole or in part the Tribes' two Motions for Summary Judgment.

All applicable statutes, regulations, Federal Register Notices, and agency policies are attached as an Addendum to this brief.

STATEMENT OF THE CASE

This Appeal seeks to reverse the decisions of the district court denying the Tribes' Summary Judgment Motions. The Tribes request this Court to vacate BLM's decision to approve the Project and to take any other appropriate action to protect public resources as required by federal law. Injury to the Tribes' interests and the environment is ongoing.

BLM's Final Environmental Impact Statement ("FEIS") containing BLM's review of the Project, was issued in September, 2008. *See* ER 337-453 (Excerpts of FEIS). BLM issued its Record of Decision ("ROD") approving the Project on November 12, 2008. ER 294-329. On November 20, 2008, the Tribes filed their Complaint challenging the ROD and FEIS. On November 24, 2008, the Tribes filed their Motion for Preliminary Injunction ("PI"). The Tribes filed an Amended Complaint on December 19, 2008. ER 246-293. The parties entered into a Joint Stipulation which was approved by the district court on December 23, 2008, which initially prevented major Project operations such as the blasting of the mine pit. The district court held a hearing on the Tribes' Motion for PI on January 20-23, 2009. On January 26, 2009, the district court issued its oral ruling denying the PI Motion. Upon the issuance of that oral ruling, Barrick began full Project construction, including the excavation and blasting of the mine pit and construction of the other Project facilities. The district court issued its written Order on February 3, 2009 in South Fork Band Council v. U.S. Department of the Interior, 643 F.Supp.2d 1192 (D. Nev. 2009).[1]

[1] In 2004 and 2005, BLM also approved Barrick's extensive mineral exploration operations in the area. The Tribes filed a lawsuit challenging BLM's approval and environmental reviews. Upon the Tribes' appeal of the district court's denial of their motion for summary judgment in that case, the Ninth Circuit Court of Appeals reversed in part the lower court's decision, finding that BLM violated NEPA, and remanded the case in order that BLM comply with federal law. *See* Te-Moak Tribe v. U.S. Department of the Interior, 608 F.3d 592 (9th Cir. 2010).

On February 6, 2009, the Tribes appealed the denial of their Motion for PI to the Ninth Circuit Court of Appeals, seeking also an Emergency Motion to halt Project construction. The Ninth Circuit denied the Tribes' Emergency Motion on February 18, 2009, but ordered briefing and argument expedited.

On June 10, 2009, the Ninth Circuit heard oral argument on the Tribes' appeal of the denial of the PI Motion. The Ninth Circuit issued its Order on December 3, 2009, reversing in part and affirming in part the district court's denial of the PI Motion. South Fork Band Council v. U.S. Department of the Interior, 588 F.3d 718 (9th Cir. 2009)(per curiam).[2] Among other findings, the Ninth Circuit held that BLM had likely violated NEPA when it conducted an "inadequate study of the serious effects of … exhausting water resources." Id. at 728. The appeals court further held that the original BLM EIS failed to fully review and consider mitigation of the serious impacts resulting from Barrick's dewatering of Mt. Tenabo. Id. at 722.

On April 13, 2010, the district court entered a preliminary injunction enjoining some Project operations, such as the pumping of ground water approved in the ROD, but did not stop excavation of the mine pit and other major Project operations. The district court further directed BLM to prepare a Supplemental

[2] The South Fork Band Council subsequently removed itself from the case and is no longer a plaintiff/appellant.

Environmental Impact Statement ("SEIS") addressing the violations and errors previously found by the Ninth Circuit.

While BLM was preparing the SEIS, the parties filed cross-motions for summary judgment on the merits. On August 25, 2010, the district court entered its Order on the cross-motions, denying in part and granting in part the Tribes' Motion. South Fork Band Council v. Dept. of Interior, 2010 WL 3419181 (D. Nev. 2010). ER 12-22. The court ruled that the 2008 FEIS had violated NEPA as determined by the Ninth Circuit's previous water resources and mitigation findings, but denied the Tribes' Motion regarding BLM's failure under FLPMA and the Sacred Sites Executive Order to protect the Mt. Tenabo Sacred Site. The Tribes' challenge to portions of that August 25, 2010 Order are part of this Appeal.

In its Order on the cross-motions, however, the district court did not rule on the parties' claims regarding whether the dewatering of Mt. Tenabo violated FLPMA's mandate that BLM "prevent unnecessary or undue degradation" of public lands and waters. The district court noted that "the Ninth Circuit did not address Plaintiffs' dewatering FLPMA claim." Id. at *9. The court then denied all parties' motions for summary judgment on the FLPMA dewatering claim, noting that "the results of the new mitigation analysis may suggest that the dewatering will unnecessarily and unduly degrade the land." Id.

BLM completed/issued the Final SEIS in January of 2011 ("FSEIS"), ER 88-123 (Excerpts), and issued a new Record of Decision in March, 2011 ("2011 ROD"). ER 55-71. The FSEIS and 2011 ROD did not contain any new mitigation measures to protect ground and surface waters, or any other public resource.

Pursuant to a joint stipulation, the Tribes filed a Supplemental Complaint on April 15, 2011, raising issues associated with the FSEIS and 2011 ROD. ER 34-54. The parties then filed cross-motions for summary judgment, which the district court ruled upon in its January 4, 2012 Order, granting BLM's and Barrick's cross-motions in full, and denying the Tribes' motion in full. ER 4-11. Upon issuance of the district court's Final Judgment on January 4, 2012, ER 3, this Appeal followed. ER 1-2.

STATEMENT OF FACTS

The Cortez Hills Mine Project

The Project, now in production, is blasting and excavating a new massive open pit on Mt. Tenabo covering over 830 acres to a depth of over 2,000 feet, dumping well over a billion tons of mine waste in several new waste disposal facilities, constructing and operating new processing facilities (including a cyanide heap-leaching facility), expanding existing mine pits, digging a new underground mine, constructing numerous support facilities and miles of new roads and transmission lines, and building and operating a 12-mile ore-hauling conveyor

system. ROD at 4-8, ER 302-306; FEIS at 2-92, -93, and -95; ER 343-45. *See also*, South Fork Band Council, 588 F.3d at 722 (summary of Project).

The Project will permanently alter the physical integrity of Mt. Tenabo and will involve approximately 6,633 acres of new surface disturbance within the 57,058-acre Project boundary. A total of approximately 102 million tons of cyanide-laced heap leach ore, 47 million tons of mill-grade ore, and over 1,102 million tons of waste rock will be mined, processed, and dumped on Mt. Tenabo. ROD at 7, ER 305.

The Project is also operating an extensive groundwater pumping system to remove approximately 16.35 billion gallons of water from Mt. Tenabo (in order to keep the open pit and mine workings dry during mining). Associated water pipelines will transport the water away from Mt. Tenabo and dump it in the arid Crescent Valley plain. FEIS at 3.19-2 (Table 3.19-1), ER 368-69.

The construction and operation of the Project will last approximately 13 years. Reclamation of some, but not all, of the Project's facilities and impacts will continue after actual mining operations are completed. For example, BLM did not require Cortez to reclaim the mine pit via "backfilling" of rock, nor did BLM require Barrick to replace the vast amounts of water removed from Mt. Tenabo. Thus, although initial construction is now complete and the Project is operating, BLM can (if directed to by this Court) prevent additional groundwater pumping

and require significant mitigation to reduce the Project's severe impacts to public and Tribal resources and uses.

The Project has received unprecedented world-wide opposition. In one petition alone, 11,570 people from around the world voiced their opposition to the Project – specifically stating that the Project should be denied because the "the proposed Cortez Hills Expansion Project will irreparably harm the Mt. Tenabo area which is of significant and well-established religious and cultural value to the Western Shoshone people. The mine would irretrievably destroy traditional Shoshone uses in the area and irreplaceably damage water resources which are not only sacred to the Shoshone, but also critical in times of drought." FEIS Vol. III at 117, ER 379.

BLM also received over 2,600 direct letters opposing the Project. FEIS Vol. III at F3.1-1 to -26, ER 427-52. Over 165 individuals submitted additional cards to BLM stating their opposition to the Project. FEIS Vol. III at F3.3-1, ER 453. The card stated that the Project "will irretrievably destroy Shoshone religious and cultural uses in the area." FEIS Vol. III at 473, ER 426.

The Mt. Tenabo Sacred Site and the Destruction of Public Resources

As attested to by various Tribal governments and traditional Western Shoshone, the majority of the Project (including the mine pit and waste dumps) is within the Mt. Tenabo Sacred Site and Western Shoshone religious and cultural

uses of the Sacred Site will be either permanently eliminated or significantly diminished. *See* ER 506-07 (2006 Te-Moak Tribal Resolution); ER 336 (additional comments from Te-Moak Tribal Chairman in 2008); ER 332-35 (2008 comments by Reno-Sparks Indian Colony); ER 470-73 (2008 comments from Tribal Chairman, Shoshone-Paiute Tribes of Duck Valley Reservation); ER 371-75 (comments from South Fork Band and Elko Band of Western Shoshone printed in FEIS); ER 171-226 (testimony of Western Shoshone traditional religious practitioners at January, 2009 PI hearing); ER 401-25 (WSDP comments on Draft EIS, including additional Western Shoshone Declarations, reprinted in FEIS).

Mt. Tenabo is a place of unique and significant religious importance to many Western Shoshone Tribes and people. The Mountain, including its slopes (e.g., the "Pediment" area at the base of the sheer "White Cliffs" where the Project is located) is used, as it has for centuries, by Western Shoshone people for prayer, fasting, purification ceremonies, and other religious practices. *See, e.g.*, Id. (collective citations from previous paragraph).

The Project "will spiritually desecrate a sacred mountain and decrease the spiritual fulfilment [sic] they [the Tribes] get from practicing their religion on the mountain." Transcript of oral PI Order, at 19, lines 12-15. ER 148. "[T]he court recognizes that Plaintiffs view Mt. Tenabo as a sacred site significant to the

exercise of their religion." South Fork Band Council, 643 F.Supp.2d at 1207 (PI Order).

Scientific studies and other analyses prepared by or for BLM or Barrick show the importance of Mt. Tenabo to Western Shoshone religion. For example, the Ethnographic Report prepared for the Pediment Project (the previous name for the Cortez Hills Project) states that:

> The mountain [Mt. Tenabo] was identified with specific stories and as a place for prayer, healing, and inspiration, as part of a network of mountain peaks and an underground waterway that concentrates and emanates *puha*, the animating power of the universe fundamental to all life, and visible and invisible reality.

Rucks, An Ethnographic Study Completed for the Cortez Gold Mines Pediment Project, January 2004, at 37-38 ("Ethnographic Report")(emphasis in original). ER 543-44 . As one traditional Western Shoshone stated in her Declaration submitted to BLM in comments on the Draft EIS in December of 2007:

> Mt. Tenabo plays a key role in our creation stories and continues today to be a source of spiritual renewal and power. … Only non-Indians would consider only the top of the Mountain to be a 'sacred site.' The spiritual significance of Mt. Tenabo is not just the 'site' at the top of the Mountain. The spirits reside throughout the Mountain and can reach us as we pray on its slopes as well as its top. The Cortez Hills mine pit and dumps are proposed in the same area as we use for our prayer ceremonies.

Declaration of Carlene Burton, ER 404. Another Declarant stated:

> I use Mt. Tenabo, the site of the proposed Project, especially the Cortez Hills mine pit and related dumps, ground water pumping and dumps, to practice my religion. In particular, I travel to the Mountain to pray and conduct sacred sweat ceremonies and to gather sacred food and medicinal plants.

> When Western Shoshone consider "Mt. Tenabo" as a unique sacred landscape, they mean the entire Mountain, not just the top and cliff-face declared a cultural site by the BLM. I and others use the slopes of the Mountain to conduct these prayer and other religious ceremonies. Sacred prayer areas such as Shoshone Wells and other locations within and adjacent to the Project's disturbed lands will be irrevocably damaged by the construction of the Project, especially the new mine pit and related facilities.
>
> Mt. Tenabo is the source of our creation stories and is a central part of our spiritual world view. Although all life, water, and land is sacred to Western Shoshone, Mt. Tenabo is a unique landscape. It holds the Puha, or life force, of the Creator. We pray to the Mountain for renewal, which comes from Mt. Tenabo's special place in Western Shoshone religion.
>
> This is due to many things, including the resting place of many of our ancestors. The spirits of these beings still reside within the Mountain and it is from these beings that we draw power and sustenance. The Mountain is a pathway for the Puha, which has been utilized by Western Shoshone travelers for countless years.
>
> Due to Mt. Tenabo's spiritual importance in the lives of traditional Western Shoshone, the proposed mining is completely incompatible with the continuation of my, and others, religious practices. It will be impossible for me and others to pray and conduct ceremonies on the Mountain in view of, and hearing, the proposed operations. Could one pray at an alter while the Church was being destroyed?

Declaration of Sandy Dann, ER 412-13.

The Ethnographic Report recognized that the entire Mt. Tenabo, including the flatter "Pediment" area along the base of the mountain which will be largely covered by the Project facilities, as well as the water contained in the Mountain, has immense spiritual importance for Western Shoshone:

> Mt. Tenabo is one of a system of three mountains in the *pasiatekkaa* homeland, connected by *puha*. As described by Rucks (2000), it is also

> considered a traditional locus of power and source of life, and figures in creation stories and world renewal. As the tallest mountain in the area – the most likely to capture snow and generate water to grow pinyon and nourish life – it is literally a life-giver. Water is to earth what blood is to the body, and these subterranean waterways are likened to the earth's arteries and veins.

Ethnographic Report, at 22-23 (emphasis in original), ER 530-31. The Report continued:

> Mt. Tenabo is a locus of stories about the creation of the *Newe* [Western Shoshone name for the people], and of several cycles of cataclysm and world renewal, told only in winter. … In the beginning, when the earth was covered in water, Mt. Tenabo was one of the peaks that remained above water.

Id. at 24, ER 532. BLM recognized that: "[Western Shoshone] people spoke of the whole mountain area (Tenabo) as being a traditional cultural property, along with 'all the canyons and waters which flow from it.'" FEIS at 3.9-36, ER 364.

The Project will severely degrade, or outright eliminate, the irreplaceable human and natural resources of Mt. Tenabo. At a minimum, religious uses at the Project site will be impossible to continue due to the blasting and excavation of the mine pits (especially the Cortez Hills Pit), cyanide heap-leach processing facility, multiple waste dumps, borrow pit area, and the network of roads, pipelines and support facilities. *See generally* Western Shoshone Declarations in the FEIS, ER 401-425; unrebutted testimony at PI hearing, ER 171-226.

In addition to the physical destruction of the Mt. Tenabo Sacred Site, it will be impossible to conduct religious practices, as Western Shoshone will be

prohibited from accessing their traditional religious use areas due to the perimeter fence that will be constructed around most of the Project. *See*, *e.g.*, FEIS at 3.12-5, ER 366.

In order to keep the mine pits dry during mining, BLM also authorized Barrick to dewater the aquifer around-the-clock for over 10 years. The amount of water taken from Mt. Tenabo is staggering. "The total estimated volume of additional groundwater extracted during pit dewatering over the life of the mine is 50,200 acre-feet." FEIS at 3.19-2 (Table 3.19-1), ER 368. With one acre-foot equal to 325,851 gallons, this means that over 16.35 **billion** gallons of water will be removed from the Mountain. Although the full extent of the impacts from dewatering will be felt over time, the irreparable injury to the environment and the uses of these waters has already begun.

The Project's massive pumping is predicted to lower the groundwater over 1,000 feet – causing the permanent loss of surface waters and springs/seeps. The FEIS predicts that at least 15 springs or seeps, and at least one perennial stream, will suffer the loss or complete elimination of their flows. FEIS at 3.2-57, ER 351.

> Potential impacts to these springs could range from reductions in flow to elimination of all flow. … 15 … springs occur within areas that are predicted to experience long-term drawdown that is not expected to fully recover within 100 years (Table 3.2-12). As a result, any flow reduction or elimination that occurs is likely to persist beyond this period.

Id.

Also as shown by the Declarations contained in the FEIS, the dewatering of Mt. Tenabo, and the loss of sacred springs/seeps and streams caused by the groundwater pumping, severely degrades and prevents the exercise of Western Shoshone traditional religion. ER 401-25. BLM also acknowledged that: "Water is the keystone of Western Shoshone religion because power (Puha), with its affinity for life, is strongly attracted to water." FEIS at 3.9-61, ER 365. *See also* Western Shoshone testimony at PI hearing, ER 187-90 (Shawn Collins); ER 212-14 (Ted Howard).

In addition, the lake that will be created in the Cortez Hills Mine Pit after mining ceases is predicted to be polluted – severely impacting the environment and Western Shoshone religious interests in the purity of the water on Mt. Tenabo. "The Cortez Hills Pit lake is predicted to have overall higher constituent concentrations due to the evapoconcentration; arsenic is … predicted to exceed Nevada water quality standards." FEIS at 2-124, Table 2-19, ER 347. *See also* FEIS at 3.5-39 (discussing additional concerns with selenium and mercury contamination in the pit lake), ER 362.

SUMMARY OF ARGUMENT

Regarding BLM's violations of FLPMA, BLM failed to meet its fundamental and substantive duty under the statute to "prevent unnecessary or undue degradation" of public land resources – the "UUD" standard. Despite this

clear mandate from FLPMA and its regulations, as well as caselaw requiring BLM to protect public lands and waters, BLM misinterpreted and misapplied its UUD authority.

BLM failed to protect the Mt. Tenabo Sacred Site from what amounts to large-scale destruction, and failed to require any protections for surface and ground waters – especially the ground water within Mt. Tenabo that will be eliminated by Barrick's round-the-clock pumping/dewatering.

BLM erroneously believed that the UUD standard was satisfied by merely showing that the Project would comply with minimal state environmental standards – ignoring the agency's independent and separate duties under FLPMA to protect federal public land resources. BLM also stated that the UUD standard was only a "temporary" restraint on mining while BLM conducted its purely-procedural consultation with affected Tribes and Indian groups. Yet the UUD standard is not procedural and is not a mere temporary restriction on BLM's approval of the Project. It is a substantive requirement to protect important public resources.

BLM's failure to prevent UUD is further demonstrated by its noncompliance with Executive Order 13007, protecting "Indian Sacred Sites." 61 Fed. Reg. 26771-2 (May 29, 1996). That Presidential Order requires BLM to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian

religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The extreme damage to Mt. Tenabo and Western Shoshone religious practices violates these mandates.

Although acknowledging BLM's duty to protect Native American Sacred Sites under FLPMA and the Executive Order, the district court nevertheless relied on BLM's unilateral determination that the Pediment area at the base of the White Cliffs on Mt. Tenabo – the Project site – was not the subject of religious practices nor held as sacred by the Tribes and that only the very top areas of Mt. Tenabo qualified as a protected Sacred Site. "[N]o information in the record suggests that the pediment area is an established place for the tribes to conduct specific religious rituals and ceremonies. … Absent evidence in the record suggesting that the pediment area is a sacred site within the meaning of the executive order, the BLM did not act arbitrarily or capriciously." 2010 WL 3419181, at * 9, ER 20. Like BLM, this conclusion ignores the overwhelming evidence in the record to the contrary.

First, under the E.O., it is the Tribes, **not** BLM, that are qualified to determine whether a site is to be considered sacred. As defined by the Executive Order, "Sacred site means any specific, discrete, narrowly delineated location on Federal land that is **identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian**

religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." 61 Fed. Reg. at 26771 (emphasis added).

Second, BLM ignored repeated submittals by various Indian tribes (including the Appellant tribes) specifically attesting to the "established religious significance to, or ceremonial use by, an Indian religion" of the Project site. Thus, BLM's failure to consider the Project area as part of the larger Mt. Tenabo Sacred Site, and the agency's associated failure to protect the Site through mitigation or otherwise from the blasting, mine pit excavation, cyanide processing, massive dewatering, and water pollution violates its duties under FLPMA and the E.O.

BLM's decision to ignore the unrebutted evidence provided by the Tribes attesting to the fact that the Pediment area at the base of the White Cliffs (i.e., the Project site) is part of the Mt. Tenabo Sacred Site is the essence of an "arbitrary and capricious" decision under the APA. BLM cannot "offer[] an explanation for its decision that runs counter to the evidence before the agency." Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

Similarly, regarding the Project's dewatering of Mt. Tenabo and the removal of 16.35 billion gallons of water from the Mountain, BLM relied on its procedural analysis of impacts to area waters as enough to satisfy the UUD standard. Yet, this Court previously held that the initial EIS "was [an] inadequate study of the serious effects of … exhausting scarce water resources." South Fork Band Council, 588

F.3d at 728. Further, simply analyzing the Project's impacts (even if found adequate, which it was not) is not a substitute for actually protecting these waters.

Regarding BLM's NEPA violations, in addition to conducting an "inadequate study of the serious effects of exhausting scarce water resources," BLM also violated NEPA's mandate that mitigation measures be fully reviewed in the FEIS, not at some point in the future. BLM's "mitigation" for ground and surface waters is just a plan to initially monitor the already-predicted impacts from the dewatering on these waters and only then consider taking any action to protect the resource. Yet simple monitoring will only determine the extent of the impact from dewatering – it will not prevent the loss or damage to these waters in the first place.

Despite the previous ruling from the Ninth Circuit, FSEIS did not add or review any new mitigation measures – merely supplying a perfunctory summary of the potential effectiveness of the old (and inadequate) mitigation measures. It is undisputed that the 2011 FSEIS presented no new mitigation measures whatsoever.

Further, BLM failed to analyze any mitigation at all for the loss of ground water. For surface water, its mitigation analysis dealt only with livestock, irrigation, and wildlife – completely ignoring the Western Shoshone uses and values in Mt. Tenabo's waters.

Overall, the agency's numerous substantive and procedural violations of federal law warrant a vacation and remand of the approval of the Project.

STANDARD OF REVIEW

"We review *de novo* a district court's denial of summary judgment." Karuk Tribe of California v. U.S. Forest Service, --F.3d--, 2012 WL 1959231, *7 (9th Cir. June 1, 2012)(En Banc). *See also*, Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005)(*de novo* review of administrative record). Pursuant to the APA, a federal court "shall … hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] … (D) without observance of procedures required by law." 5 U.S.C. § 706(2). *See* Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998).

The Court must "engage in a substantial inquiry," and a "thorough, probing, in-depth review." Or. Nat. Res. Council Fund v. Brong, 492 F.3d 1120, 1125 (9th Cir. 2007). BLM's decisions must be "fully informed and well-considered." Save the Yaak Committee v. Block, 840 F.2d 714, 717 (9th Cir.1988). The court "need not forgive a 'clear error of judgment.'" Blue Mountains, 161 F.3d at 1208. *See also* Anderson v. Evans, 350 F.3d 815, 829 (9th Cir. 2003) (court should not "rubber stamp a clear error of judgment"). "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, if the agency offers an explanation that is contrary to the evidence, … or if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2)." Lands Council, 395 F.3d at 1026. *See also* Karuk Tribe, 2012 WL 1959231, *7.

ARGUMENT

I. BLM VIOLATED FLPMA

A. *BLM's Duty to "Prevent Unnecessary or Undue Degradation" of Public Lands from Mining Operations*

FLPMA requires that BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands" (the "UUD" standard). 43 U.S.C. § 1732(b). This duty to prevent such degradation of public resources is "the heart of FLPMA [that] amends and supersedes the Mining Law." Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003).

> FLPMA, by its plain terms, vests the Secretary of the Interior [and BLM] with the authority – and indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.

Id. "FLPMA's requirement that the Secretary prevent UUD supplements requirements imposed by other federal laws and by state law." Center for Biological Diversity v. Dept. of Interior, 623 F.3d 633, 644 (9th Cir. 2010).

BLM complies with this mandate "by exercising case-by-case discretion to protect the environment through the process of: (1) approving or rejecting individual mining plans of operation." Id. at 645, *quoting* Mineral Policy Center, 292 F.Supp.2d at 44. The Ninth Circuit has stressed the "*environmental protection provided by the MPO [mining plan of operation] process.*" Center for Biological Diversity, 623 F.3d at 645 (emphasis in original).

BLM cannot approve a mining plan of operations that may cause UUD. 43 C.F.R. § 3809.411(d)(3)(iii) (BLM's mining regulations). As BLM stated in the record, in order to meet these FLPMA and Part 3809 obligations:

> BLM will ensure that the project includes adequate provisions to prevent unnecessary or undue degradation of federal lands and **to protect non-mineral resources of federal lands, including groundwater and surface water.**

BLM response to comment O-001-2, FSEIS at A-19 (emphasis added), ER 108.

BLM must also ensure that all operations comply with the Performance Standards found at §3809.420. *See* 43 CFR §3809.5 (definition of UUD, specifying that failing to comply with the Performance Standards set forth at §3809.420 constitutes UUD). *See also* Center for Biological Diversity, 623 F.3d at 644-45 (illustrating some of the §3809.420 Performance Standards that must be met to comply with the duty to prevent UUD). As stated by BLM: "Those standards include the requirement that an operator 'take mitigation measures specified by BLM to protect public lands.' (43 CFR 420(a)(4)." FSEIS at A-18, ER 107. "Mitigation measures fall squarely within the actions the Secretary can direct to prevent unnecessary or undue degradation of the public lands. An impact that can be mitigated, but is not, is clearly unnecessary." 65 Fed. Reg. at 70052 (Nov. 21, 2000)(preamble to BLM's 43 CFR Part 3809 mining regulations).

BLM has previously interpreted this UUD authority as requiring the agency to prevent irreparable harm to environmental and cultural values: "[BLM] will

prevent all UUD, including UUD occasioning irreparable harm to scientific, cultural, or environmental resource values." Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 44 (D.D.C. 2003)(*quoting* BLM's brief to the court).

Another statement in BLM's brief in that case specifically noted that the UUD standard is not limited to mere compliance with other laws and that the UUD standard protects these resources above and beyond the requirements of other laws. BLM interpreted UUD as providing for "Interior's enhanced capability to protect the public lands on a case-by-case basis from any UUD that these existing environmental laws would not prevent." Federal Defendants' Consolidated Motion for Summary Judgment in Mineral Policy Center, at 2, ER 571. *See also* DOI Consolidated Statement of Material Facts and Statement of Issues in that case, at 9, ¶20 (the UUD standard protects "cultural values … springs, seeps, and ephemeral streams that are not otherwise protected by specific laws"), ER 556. BLM stressed that it would apply its FLPMA mandate and Part 3809 regulations to "prevent unnecessary or undue degradation and irreparable harm to significant scientific, cultural, or environmental resource values." Id. at ¶21.

The Interior Department has also repeatedly held that compliance with these protective standards cannot be waived by BLM due to the fact that the costs of compliance would render the mining operation uneconomic and the mining claims invalid.

> If the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefor is properly rejected. **Under no circumstances can compliance be waived merely because failing to do so would make mining of the claim unprofitable.**

Great Basin Mine Watch, 146 IBLA 248, 256 (1998)(emphasis added)(decision of the Interior Board of Land Appeals, the administrative review body of the Interior Department). The operator must provide sufficient information to demonstrate that the proposed mining operation will not cause UUD: "BLM not only has the authority to require the filing of supplemental information, it has the obligation to do so." Center for Biological Diversity, 623 F.3d at 644, *quoting* Great Basin Mine Watch at 256.

Overall, these mandates represent a nondiscretionary and substantive duty on BLM to protect public lands, including as acknowledged by BLM the duty to "protect non-mineral resources of federal lands, including groundwater and surface water," as well as cultural and religious resources, from the destruction caused by the Project. ER 108. That it failed to do in this case.

Here, despite its previous commitments to protect Native American religious and cultural resources (and ground and surface waters) under the UUD standard, BLM took an inappropriately limited view of its UUD duty. For example, the agency stated that the UUD standard was only a "temporary" restraint on mining while BLM conducted its purely-procedural consultation with affected Tribes and

Indian groups. Indeed, BLM believed that the UUD standard did not provide **any** substantive protection above the procedural mechanisms of the National Historic Preservation Act ("NHPA"):

> The purpose of the unnecessary or undue degradation standard is to **temporarily** protect potential historic properties to allow compliance with Section 106 of the NHPA. **The unnecessary or undue degradation standard does not provide greater protection for historic properties than the NHPA.**

FEIS Vol. III at 37(emphasis added), ER 377. However, the NHPA, unlike FLPMA, is only a procedural statute that has no substantive requirements to protect sacred sites. *See* Pit River Tribe v. U.S. Forest Service, 469 F.3d 768, 787 (9th Cir. 2006).

Further, BLM (and the district court) were under the view that, as long as the Project complied with other laws (especially state law), BLM satisfied its duty to prevent UUD. *See* South Fork Band Council, 2012 WL 13780, at *7, ER 9-10. Yet, as recently held by the Ninth Circuit (decided after the PI phase of this case), "FLPMA's requirement that the Secretary prevent UUD **supplements** requirements imposed by other federal laws and by state law." Center for Biological Diversity, 623 F.3d at 644 (emphasis added).

Thus, and at the outset, BLM's truncated view of its UUD authority is contrary to law in violation of the APA and undermined its entire review of the Project.

B. *BLM's Duty to Protect Recognized Sacred Sites Under FLPMA and the Executive Order On Sacred Sites*

The Project's impacts to Mt. Tenabo, including the severe degradation of, and the prevention of, the ability of Western Shoshone to exercise and practice their religion (including the loss of sacred waters caused by the dewatering), constitute UUD under FLPMA. This violation is especially egregious based on BLM's failure to comply with the Presidential Executive Order specifically promulgated to protect Native American religious and cultural resources on public land. Pursuant to the Sacred Sites Executive Order ("E.O."), BLM must: "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." 61 Fed. Reg. at 26771.

As defined by the E.O., the determination of whether a tract of land is a "Sacred Site" is determined by an Indian Tribe, or its authorized representative – not the federal agency. "Sacred site means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." Id.

In this case, the Te-Moak Tribe, the Elko Band Council, the South Fork Band Council, the Shoshone-Paiute Tribe, and the Reno-Sparks Indian Colony all

submitted formal tribal resolutions or comments to BLM detailing the sacred nature of Mt. Tenabo and in particular the Project site. *See* ER 506-07 (2006 Te-Moak Tribal Resolution); ER 336 (additional comments from Te-Moak Tribal Chairman in 2008); ER 332-35 (2008 comments by Reno-Sparks Indian Colony); ER 470-73 (2008 comments from Tribal Chairman, Shoshone-Paiute Tribes of Duck Valley Reservation); ER 371-75 (comments from South Fork Band and Elko Band of Western Shoshone printed in FEIS); ER 171-226 (testimony of Western Shoshone traditional religious practitioners at January, 2009 PI hearing); ER 401-25 (WSDP comments on Draft EIS, including additional Western Shoshone Declarations, reprinted in FEIS).

Native American Sacred Sites such as Mt. Tenabo are recognized as critical public land resources protected by FLPMA. Although the E.O. is not an independently-enforceable law, it clearly recognizes the federal government's priority to protect sacred sites on public land. "Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole." Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 976 (9th Cir. 2004).[3]

[3] BLM's failure to meet its obligations under FLPMA and Executive Order 13007 also contravenes its trust obligations to Native Americans. BLM is charged with:

> moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. The

Both the district court in this case, and the Ninth Circuit in its review of the PI Motion, correctly held that the BLM had a duty to comply with the E.O. as part of the agency's FLPMA mandate:

> Executive Order No. 13007 ("EO 13007") [] **imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them**. *See* 61 Fed. Reg. 26771 (May 24, 1996). The district court expressly recognized that BLM was required to comply with the Executive Order. *South Fork Band*, 2009 WL 24911, at *16 n. 9. [now reported at 643 F.Supp.2d 1192, 1211, n. 9].

South Fork Band Council, 588 F.3d at 724 (emphasis added).

Other federal courts have recognized the need to protect sacred sites under the Executive Order as part of the government's public land management authorities:

> Executive Order no. 13007 signed by President Clinton, May 24, 1996, orders Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.

Wyoming Sawmills, Inc. v. U.S. Forest Service, 383 F.3d 1241, 1245 (10th Cir. 2004). The preamble to BLM's mining regulations (43 C.F.R. subpart 3809) acknowledges the binding nature of E.O. 13007 as part of BLM's duty to comply with FLMPA's UUD standard:

> trust responsibility restrains governmental action that affects Indians and therefore is an important source of protection for Indian rights.

Seminole Nation v. U.S., 316 U.S. 286, 297 (1942).

> In these regulations, BLM has decided that it will approve plans of operations … **if** the requirements of subpart 3809 are satisfied and **other considerations that attach to a Federal decision, such as Executive Order 13007 on Indian Sacred Sites, are also met.**

65 Fed.Reg. 69998, 70013 (Nov. 21, 2000)(emphasis added).

FLPMA and the E.O. protect all Sacred Sites, not just those covered by the procedural mechanisms of the National Historic Preservation Act. "Those [sites/properties] that do not meet the eligibility standard are not subject to compliance with Section 106 of the National Historic Preservation Act. This does not mean that they are without protection, only that the NHPA is not the correct legal tool for protecting them." BLM Handbook H-8120-1, "*Guidelines for Conducting Tribal Consultation*" at II-2 (attached to Addendum at the end of this brief). "[M]itigation responsibilities required by various federal mandates remain in effect for both eligible and ineligible properties. Those mandates include … the Federal Land Policy and Management Act ..., and Executive Order 13007." BLM 2004 NHPA Eligibility determination for Mt. Tenabo, at 14, ER 522.

As shown herein, however, BLM failed to "accommodate access to and ceremonial use of," and failed to "avoid adversely affecting the physical integrity of" the Mt. Tenabo Sacred Site. Indeed, the Sacred Site will be largely destroyed.

C. *BLM Failed to "Prevent Unnecessary or Undue Degradation" of the Mt. Tenabo Sacred Site*

As noted above, the district court and the Ninth Circuit correctly cited BLM's duties to protect the Mt. Tenabo Sacred Site under the E.O. as part of BLM's UUD responsibilities. However, during both the PI and summary judgment decisions, the district court determined that BLM complied with the E.O. based on the fact that the Project would not be directly situated on the extreme top of Mt. Tenabo and the sheer "White Cliffs" immediately below the summit. 643 F.Supp.2d at 1211, n 9 (PI decision); 2010 WL 3419181, * 9 (summary judgment decision), ER 20.

BLM based its Project approval on its belief that only these limited areas were eligible for listing on the National Register of Historic Places under the NHPA, and thus the other areas of the Sacred Site deserved no protection. In its 2004 determination as to the eligibility of Mt. Tenabo to be placed on the National Register, BLM believed that only the "top" of Mt. Tenabo and the "White Cliffs" deserved recognition. BLM 2004 NHPA Eligibility determination for Mt. Tenabo, at 14, ER 508-524.

Yet this decision was made three years **before** the Draft EIS for the Cortez Hills Project was released for public comment. All of the Tribal Resolutions and comments attesting to the Pediment area at the base of the White Cliffs (i.e., the Project site) as part of the Mt. Tenabo Sacred Site were submitted in 2006, 2007,

and 2008 prior to the issuance of the Final EIS in September, 2008. Despite this, BLM essentially ignored this evidence and maintained throughout the permitting process that, based on its 2004 "eligibility" decision, only the "top" and "White Cliffs" had any religious significance to Western Shoshone, or was used by religious practitioners at all.

In these submittals, the Native American governments contradicted BLM's 2004 determination and formally notified BLM that the "Pediment" area at the base of the White Cliffs (i.e., the location of the Project's mine pit, and waste and cyanide dumps) was included in what the tribal governments considered the Mt. Tenabo Sacred Site.

Five separate Western Shoshone governments submitted comments and formal resolutions to BLM opposing the Project due to the irreparable and devastating impacts to Mt. Tenabo's unique religious significance. For example, the Te-Moak Tribe stated: "[A]ny new or additional mining or exploration **in the area identified in the Cortez Expansion proposal** would cause irreparable harm to our culture and spirituality." 2006 Te-Moak Tribal Resolution (emphasis added), ER 506-07. "The area of Tenabo, in particular is well known by BLM and Barrick to hold significant spiritual and religious importance to the Shoshone people." Letter from Larson Bill, Vice-Chairman, South Fork Band Council, to BLM, December, 2007, ER 371.

"The South Fork Band … opposes this project … due to concerns about the destructiveness that this expansion will have towards Native American Culture and the water quality **within the proposed area**." Letter from Emiliano McLane, South Fork Band Environmental Coordinator, to BLM, December, 2007 (emphasis added), ER 372. The Elko Band Council stated that: "Because of the … irreparable harm to our culture and religion/spirituality, and due to the amount of water that will be wasted and/or polluted, we must oppose the Cortez Hills Mine Expansion Project." Letter from Lynette Piffero, Chairperson, Elko Band Council, December, 2007, ER 374. *See also* ER 336 (additional comments from Te-Moak Tribal Chairman in 2008); ER 332-35 (2008 comments by Reno-Sparks Indian Colony); ER 470-73 (2008 comments from Tribal Chairman, Shoshone-Paiute Tribes of Duck Valley Reservation).

The Ethnographic Report and other evidence in the record (including the Declarations by Western Shoshone submitted to BLM) demonstrate the irreparable harm that will occur to religious practices and Mt. Tenabo's lands and waters. The fact that the top of Mt. Tenabo would not be directly disturbed does not mean that BLM has "avoided physical damage" to the Mt. Tenabo Sacred Site under FLPMA and E.O. 13007. South Fork Band Council, 588 F.3d at 724. Thus, simply because the extreme top of Mt. Tenabo will not be mined does not mean that BLM

has complied with its duty to "avoid adversely affecting the physical integrity" of the Mt. Tenabo Sacred Site under the E.O.

In addition to essentially ignoring the formal submittals from the Tribal governments recognizing the entirety of Mt. Tenabo as a Sacred Site, BLM's decision to protect only the "top" and "White Cliffs" ignores its own evidence in the record. The Ethnographic Report recognized that the entire Mountain and Pediment area, not just the top, was part of a Native American "Traditional Cultural Property." "Contemporary people returning to the pediment area are also, in effect, returning to Mt. Tenabo. Particularly when viewed from a distance, as from the camp at Shoshone Wells, the pediment is seen as part of the same landform. **The pediment area is part of the mountain**…." Ethnographic Report at 39 (emphasis added), ER 545.

"Nearly all [Western Shoshone] field trip participants expressed opinions that there must be other burials on the pediment that would be disturbed or destroyed by mining development." Id., Management Summary at 2, ER 527. BLM recognized that: "[Western Shoshone] people spoke of the whole mountain area (Tenabo) as being a traditional cultural property, along with 'all the canyons and waters which flow from it.' … The Mount Tenabo area was further described as being an 'ethnographic landscape,' which included not only the top of the mountain, but also the surrounding valleys." FEIS at 3.9-36, ER 364.

BLM also ignored the comments from one of the country's leading experts on the protection of cultural resources. Thomas King, the co-author of National Register Bulletin 38 concerning Traditional Cultural Properties, stated:

> As the co-author of the primary federal guidance on the evaluation of traditional cultural properties (National Register Bulletin 38), I have no doubt that there is a large, multi-element cultural landscape including but extending far beyond Mount Tenabo that is eligible for the National Register of Historic Places. Your FEIS, however, treats the "cultural resources" (sic) of this area in a scattershot fashion, carefully avoiding any sort of holistic analysis either of a landscape or the project's impacts on it.
> …
> **[I]t appears to me that you are simply going to a great deal of trouble to avoid doing what the laws actually require, while throwing up a smokescreen of faux compliance.**

Thomas King email to BLM dated Nov. 3, 2008, ER 330-31 (emphasis added).

BLM also ignored the directive from the President that it is the affected Tribes, not BLM, that determine the location and scope of a Sacred Site under the E.O. The Sacred Sites E.O. applies to a "location on Federal land **that is identified by an Indian Tribe** … as sacred." 61 Fed. Reg. at 26771 (emphasis added). Thus, FLPMA and the E.O. protect a sacred site as identified by the Tribes – not as unilaterally limited in this case by BLM. BLM thus either failed to respond to these substantive concerns, or ignored the evidence in the record as to the religious uses of the Project site by Western Shoshone – in contravention of its duties under FLPMA and E.O. 13007.

BLM's decision to ignore the evidence showing that the Pediment area (i.e., the Project site) is part of the Mt. Tenabo Sacred Site violates fundamental tenets of administrative law. An agency' action must be reversed as "arbitrary and capricious" if it "failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency." Northern Plains Resource Council v. Surface Transp. Brd., 668 F.3d 1067, 1074 (9th Cir. 2011). "[W]e may not defer to an agency decision that is without substantial basis in fact." Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 878 (9th Cir. Ariz. 2009). *See also* Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 954 (9th Cir. 2003) (agency conclusions must be "based on a reasoned evaluation of the relevant factors"); Earth Island Inst. v. U.S. Forest Service, 442 F.3d 1147, 1159-60 (9th Cir. 2006) (same).

Despite the evidence in the record submitted by the Tribal governments attesting to the fact that the Pediment area of Mt. Tenabo (i.e., the Project site) was considered a Sacred Site under the meaning of the E.O., and is used for religious purposes, BLM nevertheless concluded that the Sacred Site only included the very "top" of the Mountain and the sheer White Cliffs above the Pediment. "The EIS did not conclude that the Western Shoshone use the project site for religious activities or that the site is a central part of Western Shoshone religious practices." FEIS Vol. III at 121 (Response to comment O-003-004), ER 381.

Thus, BLM based its approval of the Project on its conclusion that, despite all the evidence submitted by the Western Shoshone, as well as the other evidence in the record, attesting to the significance of the Pediment area on Mt. Tenabo to Western Shoshone religion and to the elimination of current Western Shoshone religious uses and practices at the site: "BLM knows of no Western Shoshone uses that would be prevented or uses or resources that would be destroyed by the proposed project." Id. at 122, ER 382.

Strikingly however, the record shows that this BLM position was actually authored by Barrick and its attorneys prior to the completion of the FEIS when they wrote this portion of the Response to Comments in the FEIS. Barrick wrote: "BLM knows of no Western Shoshone uses or resources that will be destroyed by the Project." Feb. 5, 2008 email comments from Barrick to BLM, ER 474-79, at 477-78. Except for a slight change in the grammar, this "finding" by BLM is actually Barrick's version of the facts. Barrick also requested that the agency delete the findings in the Draft EIS that Western Shoshone used the Project site for spiritual and religious uses – and BLM changed its position as a result. ER 454.

Thus, and overall, BLM's conclusion not only misinterprets FLPMA and the E.O., it is based on insufficient evidence and contradicts the record – in other words, arbitrary and capricious. Accordingly, BLM's position that, despite the Project's severe and permanent damage to Western Shoshone religious uses and to

the Mt. Tenabo Sacred Site, it has nonetheless "prevented UUD," cannot withstand judicial review under the APA.

D. *BLM Failed to Prevent UUD to Ground Waters and to the Western Shoshone Cultural and Religious Uses and Values Inherent in Mt. Tenabo's Ground Waters*

BLM approved Barrick's proposal to dewater Mt. Tenabo in order to keep the 2,000-foot deep mine pit dry during mining. However, BLM did not require **any** mitigation for the severe depletion of ground water in Mt. Tenabo. In the original 2008 FEIS, BLM did not analyze, let alone prevent, loss and damage to the ground water as well as to Western Shoshone cultural, religious, and traditional uses and values associated with Mt. Tenabo's ground waters.

In addition to the basic irreplaceable value of clean water in a desert that must be protected as a core public-lands resource, the waters of Mt. Tenabo hold unique and significant religious importance. "Water is the keystone of Western Shoshone religion because power (Puha), with its affinity for life, is strongly attracted to water." FEIS at 3.9-61, ER 365. As the Ethnographic Report found regarding Mt. Tenabo's waters: "Water is to earth what blood is to the body, and these subterranean waterways are likened to the earth's arteries and veins." Ethnographic Report at 22-23, ER 530-31. As one declarant stated to BLM:

> Water is the source of all life and the power of life flows through water. The water flowing underneath the Mt. Tenabo area is especially important to

> maintaining the balance and power of life I value as a central tenet of my religious beliefs as a Western Shoshone.

Declaration of Carrie Dann, ER 408. "The waters and springs of the Mountain contain the life energy of the world, as concentrated on Mt. Tenabo, and are sacred to myself and other traditional Western Shoshone." Declaration of Delbert Holly, ER 419.

Despite the importance of these waters, the BLM conducted an "inadequate study of the serious effects of … exhausting water resources," 588 F.3d at 728. The Ninth Circuit further held that BLM failed to fully review and consider mitigation of the serious impacts resulting from Barrick's dewatering of Mt. Tenabo. Id. at 722. Upon remand, and after the district court's first summary judgment ruling, BLM prepared its Supplemental EIS supposedly addressing the NEPA failures in the original EIS.

However, in the SFEIS, BLM admits that "the mitigation measures discussed in the Draft SEIS are not 'new,' rather, these measures were described in Section 3.2.4 of the Cortez Hills Expansion Project Final EIS (BLM 2008a)…" BLM response to comment O-001-2, FSEIS at A-18, ER 107. Thus, like the 2008 FEIS, the 2011 Supplemental EIS contained no mitigation measures for ground water.

BLM limited its mitigation analysis to purportedly protecting surface waters only. "For water resources, the scope of the SEIS is to provide supplemental

information and analysis to refine the evaluation of the effectiveness of mine dewatering mitigation measures provided in Mitigation Measure WR1b in the Final EIS." BLM response to comment O-001-8, FSEIS at A-27, ER 116.

"Mitigation Measure WR1b" in the original EIS, however, dealt with surface water only. There is no mention of protecting ground water. FSEIS at 3-11 to -12, ER 100-01. "Mitigation Measures WR1a and WR1b presented in Section 3.2.4 (Monitoring and Mitigation Measures) of the Cortez Hills Expansion Project Final EIS (BLM 2008a) provide a framework for monitoring and mitigating potential impacts to perennial surface water resources from mine-related groundwater drawdown." FSEIS at 3-1, ER 90. Further, BLM's "Water Resources Mitigation Summary," FSEIS Table 3.2.-1, ER 92-99, is limited to only the 33 "surface water resources" considered by the agency. FSEIS at 3-2 (describing contents of Table 3.2-1), ER 91.

None of these mitigation measures are aimed at preventing the loss and degradation of ground waters. At most, they purportedly reduce the impacts to "the identified surface water resources within the mine-related groundwater drawdown area." FSEIS at 3-11 to -12, ER 100-01. While some of these measures may arguably, if they were ever implemented, reduce the impacts to **surface** springs or seeps, they are not intended at all to prevent the loss of **ground water**.

As noted above, BLM has not proposed any new mitigation measures in the FSEIS. At most, the FSEIS and 2011 ROD purport to analyze the "effectiveness" of these measures to surface waters. BLM only "refined" its effectiveness analysis and even then limited its analysis to "potential impacts to surface water resources" – ignoring impacts to ground water as well as to Western Shoshone cultural, religious and traditional uses and values. FSEIS at A-19, ER 108.

BLM cannot deny that the depletion of ground water on Mt. Tenabo is significant. The Project's massive pumping of groundwater is predicted to lower the groundwater over 1,000 feet. FEIS at 3.2-86 (Figure 3.2-19) (showing drop of 1,200 feet of ground water on Mt. Tenabo), ER353. Over 16.35 billion gallons of water will be lost. FEIS at 3.19-2, ER 368 (50,200 acre-feet of water = 16.35 billion gallons). BLM has no plans to replace or otherwise mitigate for the loss of this water, except for a possible future potential to pipe some limited water to existing surface springs. FSEIS at 3-11 to -12, ER 100-01.

As BLM previously acknowledged, it has a duty under FLPMA to protect ground water under its UUD mandate:

> BLM will ensure that the project includes adequate provisions to prevent unnecessary or undue degradation of federal lands and **to protect non-mineral resources of federal lands, including groundwater and surface water.**

BLM response to comment O-001-2, FSEIS at A-19 (emphasis added), ER 108.

In describing its duty to protect groundwater as a separate resource, the agency's regulatory policy stated that:

> **BLM disagrees with the comment that unnecessary or undue degradation does not consider the effects of mining on ground water**, surface water, or other environmental media. … The FLPMA mandate to prevent unnecessary or undue degradation includes degradation of water resources. … Therefore, BLM may require operators to conduct operations to avoid or limit impacts to air and water resources.

65 Fed. Reg. at 70051 (Nov. 21, 2000)(emphasis added)(regulatory preamble to the revised Part 3809 regulations). Despite this, BLM did not follow its own policy and legal interpretations in this case.

Because BLM has no plans to protect or mitigate against the loss of Mt. Tenabo's ground water, the 2011 ROD, like the original ROD, failed to "prevent UUD" to this resource under FLPMA. In addition, BLM failed to "prevent UUD" to the Western Shoshone traditional, cultural, and religious values inherent in this ground water (*see* above discussion on Western Shoshone uses/interests in Mt. Tenabo's ground water).

E. *BLM Failed to Prevent UUD to Surface Waters and to the Western Shoshone Cultural and Religious Uses and Values Inherent in Mt. Tenabo's Surface Waters*

Although, as BLM admits, there is no plan to prevent the degradation, indeed elimination, of the **ground** waters that will be removed from the Mountain,

the 2008 and 2011 EISs, and 2008 and 2011 RODs, purport to protect **surface** water resources. However, as BLM states in the FSEIS, "the mitigation measures discussed in the Draft SEIS are not 'new,' rather, these measures were described in Section 3.2.4 of the Cortez Hills Expansion Project Final EIS (BLM 2008a)…" FSEIS at A-18, ER 107.

At most, the 2011 FSEIS only "refine[d] the analysis of the effectiveness of measures adopted to mitigate potential impacts to surface water resources from mine-related groundwater pumping." FSEIS at A-19, ER 108. BLM simply reiterated its previous plan to "study first, mitigate later." The original FEIS predicts that at least 15 springs or seeps, and at least one perennial stream, will suffer the loss or complete elimination of their flows. FEIS at 3.2-57, ER 351. *See also* FEIS at 3.2-86 (Figure 3.2-19) (showing drop of over 1,200 feet in the ground water table on Mt. Tenabo), ER 353.

At most, the "mitigation" for undue degradation of surface waters contained in the 2011 ROD and FSEIS will apply only after the impacts have begun – thus allowing the degradation to occur (i.e., supposedly "preventing" degradation, if at all, only at some point after it has already occurred). Despite these predicted losses, BLM maintains that it will monitor these depletions and then fully "mitigate" and prevent any losses. A close look at this plan shows that Barrick and BLM will take action only long after the losses have happened.

This "mitigation plan" is largely a plan for Barrick to study the extent of the groundwater loss. *See* FEIS at 3.2-109 to 3.2.111, ER 357-59. Under BLM's much-touted "Mitigation Measure WR1b," even after water loss is detected, Barrick and the agencies would only then determine "if mitigation is required." FEIS at 3.2-111, ER 359. The new FSEIS does not require any additional mitigation, and repeats BLM's reliance on future "monitoring" to determine the extent of the losses to surface water resources. FSEIS at 3-11, ER 100.

Thus, only after significant water losses began would Barrick consider developing a plan to replace lost waters, and even then there is no discussion as to how such imported waters prevent the damage and loss of the unique, and sacred, waters of Mt. Tenabo. Id.[4] Further, as noted above, the purported efforts to prevent degradation apply only to surface waters and thus fail to prevent UUD to ground waters – including the cultural, religious, and traditional uses and values in the ground water on Mt. Tenabo. Indeed, according to BLM, the primary means of purportedly "mitigating" for the loss of surface waters is to pump **additional** ground water and then deliver it via a network of pipes to the degraded surface water source. FSEIS at 3-11 to -12, ER 100-01.

BLM does not even recognize Western Shoshone values and uses in Mt. Tenabo's waters – and simply focuses the mitigation on replacing surface water to

[4] This failure to provide and analyze a proper mitigation plan also violates NEPA, as discussed below.

purportedly benefit "livestock and wildlife." FSEIS Table 3.2.1, ER 92-99. In that table, entitled "Water Resources Mitigation Summary," a critical column is labeled "Effectiveness of Site-Specific Mitigation Plan." There is not a **single** mention of Western Shoshone uses of the springs, seeps, and streams that will suffer varying degrees of dewatering and elimination. Instead, the only uses that BLM believed it had to "mitigate" were livestock and wildlife/habitat. Id. In addition, as noted above, there is not any mention at all regarding the need to mitigate for the loss of ground water in Mt. Tenabo.

Further, in the discussion of "Identified Use" of these waters, BLM fails to analyze, or even mention, these Western Shoshone uses:

> **Identified Use**. The identified uses of the water resources include: (1) livestock and/or wildlife water source; (2) hydrophilic vegetation or riparian corridor that provides habitat diversity; and/or (3) pasture irrigation…. The identified use(s) of each surface water feature is listed in Table 3.2-1.

FSEIS at 3-11, ER 100. However, in Table 3.2-1, there is no mention of any Western Shoshone uses of surface water on Mt. Tenabo. Thus, based on BLM's failure to even consider Western Shoshone uses and values in Mt. Tenabo's waters, the reasoning behind the agency's failure to protect these resources becomes clear.

Lastly, the lake that will be created in the 2,000-foot deep mine pit after mining ceases is predicted to be polluted – severely impacting the environment and Western Shoshone religious interests in the purity of the water on Mt. Tenabo. "The Cortez Hills Pit lake is predicted to have overall higher constituent

concentrations due to the evapoconcentration; arsenic is … predicted to exceed Nevada water quality standards." FEIS at 2-124, Table 2-19, ER 347. *See also* FEIS at 3.5-39 (discussing additional concerns with selenium and mercury contamination in the pit lake), ER 362.

The polluted pit lake was specifically highlighted by the tribal governments as one reason why the Tribes opposed the Project. "Because of the … irreparable harm to our culture and religion/spirituality, **and due to the amount of water that will be wasted and/or polluted**, we must oppose the Cortez Hills Mine Expansion Project." Letter from Lynette Piffero, Chairperson, Elko Band Council, December, 2007 (emphasis added), ER 374. *See also* Western Shoshone Declarations in FEIS, discussing spiritual importance of Mt. Tenabo's waters, ER 401-425. BLM fails to propose or analyze any mitigation at all for this pollution.

Thus, BLM's approval of the complete or near-complete loss of, and contamination of, this precious desert resource violates BLM's duties under FLPMA and its implementing regulations to protect this resource.

II. BLM VIOLATED NEPA

A. *Statutory Background*

NEPA "prevent[s] or eliminate[s] damage to the environment and biosphere by focusing government and public attention on the environmental effects of

proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). It requires the federal agency to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." Baltimore Gas and Electric Company v. NRDC, 462 U.S. 87, 97 (1983). As the Ninth Circuit recently stated in overturning a BLM-issued EIS:

> In NEPA, Congress recognized the "profound impact" of human activities, including "resource exploitation," on the environment and declared a national policy "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). To further this policy, NEPA establishes "action-forcing" procedures that require agencies to take a "hard look" at environmental consequences.
> …
> An EIS serves two purposes:
>
> > First, [i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Center for Biological Diversity, 623 F.3d at 642 (citations omitted).

By focusing the agency's attention on the environmental consequences of the proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). "NEPA procedures must ensure that environmental information

is available to public officials and citizens before decisions are made and before actions are taken." 40 CFR § 1500.1(b).

BLM must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 1502.16; 1508.8; 1508.25(c). This review must be supported by detailed data and analysis – unsupported conclusions violate NEPA. *See* Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998); Northern Plains Resource Council v. Surface Transp. Brd., 668 F.3d 1067, 1075 (9th Cir. 2011).

NEPA also requires BLM to: (1) "include appropriate mitigation measures not already included in the proposed action or alternatives," 40 CFR § 1502.14(f); and (2) "include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 CFR § 1502.16(h). NEPA regulations define "mitigation" as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action. 40 CFR §§1508.20(a)-(e). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." Robertson, 490 U.S. at 353.

B. *BLM Failed to Adequately Analyze the "Serious Effects of Exhausting Water Resources" and Failed to Conduct the Proper Mitigation Analysis*

As previously found by the Ninth Circuit, the 2008 FEIS contained an "inadequate study of the serious effects of … exhausting water resources." South Fork Band Council, 588 F.3d at 728. "The Tribes contend the BLM failed to conduct an appropriate mitigation analysis with respect to the environmental consequences of mine dewatering." South Fork Band Council, 588 F.3d at 726-27. The Ninth Circuit agreed with the Tribes. Id. at 727. The appeals court also held that the FSEIS failed to "adequately consider[] … mitigation of the adverse impact on local springs and streams." Id. at 722.

The court also rejected BLM's contention that it was "impossible to conclusively identify specific springs and seeps that would or would not be impacted." Id. at 727.

> That these individual harms are somewhat uncertain due to BLM's limited understanding of the hydrologic features of the area does not relieve BLM of the responsibility to discuss mitigation of reasonably likely impacts at the outset. *See* National Parks [Conservation Assoc. v. Babbitt], 241 F.3d at 733 ("lack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.").

588 F.3d at 727.

Regarding BLM's failure to analyze mitigation measures to avoid adverse impacts to ground and surface waters, the appeals court found that: "Nothing whatsoever is said [in the FEIS] about whether the anticipated harms [to surface

and ground waters] could be avoided by *any* of the listed mitigation measures. This discussion is inadequate." Id. (emphasis in original). "NEPA requires that the agency give some sense of whether the drying up of these water resources could be avoided." Id. The appeals court also found that the FEIS "does not in fact assess the effectiveness of the mitigation measures related to groundwater," as required by NEPA. Id.

The Ninth Circuit further required BLM to "do the necessary work to obtain" the necessary underlying information regarding the "hydrologic features" that will be adversely affected by the Project as part of an adequate mitigation plan and EIS, as well as conducting an adequate "study of the serious effects of exhausting water resources." Id. at 727-28.

Yet, upon remand, outside of a self-described "refinement" of its previous analysis, BLM conducted no additional work or analysis in the 2011 FSEIS.

1. BLM failed to "do the necessary work" to fully analyze dewatering and mitigation

Despite these directives from the Ninth Circuit, the FSEIS was limited to merely "refining" its discredited mitigation analysis and then only analyzed mitigation for surface water impacts only. The agency never conducted any additional analysis of the "uncertainty" regarding the impacts from dewatering and

related mitigation measures. It also failed entirely to discuss mitigation of the impacts from the elimination of Mt. Tenabo's ground waters.

The 2011 FSEIS does not present any new dewatering analysis or mitigation strategy, admitting that "the mitigation measures discussed in the Draft SEIS are not 'new,' rather, these measures were described in Section 3.2.4 of the Cortez Hills Expansion Project Final EIS (BLM 2008a)…" BLM response to comment O-001-2, FSEIS at A-18, ER 107. In their comments on the Draft Supplemental EIS, Plaintiffs specifically urged BLM to consider and adopt mitigation measures to protect ground water, and increase the meager mitigation measures contained in the original EIS to protect surface waters (which did not change in the FSEIS). ER 124-146. In the Final SEIS, however, BLM refused to address any additional mitigation.

The 2011 FSEIS was based on the agency's position that "BLM disagrees with the commenter's [Plaintiffs'] apparent reading of the Ninth Circuit's decision; the Ninth Circuit's decision addressed only the question of Mitigation Measure WR1b for surface water resources." FSEIS at A-28, ER 117. Such a narrow view of the Ninth Circuit's decision, and BLM's NEPA duties, undermines the 2011 FSEIS and 2011 ROD – as well as the 2008 FEIS and ROD which were originally held illegal by the Ninth Circuit.

Upon publication of the FSEIS, the Tribes again submitted extensive comments to the BLM, requesting that the agency consider and adopt mitigation measures to protect ground and surface waters in the upcoming 2011 ROD. ER 72-87. Again, BLM refused to act, issuing the ROD without any additional mitigation measures beyond the ones contained in the inadequate original EIS and ROD. 2011 ROD at 5-6 (repeating list of mitigation measures from 2008 FEIS), ER 64-65.

BLM's failure to review, or require, any mitigation for the loss of ground water is based on its truncated view of the Ninth Circuit's decision and its NEPA responsibilities. In describing the limited scope of the FSEIS, BLM acknowledged that the FSEIS considered only three issues:

> 1) analyze the air quality impacts of the off site transportation and processing [of the refractory ore]; 2) **refine the analysis of the effectiveness of measures adopted to mitigate potential impacts to surface water resources from mine-related groundwater pumping**; and 3) present an air quality analysis of [PM2.5 emissions].

BLM response to comment O-001-3, FSEIS at A-19 (emphasis added), ER 108.[5] Thus, the only new mitigation analysis undertaken in the 2011 FSEIS was a "refinement" of its previous analysis regarding the "effectiveness" of the surface water mitigation measures listed in the 2008 FEIS.

[5] In order to narrow the issues for review, this Appeal does not contest the remanded air quality analysis/issues contained in the FSEIS.

Yet BLM's mitigation and analysis in the FSEIS, including its self-imposed restriction limiting its review to only surface waters, was improperly constrained by its incorrect reading of the Ninth Circuit's decision and NEPA itself. The FSEIS also avoids its duties under NEPA regarding the analysis and protection of these critical water resources by repeating its discredited position in the 2008 FEIS, saying that it is "uncertain" whether the dewatering operations would impact these waters. FSEIS at 3-1, ER 90.

This ignores the very finding from the Ninth Circuit that BLM cannot avoid its NEPA duties by labeling an impact "uncertain." Regarding the lack of an adequate mitigation analysis, the Ninth Circuit held that the Supplemental EIS must "adequately consider[] … mitigation of the adverse impact on local springs and streams." South Fork Band Council, 588 F.3d at 722. This is not limited to only determining the "effectiveness" of surface water mitigation.

The court also rejected BLM's contention that it was "impossible to conclusively identify specific springs and seeps that would or would not be impacted." Id. at 727. The Ninth Circuit found that BLM had conducted an "inadequate study of the serious effects of … exhausting water resources." Id. at 728. Thus, in addition to requiring a detailed analysis of the effectiveness of BLM's mitigation plan, the Ninth Circuit further required BLM to "do the necessary work to obtain" the necessary underlying information regarding the

"hydrologic features" that will be adversely affected by the Project as part of an adequate mitigation plan and EIS, as well as conducting an adequate "study of the serious effects of exhausting water resources." Id. at 727-28. Yet none of this further work was done upon remand as ordered by the court and as required by NEPA.

If at all, BLM's "mitigation" plan to actually replace or repair the loss or damage to surface waters would only be submitted at some undetermined time in the future based on future monitoring results (and even then only after further "evaluation" by BLM). FEIS at 3.2-111 (Mitigation Measure WR1b), ER 359. No such detailed plan has yet been submitted to BLM or to the public for review. Monitoring prior to actual mitigation of impacts merely "serve[s] to confirm the appropriateness of a mitigation measure, but that does not make it an adequate mitigation measure in itself." Alaska Wilderness League v. Kempthorne**,** 548 F.3d 815, 828 (9th Cir. 2008), *vacated as moot*, 555 F.3d 916 (9th Cir. 2009).

There is no assurance that the eventual mitigation plan will be subject to public review under NEPA. Id. Such deferred analysis violates NEPA.

> Even if mitigation measures may guarantee that the data will be collected some time in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Northern Plains Resource Council, 668 F.3d at 1085.

Overall, the sole product of the 2011 FSEIS regarding mitigation was BLM's mere "refinement" of its previous analysis regarding the effectiveness of its list of potential future mitigation measures for surface waters. This failed to correct the deficiencies of the 2008 FEIS and failed to conduct the required analysis of impacts previously noted by the Ninth Circuit. BLM's plan to simply "monitor" the drawdown and elimination of ground and surface waters, and only then figure out a way to avoid losses to surface water only, is the type of "impact first, develop a plan later" approach rejected by the Ninth Circuit.

2. BLM failed to analyze and account for the need to mitigate the impacts to Western Shoshone uses and interests in the ground and surface waters.

Another significant omission in BLM's analysis is the failure to analyze the degradation to the spiritual, religious, and cultural values and uses these waters have to many Western Shoshone. As noted above in the FLPMA discussion, BLM does not even recognize these values and uses – and simply focuses the mitigation on replacing surface water to purportedly benefit "livestock and wildlife." FSEIS Table 3.2.1, ER 92-99. *See also*, FEIS at 3-11, listing the "Identified Use" of Mt. Tenabo's waters as limited to "livestock/wildlife," "hydrophilic vegetation," and "pasture irrigation." ER 100.

NEPA requires BLM to review all potential uses and the impacts upon them that will be caused by the Project's dewatering. *See* Te-Moak Tribe v. Dept. of the

Interior, 608 F.3d 592, 602-607 (9th Cir. 2010)(BLM violated NEPA by failing to adequately review impacts from mining operations on Western Shoshone cultural resources). *See also*, 40 CFR § 1508.8 ("effects" and "impacts" that must be analyzed include impacts to "historical, cultural" and "social" resources).

BLM is well aware of the importance of these waters to Western Shoshone, as attested to by the numerous tribal government comments/resolutions and declarations submitted to BLM during the previous NEPA process, and during this litigation (all incorporated into the Tribes' comments on the Draft SEIS). In commenting upon the Draft SEIS in 2011, the Tribes attached additional declarations of Western Shoshone, including tribal government leaders, which further evidenced these uses and values and how BLM's "mitigation" plan failed to recognize and protect these uses and values.

Notably, these declarations did not just testify as to the loss of springs/surface waters, but also to the loss of the religious and cultural values in the **ground water** on Mt. Tenabo as well. As stated by the Chairman of the Timbisha Tribe, Joe Kennedy:

> The water flowing underneath the Mt. Tenabo area is especially important to maintaining the balance and power of life I value as a central tenet of my religious beliefs as a Western Shoshone. Under our religious beliefs, the water in Mt. Tenabo is unique and is connected to specific spirits that reside in the Mountain and in the water. These spirits will suffer greatly, and indeed will likely be eliminated altogether, when this water is lost through the Project's dewatering operations.

Declaration of Joe Kennedy, ER 132-34, at 133. "The loss of these irreplaceable waters, and the spirits and religious values of these waters, constitutes irreparable damage to them, as to the fundamental religious practices and beliefs of myself and other traditional Western Shoshone." Declaration of Carrie Dann, ER 129-31, at 130. *See also* Declaration of Larson Bill, ER 135-36. [6]

BLM's failure to recognize these values and uses in its overall analysis, as well as its mitigation analysis, fatally flaws the 2008 and 2011 EISs. In other words, BLM cannot possibly meet its duties under NEPA to fully analyze the necessary mitigation (including its effectiveness) to protect these values/uses when the FSEIS does not even recognize or consider them.

BLM's failure to fully review, analyze, and protect the spiritual, religious, and cultural uses and values in Mt. Tenabo's waters is based on BLM's position that "BLM knows of no specific Western Shoshone cultural, traditional, or religious uses that would be prevented or destroyed by the Cortez Hills Expansion Project." BLM response to comment O-001-5, FSEIS at A-23, ER 112. This was the same position taken by BLM in the original EIS. "The EIS did not conclude that the Western Shoshone use the project site for religious activities or that the site is a central part of Western Shoshone religious practices." FEIS Vol. III at 121,

[6] These statements, especially by the elected Chairman of the Timbisha Tribe, Mr. Kennedy, regarding BLM's failure to protect groundwater on Mt. Tenabo, also evidences BLM's failures under FLPMA as detailed *supra*.

ER 381. "BLM knows of no Western Shoshone uses that would be prevented or uses or resources that would be destroyed by the proposed project." Id. at 122, ER 382. As noted previously, this factual position was actually written by Barrick and its attorneys during the EIS process, and copied largely verbatim by BLM into the EISs. ER 477-78.

This position flatly ignores the many and detailed Western Shoshone declarations and testimony submitted to BLM, including numerous additional Declarations submitted in comments on the Draft SEIS. *See, e.g.*, Declarations of Kennedy and Dann, ER 132-34, 129-31.

Thus, BLM either failed to respond to these substantive concerns, or ignored the evidence in the record as to the Western Shoshone uses and values inherent in the water – in contravention of established NEPA case law and the APA. An agency' action is "arbitrary and capricious" if it "failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency." Northern Plains Resource Council, 668 F.3d at 1074. That certainly is the case here.

CONCLUSION

Based on the foregoing, the Tribes respectfully request that this Court vacate and set aside BLM's approval of the Project (i.e., the 2008 and 2011 RODs), and the agency's deficient NEPA analysis contained in the 2008 FEIS and 2011 FSEIS.

Respectfully submitted this 5th day of June, 2012.

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 32-1

I certify that: Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,849 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words).

/s/ Roger Flynn 6-5-12

Roger Flynn Date

CERTIFICATE OF SERVICE

I certify that the following parties were served with a copy of the Appellants' Excerpts of Record by placing it for delivery via Federal Express this 5th day of June, 2012:

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CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on June 5, 2012, I electronically filed the foregoing brief 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 certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Roger Flynn

Roger Flynn

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(b), Appellants state that there is one related case that has been before this Court (although none others are currently pending): **South Fork Band Council v. U.S. Department of the Interior, 588 F.3d 718 (9th Cir. 2009)**(per curiam)(decision on preliminary injunction)(Judges Schroeder, Tashima, and Berzon).