UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17843

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

DENISON ARIZONA STRIP LLC AND DENISON MINES (USA) CORP.,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA
Case No: 09-8207-DGC
District Judge David G. Campbell

OPENING BRIEF OF APPELLANTS

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March 7, 2012

CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT OF JURISDICTION

The U.S. District Court for Arizona had jurisdiction under 5 U.S.C. § 701 et seq. and 28 U.S.C. § 1331. Final judgment was entered on October 7, 2011. ER 633. Pursuant to 28 U.S.C. § 2107(b), Appellants Center for Biological Diversity, Grand Canyon Trust, Sierra Club, the Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, and the Havasupai Tribe timely filed a Notice of Appeal on November 28, 2011. Id. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the U.S. Bureau of Land Management (BLM) violate the Federal Land Policy and Management Act (FLPMA) by failing to approve a new "plan of operations" for the Arizona 1 uranium mine before mining began in 2009.

    a. Did BLM's approval of Arizona 1's 1988 "plan of operations" become ineffective because Arizona 1 was closed in 1990.

2. Did BLM violate the National Environmental Policy Act (NEPA) by failing to evaluate new information regarding the Arizona 1's impacts to Grand Canyon National Park, Colorado River water supply, groundwater, archaeological and cultural resources, and the endangered California condor in a supplement to the 1988 Environmental Assessment.

a. Did BLM provide additional approvals -- and thus undertake "major Federal action" -- that were required before mining operations could begin at Arizona 1.

3. Did BLM violate NEPA by failing to analyze Arizona 1's environmental impacts upon approving a new reclamation bond for the mine.

a. Was BLM's approval of the Arizona 1 Reclamation Bond a NEPA "major federal action."

4. Did BLM violate NEPA by failing to analyze the environmental impacts of Arizona 1 mining and roadwork upon issuing the Gravel Permit, and relying on a categorical exclusion.

ADDENDUM STATEMENT

The attached addendum contains pertinent statutes and regulations.

STATEMENT OF THE CASE

I. INTRODUCTION: NATURE OF THE CASE

Uranium mining in Northern Arizona threatens Grand Canyon natural resources and the region's people. Grand Canyon uranium mining began during the 1950s and peaked in the 1980s. Uranium mining continued until the demand for uranium crashed in the late 1980s. It left a legacy of radioactive contamination, devastating effects to regional tribes, and degradation of Grand Canyon National Park resources, including its watershed, seeps and springs, sacred sites, and critical

wildlife habitat. When the uranium market rebounded in 2006, thousands of new mining claims were filed in the Grand Canyon region, and old mines that had been closed for decades re-emerged. ER 50, 379, 413.

One of the mines that sprang back into life was the Arizona 1 uranium mine (Arizona 1). Arizona 1 is one of several previously-approved mines located a few miles north of Grand Canyon National Park, on public lands managed by the U.S. Bureau of Land Management (BLM). In 1988, BLM approved Arizona 1 under FLPMA and its implementing regulations through a "plan of operations" (1988 Plan) after evaluating under NEPA its environmental impacts in an Environmental Assessment (1988 EA). ER 488, 566, 578. Upon approval, the operator Energy Fuels Nuclear (EFN) constructed Arizona 1, but never began production. Rather, EFN closed Arizona 1 in 1990, subsequently went bankrupt and sold the mine.

Nineteen years after BLM's initial 1988 approval, a new operator -- the Canadian-Korean mining company Denison Mines (Denison) -- announced its intention to open Arizona 1. In response, BLM did not require approval of a new plan of operations under FLPMA, supplement its 1988 Environmental Assessment under NEPA, or otherwise inform the public that Arizona 1 was going to begin operations based on 20-year-old approval documents. Nonetheless, because the approved 1988 Plan was found wanting in several respects, BLM had to regulate and provide additional approvals before Denison could begin Arizona 1 mining.

This appeal challenges Appellees Secretary of the Interior Ken Salazar and BLM's failure to comply with mandatory FLPMA and NEPA duties regarding new operations at Arizona 1.

II. STATEMENT OF FACTS

A. The Grand Canyon Region

The Grand Canyon is recognized around the world as one of the planet's greatest natural and geologic wonders. The mile-deep, 277-mile-long canyon is protected as a national park and is surrounded by public lands. Lush groundwater-fed springs dot the area, supporting a diversity of species up to 500 times greater than the surrounding arid lands. ER 318-25. The region's diversity provides habitat for a variety of wildlife, including mule deer, desert bighorn sheep, pronghorn, western burrowing owl, northern goshawk, and the desert horned lizard. Id. Endangered species such as the California condor and Mexican spotted owl nest and forage in the area, while the Colorado River provides critical habitat for the endangered humpback chub and other imperiled aquatic species. Id.

The Grand Canyon region also comprises the ancestral homelands of several American Indian tribes. ER 51. For thousands of years, these tribes, including Appellants Havasupai and Kaibab Paiute tribes, have sustained themselves hunting, gathering, and farming. For centuries, they have held religious ceremonies and buried their dead in the Grand Canyon region. Their history, culture and spiritual identities

are intimately connected to the region and its resources, and the area contains many religious and cultural sites that remain vital to the tribes.

These natural and cultural resources and Native American lands provide a recreational mecca that welcomes five million tourists annually and supports the local economy. ER 413, 379. Visitors enjoy hiking, camping, hunting, and other activities that allow them to experience the scenic vistas, diverse flora and fauna, traditional cultural sites, and natural quiet and solitude of the area. ER 52.

B. BLM's 1988 Approval Of Arizona 1

While the 1872 Mining Law authorizes mining on the region's public lands (30 U.S.C. §§ 22, 26), FLPMA and its implementing regulations charges BLM with mining management. 43 U.S.C. §§ 1701-1787; 43 C.F.R. §§ 3809 et seq. (the "3809 Regulations").[1] Under the 3809 Regulations, mining is reviewed based on a three-tiered system: casual use, notice-level, and plan level. 43 C.F.R. § 3809.10. Each tier corresponds to an increasing level of impact and regulatory oversight, with plans of operations required for the most significant of operations that cause a surface disturbance of five acres or more. Id. § 3809.10(c); § 3809.11(a), §

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[1] Uranium mining under the 1872 Mining Law generates no royalties for the U.S. Government, unless a special program in enacted by Congress on a case-by-case basis. E.g., Colo. Envtl. Coal. v. Office of Legacy Management, _ F.Supp.2d _, 2011 WL 4940662, *1 (D. Colo. Oct. 18, 2011) (detailing significant royalties collected from uranium mining in southwest Colorado). No such royalty program for uranium exists in the Grand Canyon region.

3809.21(a). In approving plans of operations, BLM must ensure mining activities will comply with FLPMA's overarching duty "to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b); Ctr. for Biological Diversity v. Dep't of Interior, 623 F.3d 633, 641 (9th Cir. 2010); Mineral Policy Ctr. v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003) ("FLPMA, by its plain terms, vests the Secretary of the Interior with the authority -- and indeed the obligation -- to disapprove of an otherwise permissible mining operations because the operation . . . would unduly harm or degrade the public land.").

BLM manages the public lands north of Grand Canyon, an area known as the Arizona Strip. ER 11. Arizona 1 is located within BLM's Arizona Strip, approximately six miles from the north rim of the Grand Canyon and just west of the Kaibab National Forest. Id. The mine site contains a large uncovered waste pit. ER 593. As with all mines in the region, Arizona 1's uranium ore is found in a geologic formation known as a "breccia pipe," a cylindrical vertical rock formation that extends deep into the earth. ER 326, 294. Arizona 1's mineshaft plunges roughly 1,600 feet into the ground, adjacent to the breccia pipe, with horizontal shafts accessing the ore body. ER 493. Extracted ore is stored on-site at the surface until large trucks transport it to a Utah mill. ER 499. Mt. Trumbull Road is Arizona 1's main access road, requiring travel along 30 miles of unpaved road

through the Kaibab Paiute reservation and aboriginal lands after departing south from Arizona State Highway 389. ER 494, 568.

EFN originally developed Arizona 1. ER 12. After exploring for uranium, in 1988, EFN submitted a plan of operations to mine for uranium for "approximately 10 years." ER 567, 578, 588. BLM completed the 1988 EA and, based on additional measures designed to mitigate adverse impacts from Arizona 1 operations, issued a NEPA "finding of no significant impact." ER 488-565; ER 566-77. BLM approved the 1988 Plan on May 9, 1988. ER 566. However, soon after constructing a portion of the mineshaft, EFN shut Arizona 1 down in 1990. ER 190 ¶25 (Complaint); ER 171 ¶25 (BLM Answer); ER 454 ("no ore has been produced from the Arizona 1 mine").

C. The Withdrawal Of Public Lands In The Grand Canyon Region

In addition to Arizona 1, BLM had approved several other uranium mines in the Arizona Strip in the mid-to-late 1980s. ER 460. And like Arizona 1, all were closed after the market for uranium plummeted by the early 1990s. Id., ER 52.

In the mid-2000s, however, the global uranium market spiked, sparking renewed interest in mining the Grand Canyon region. ER 50, 379, 408, 413, 468. Thousands of new mining claims were filed. ER 326 (improved market "created a flurry of mining exploration in northern Arizona"); see ER 379, 408, 413. Denison has been participating in this flurry; in addition to Arizona 1, Denison plans to

commence operations at three other previously-approved mines (Pinenut, Kanab North, and Canyon) and develop the new EZ mine, all within the immediate vicinity of Arizona 1. ER 194 ¶¶35-36 (Complaint); ER 172-73 ¶¶35-36 (BLM Answer); ER 160 ¶¶35-36 (Denison Answer); ER 469, 474.

Strong opposition to resumed, and new, uranium mining in the Grand Canyon region resulted. County, state and tribal governments as well as two large regional water districts objected because of adverse impacts to Grand Canyon National Park, its watershed, public health and safety, and tourism. ER 413 (Coconino County Resolution); ER 408 (Arizona Governor letter); ER 407 (Arizona Game and Fish letter expressing "concerns regarding the potential impact to wildlife and wildlife habitats through proposed uranium developments on lands in proximity to Grand Canyon National Park"); ER 330, 478 (Tribal resolutions); ER 385, 402 (Southern Nevada Water Authority and Metropolitan Water District of Southern California). The U.S. Geological Survey (USGS) summarized the foundation of this opposition as follows:

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

ER 326.

The threat posed by uranium mining also galvanized federal officials. In 2008, Arizona Congressman Raul Grijalva introduced legislation -- called the

Grand Canyon Watersheds Protection Act -- to protect the Grand Canyon region from uranium mining, including the public lands where Arizona 1 is located. ER 445. In 2008, under the authority of FLPMA, 43 U.S.C. § 1714(e), the U.S. House of Representative Committee on Natural Resources issued an Emergency Resolution requiring the Department of Interior (DOI) to "withdraw" approximately one million acres surrounding Grand Canyon from mining activities, which also included Arizona 1. ER 379. A "withdrawal" is the withholding of federal lands from mining settlement, sale, location, or entry under the Mining Law to maintain other public values. 43 C.F.R. § 2300.0-5(h). In support of the Emergency Resolution, the Committee found: (1) a dramatic increase in the demand of uranium found within five miles of Grand Canyon National Park; (2) uranium mining impacts the region's natural resources, air quality, archeological and cultural resources, and tourism; (3) threats to human health and safety uranium mining; and (4) previous uranium mining had left a legacy of debilitating illness and death among Native Peoples and resulted in contaminated soil and groundwater that remains unremediated. ER 379-80.

Rather than withdrawing these sensitive lands pursuant to the Emergency Resolution, DOI took a more deliberative approach. In July 2009, based on the authority vested in FLPMA, 43 U.S.C. §§ 1714(a) & (b)(1), DOI issued a two-year segregation and a proposed withdrawal for the same one million acres from mining

activities. 74 Fed. Reg. 35,887 (July 21, 2009). A "segregation" is "the removal for a limited period, subject to valid existing rights, of a specified area of the public lands from the operation of the public land laws, including the mining laws." 43 C.F.R. § 2300.0-5(m). The Segregation and Proposed Withdrawal were issued to "protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining," and to allow time for "various studies and analyses, including appropriate [NEPA] analysis" that will "support a final decision on whether or not to proceed with a withdrawal." 74 Fed. Reg. 35887; ER 237 (withdrawal was necessary to "ensure that we are developing our nation's resources in a way that protects local communities, treasured landscapes, and our watersheds"). The Segregation and Proposed Withdrawal covered lands in three parcels of public lands, and included the Arizona 1 mine site. ER 51, 55, 469.

DOI began a two-year NEPA review process for the Proposed Withdrawal with a scoping notice on August 26, 2009 and issued a draft environmental impact statement (EIS) for public review and comment on February 18, 2010. See 76 Fed. Reg. 66,747, 66,748 (Oct. 27, 2011). After completing this analysis, DOI issued a Final EIS in October 2011 and a Record of Decision on January 9, 2012. Id.; ER 49-70. Based on this review, on January 21, 2012 DOI withdrew 1,006,545 acres adjacent to Grand Canyon National Park from mining for 20 years. See 77 Fed. Reg. 2,317 (Jan. 17, 2012) (NEPA Record of Decision); 77 Fed. Reg. 2,563 (Jan.

18, 2012) (Public Land Order). Mines with "valid existing rights," however, are grandfathered under the withdrawal, provided the operator can demonstrate to BLM, on a case-by-case basis, that valid existing rights are present. Id.; ER 53-54.

D. BLM's New Approvals For Arizona 1

Denison approached BLM to begin mining at Arizona 1 in 2007. ER 455 (Denison informing BLM that "mining activities will begin at Arizona 1 Mine in the third quarter of 2007; however, it is not anticipated that ore will be hauled from the Mine until early 2008"); ER 474-75 (2007 press release announcing "Denison is planning on restarting operations at Arizona 1 this year to complete the shaft and begin mining in 2008"). BLM did not under undertake a new plan of operations approval process in response. However, mining was delayed for over two years because BLM's initial approval of Arizona 1 through the 1988 Plan was inadequate to begin mining. Accordingly, BLM undertook additional approval actions: (1) approving a reclamation bond because the prior bond was deemed inadequate, (2) issuing a Gravel Permit that provided Denison with a new gravel source to rehabilitate Arizona 1's primary access road because the 1988 Plan did not cover such roadwork or provide an available gravel source, and (3) requiring Denison to secure a new air permit because a 1988 Clean Air Act (CAA) permit covering radon gas emissions had expired.

BLM undertook a NEPA process for the Gravel Permit because it was a "major Federal action." BLM relied on a NEPA "categorical exclusion" (or "CE") to restrict the scope of its analysis to extracting gravel from Robinson Wash and did not evaluate Arizona 1 roadwork or mining, claiming those actions were unrelated to extracting gravel. ER 396, 71-73. BLM did not conduct a NEPA review upon approving the Reclamation Bond.

III. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Center filed suit on November 16, 2009 challenging BLM's actions and inactions regarding Arizona 1 operations. At that time, Denison had not commenced mining operations. The complaint contends: (1) FLPMA requires that BLM approves mining operations on public lands through a plan of operations, and the 1988 Plan for Arizona 1 is no longer in effect under 43 C.F.R. § 3809.423 because operations stopped in 1990; and (2) even if the 1988 Plan is nonetheless effective, BLM must complete a supplemental EA or EIS under NEPA, 40 C.F.R. § 1502.9(c)(1), because it issued additional approvals for Arizona 1, and significant new information has emerged since 1988 concerning impacts to Grand Canyon National Park, the endangered California condor, and cultural and archeological resources; (3) BLM's approval of a Reclamation Bond for Arizona is a NEPA "major Federal action" requiring preparation of an EA or EIS; and (4) BLM failed to assess under NEPA the impacts from Arizona 1 roadwork and

mining and instead relied on a "categorical exclusion" upon issuing the Gravel Permit. ER 201-210

A month after Appellants filed suit, in December 2009, Denison started mining at Arizona 1 and began transporting uranium ore across the Kaibab Paiute Reservation to a mill in Blanding, Utah. ER 193 ¶34 (Complaint); ER 172 ¶34 (BLM Answer). BLM did not inform Appellants or the public that Denison had begun operations.

On April 8, 2010, Appellants moved for a preliminary injunction to stop all mining activities at Arizona 1. ER 619. The district court denied that motion on June 17, 2010, finding Appellants were not likely to succeed on the merits. ER 623.[2] This Court upheld that ruling without explanation on May 6, 2011.

Proceedings continued in the district court while the preliminary injunction was on appeal. During discovery, Appellants uncovered documents detailing new BLM approval actions relating to Arizona 1, even though BLM did not approve a new plan of operations or supplement the 1988 EA.

Appellants' Motion for Summary Judgment was denied in part on May 27, 2011. ER 11. The court ruled that FLPMA and the 3809 Regulations did not render BLM's 1988 Plan approval invalid, or require BLM to provide a new plan

[2] Two days before oral argument on the preliminary injunction motion, the district court informed the parties of a potential conflict (family business supplies machinery for region's mining operations) and asked if any party objected. ER 622. No party objected.

approval. ER 14-22. The court also held that NEPA did not require BLM to reevaluate Arizona 1 mining operations because the agency did not undertake additional approval actions since 1988. ER 22-26. In addition, the court concluded that BLM's approval of the Reclamation Bond did not require NEPA compliance because it was straightforward and did not authorize Arizona 1 mining. ER 35-36.

However, the district court did find that BLM's reliance on a NEPA categorical exclusion for the Gravel Permit was arbitrary and capricious. ER 32-34. The court ruled that BLM failed to assess the cumulative impacts from Arizona 1 roadwork and mining, and did not explain its conclusion that the Gravel Permit was unrelated to these actions. Id.[3] The court remanded the CE for a further explanation as to why there were no cumulative impacts. ER 36-37.[4]

BLM's June 24, 2011 explanation for not considering Arizona 1 roadwork and mining as cumulative impacts of the Gravel Permit parroted its prior summary judgment briefing. ER 71-73. After supplemental briefing, the court deferred to

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[3] Curiously, despite this holding, the court did not grant summary judgment to Appellants on this claim. ER 1, 34. Instead, the court deferred judgment, to allow BLM to explain its CE. ER 34, 36.

[4] The court provided no further relief. Appellants objected, explaining that in an April 2010 Case Management Order and August 2010 Discovery Order (ER 46, 39), liability and remedy were bifurcated and that Appellants would be permitted discovery and briefing on remedy after the court ruled on liability. Nonetheless, the court maintained that no discovery or briefing concerning remedy would be permitted because those prior Orders preceded Appellants' claim on the Gravel Permit. ER 9. The court's apparent distinction among claims was never an issue when discovery was deferred. See ER 46, 39.

BLM's explanation that extracting gravel at Robinson Wash was unrelated to roadwork on the Mt. Trumbull access road and Arizona 1 mining. ER 4-6.

SUMMARY OF ARGUMENT

BLM violated FLPMA and its implementing regulations by failing to approve new Arizona 1 operations before mining began in 2009. FLPMA requires BLM to "prevent the unnecessary or undue degradation of public lands." To fulfill this mandate, regulations require BLM to approve (or disapprove) a "plan of operations" before mining operations begin. Plan approvals do not remain in effect indefinitely, but only as long as operations, as defined, are being conducted. In 1988, BLM approved a plan for Arizona 1. However, Arizona 1 closed in 1990 and the operator stopped conducting operations for more than 19 years, which rendered BLM's 1988 Plan approval ineffective under 43 C.F.R. § 3809.423. FLPMA thus required BLM to provide a new approval before mining operations could begin at Arizona 1, which BLM failed to do.

BLM violated NEPA in relation to Arizona 1 in three ways. First, BLM failed to supplement its 1988 EA. Federal agencies must supplement a prior NEPA analysis upon providing additional approvals for a project where significant new information exists. Because BLM's 1988 Plan approval did not provide sufficient authority for Denison to begin Arizona 1 mining, BLM had to undertake new "major Federal actions." Absent these additional approvals, mining could not

occur. Additionally, between 1988 and 2009, significant new information concerning Arizona 1's environmental impacts developed. BLM's failure to prepare a supplemental EA or EIS for Arizona 1 violates NEPA.

Second, BLM failed to conduct any NEPA analysis prior to approving the Reclamation Bond. BLM must not only approve a plan of operations for public lands mining, it must also approve a reclamation bond. In February 2008, BLM approved the Arizona 1 Reclamation Bond. Because BLM's approval of the Reclamation Bond was a pre-requisite for Denison to begin mining, it is a major federal action that requires NEPA compliance. BLM performed no environmental review of the Reclamation Bond, in violation of NEPA.

Third, BLM improperly relied on a categorical exclusion to preclude the Gravel Permit from the full NEPA process. NEPA requires agencies to evaluate not only the direct impacts of their actions, but also the indirect and cumulative impacts, as well as the impacts of connected actions. BLM's NEPA process for the Gravel Permit unlawfully limited the scope of analysis to invoke a categorical exclusion, and ignore impacts from Arizona 1 roadwork and mining.

STANDARDS OF REVIEW

The Court reviews a ruling on summary judgment de novo. Pac. Coast Fed'n of Fishermen's Ass'n v. Bureau of Reclamation, 426 F.3d 1082, 1090 (9th Cir. 2005). The Administrative Procedure Act (APA) standards at 5 U.S.C. § 706

apply to BLM's violations of FLPMA and NEPA. Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 778 (9th Cir. 2006); Ctr. for Biological Diversity, 623 F.3d at 641.

ARGUMENT

I. BLM VIOLATED FLPMA AND THE 3809 REGULATIONS

A. Standard Of Review

BLM's failure to require a new approval of a plan of operations for Arizona 1 after the 1988 Plan became ineffective is reviewed under the APA § 706(1). When agencies fail to act, courts must compel actions "unlawfully withheld." 5 U.S.C. § 706(1); Norton v. S. Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 61-62 (2004); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000).

B. FLPMA And The 3809 Regulations

FLPMA imposes a mandatory duty on BLM to "prevent the unnecessary or undue degradation" (UUD) of public lands. 43 U.S.C. § 1732(b); Sierra Club v. Hodel, 848 F.2d 1068, 1090-92 (10th Cir. 1988) (finding BLM's duty to "prevent UUD" mandatory). The UUD mandate applies to BLM's review and approval of mining operations. Ctr. for Biological Diversity, 623 F.3d at 644. As one court explained:

> FLPMA, by its plain terms, vests the Secretary of the Interior with the authority -- and indeed the obligation -- to disapprove an otherwise

> permissible mining operations because the operations, though necessary for mining would unduly harm or degrade the public land.

MPC, 292 F.Supp.2d at 42.

BLM promulgated regulations that specifically implement the UUD mandate for mining. 43 C.F.R. § 3809.1. To avoid UUD, the 3809 Regulations require that an operator submit and BLM approve a "plan of operations" for mines impacting more than five acres. Id. § 3809.10(c) ("operator must submit a plan of operations and obtain BLM's approval"). As this Court explained,

> [BLM] will protect the public lands from any UUD by exercising case-by-case discretion to protect the environment through the process of [] approving or rejecting individual mining plans of operations.

Ctr. for Biological Diversity, 623 F.3d at 644-45. BLM must approve a plan before operations begin. 43 C.F.R. §§ 3809.11(a); 3809.412 ("You must not begin operations until BLM approves your plan of operations"); 3809.605(b) (prohibiting operations before "receiv[ing] an approve plan of operations").

BLM's approval of a plan of operations must ensure mining adheres to specific requirements. A plan must include: a description of operations; a schedule of operations; duration of operations, plans for access roads; a reclamation plan; an interim management plan; and a monitoring plan. 43 C.F.R. § 3809.401(b). Further, in accordance with the UUD mandate, a plan's operations must comply with "other Federal and state laws related to environmental protection and protection of cultural resources." Id. § 3809.5, 3809.415(a).

BLM also complies with the UUD requirement by approving a mine's reclamation bond. BLM "determine[s] a final reclamation cost" that "cover[s] the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan[.]" 43 C.F.R. §§ 3809.401(d); 3809.552(a). Like a plan approval, a bond approval is a pre-requisite to mining. Id. §§ 3809.412, 3809.500(b) ("you must provide BLM ... a financial guarantee that meets the requirements of this subpart before starting operations"); 3809.605(d) (prohibiting "[b]eginning operations prior to providing a financial guarantee").[5]

A plan of operations effectively limits the scope and duration of mining activities. Mining operations that extend beyond the scope of a plan are prohibited. 43 C.F.R. § 3809.605(c). A plan must be modified and approved by BLM when operations expand beyond what was originally contemplated. Id. §§ 3809.431(a), 3809.432.

Moreover, an approved plan ceases to exist for several reasons, including a BLM decision to "suspend" or "revoke" a plan, a BLM decision to "terminate" a plan, or an operator's decision to stop operations. 43 C.F.R. §§ 3809.424(a)(3), 3809.423.

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[5] A BLM bonding decision may be administratively appealed and is subject to judicial review. See, e.g., ER 411-12; See Great Basin Mine Watch v. Hankins, 456 F.3d 955, 974 (9th Cir. 2006) (reviewing adequacy of BLM's bonding determination).

C. BLM's 1988 Approval Of Arizona 1

In January 1988, EFN submitted for BLM review and approval a plan of operations ("1988 Plan") for Arizona 1. ER 578, 566.[6] The 1988 Plan detailed EFN's mining operations, the construction and use of access roads, and identified measures to mitigate and monitor and for interim management and reclamation. ER 578-600. The 1988 Plan covered 10 years of operations in two phases: (1) developing the mine and related infrastructure, and (2) extracting the uranium ore. ER 580-81, 588. EFN would access Arizona 1 along Mt. Trumbull Road (30 miles), the Pinenut Mine access road (6 miles), and the Arizona 1 access road (1.4 miles). ER 542, 584. The 1988 Plan also provided that roadwork would occur on the Arizona 1 access road using rock extracted from the mineshaft. ER 567, 581, 594, 596. The 1988 Plan did not contemplate roadwork on Mt. Trumbull Road or other sources of gravel.

The 1988 Plan was prepared and approved before the 2000 version of the 3809 Regulations was promulgated. Consequently, BLM did not require a reclamation bond upon approving the 1988 Plan.[7] In addition, although the 1988 Plan lists measures to be implemented if the mine was closed temporarily (ER 597-

[6] BLM approved the original plan covering exploration activities in 1984. ER 492. EFN later decided to modify its plan and seek approval for mining. ER 580.

[7] The 1980 version of the 3809 Regulations did not mandate reclamation bonds. Revised in 2000, the new 3809 Regulations required reclamations bonds for all plans of operations, while providing BLM with discretion to determine the amount. 43 C.F.R. §§ 3809.500(b), 3809.401(d).

98), it did not include the specific measures required in an "interim management plan" under 43 C.F.R. § 3809.401(b)(5).

BLM approved the 1988 Plan on May 9, 1988. ER 566. Based on the 1988 Plan and the 1988 EA, BLM found that Arizona 1 would not cause UUD or result in significant environmental impacts under NEPA. ER 569, 572-74. BLM also relied on a CAA permit issued by the Environmental Protection Agency to comply with its UUD mandate. ER 485; see 43 C.F.R. § 3809.5; § 3809.415(a).

D. The 1988 Plan Approval Expired

One of the purposes of the 2000 revisions to the 3809 Regulations was to ensure that an approved plan does not remain effective indefinitely. 64 Fed. Reg. 6422, 6439 (Feb. 9, 1999). Section 3809.423 was thus promulgated to render an approved plan ineffective when mining operations stop. This provision states in relevant part: "Your plan of operations remains in effect as long as you are conducting operations." 43 C.F.R. § 3809.423. "Operations" are defined to include:

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

Id. § 3809.5. Accordingly, although an approved plan of operations remains valid during mining operations, it becomes ineffective under § 3809.423 when an operator decides to stop conducting operations.

The 1988 Plan for Arizona 1 is no longer in effect under the plain language of 43 C.F.R. § 3809.423. EFN -- the operator at the time -- constructed Arizona 1, but the mine never went into production. ER 454; ER 190 ¶25 (Complaint); ER 171 ¶25. Instead, EFN made a business decision to stop conducting mining operations in 1990. ER 483 ("The first compliance inspection was recorded in 1990 and at that time the mine was on non-operational status."). That Arizona 1 was completely closed for almost two decades is undisputed. ER 16 n.4; ER 454-55; ER 169 ¶2 ("aver[ring] that the Mine was in a period of non-operation"); ER 386 ("These mines [including Arizona 1] are not currently in operation and have not operated since the early 1990s."); ER 255-56 (U.S. Mining Safety and Health Administration records showing no worker hours were logged at Arizona 1 until 2007). Nothing in the regulatory definition of "operations" characterized the status of Arizona 1 between 1990 and 2009. See 43 C.F.R. § 3809.5. For these 19 years, the mine was completely closed down: there was no mine development, no ore production, no reclamation activities, no road construction, no workers present, no machinery in use, and the gates were locked. Indeed, during this time, EFN went bankrupt and ownership of Arizona 1 was transferred to Denison.

As a result, based on 43 C.F.R. § 3809.5 and § 3809.423, the 1988 Plan is ineffective because EFN stopped conducting operations.

E. BLM Was Required To Provide A New Approval Prior To Denison Beginning Operations

Because the 1988 Plan became ineffective under § 3809.423, FLPMA required BLM to provide a new approval of a plan of operations before Denison could begin mining at Arizona 1. See 43 C.F.R. §§ 3809.10(c), 3809.11(a), 3809.605(b). BLM did not do so prior to Denison commencing operations in December 2009, in violation of FLPMA and its regulations.

There are no exceptions to FLPMA and the 3809 Regulations' requirement that a mine must maintain a valid plan of operations. This requirement applies to new mines when they are first proposed, as Arizona 1 was in 1988. It applies equally when BLM revokes or suspends an existing plan, BLM terminates a plan, or when a plan becomes ineffective because operations have ceased. See 43 C.F.R. §§ 3809.423, 3809.424(a)(3). In any of these scenarios, the operator lacks a valid, approved plan of operations, and BLM must provide a new approval before operations begin.

The district court offered a perplexing retort. According to the court, the duty to obtain BLM's approval of a plan is only needed "at the outset of the project," and the beginning of the Arizona 1 project was 1988. ER 18 ("nowhere does it provide that a new plan of operations must be approved before operations

resume"). The relevant provisions do not support the court's narrow reading. Rather, the 3809 Regulations simply mandate that an operator have an approved plan before mining. See 43 C.F.R. §§ 3809.11(a), 3809.10(c), 3809.412, 3809.605(b). If an approved plan of operations becomes ineffective due to non-operation under § 3809.423 (the situation at Arizona 1), is "suspended or revoked" by BLM for non-compliance with the 3809 Regulations under § 3809.423, or is "terminated" by BLM under § 3809.424(a)(3), the 3809 Regulations provide in no uncertain terms that a new approval must be obtained. It is contrary to the regulations and patently unreasonable to find, for example, that an operator with a revoked plan approval need not obtain a new approval before mining.

F. Other 3809 Provisions Do Not Save The 1988 Plan

As detailed above, the meaning of § 3809.423 and § 3809.5 is unambiguous. This means that courts must "give effect to the natural and plain meaning of its words." Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 698 (9th Cir. 2004). "When a statute or regulation defines a term, that definition controls, and the court need not look to the dictionary or common usage." Alaska Trojan P'ship v. Gutierrez, 425 F.3d 620, 628 (9th Cir. 2005). A BLM interpretation that is contrary to the plain meaning of these provisions is not entitled to deference. See Wards Cove Packing v. Nat'l Marine Fish. Serv., 307 F.3d 1214, 1219 (9th Cir. 2002) ("Deference to an agency's interpretation of its

regulation is warranted only when the regulation's language is ambiguous.") (emphasis in original); El Comite Para El Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1070-71 (9th Cir. 2008) (finding regulation's language unambiguous).

Recognizing as much, the district court and BLM suggest ambiguity exists based on other provisions in the 3809 Regulations. The district court determined that § 3809.424 creates an ambiguity and, based on this provision, BLM's 1988 Plan approval remains in effect. However, the relevant provisions are easily reconciled and do not conflict.

As an initial matter, any interpretation of the 3809 Regulations cannot leave § 3809.423 without meaning. The district court's interpretation and reliance on § 3809.424 means that the 1988 Plan remains in effect even though Arizona 1 was not operating for 19 years, and that Denison -- a new operator -- can simply rely on the outdated 1988 Plan that was submitted by EFN.[8] This, however, renders § 3809.423 meaningless. It violates the canon of regulatory construction that courts must "give effect, if possible, to every clause and word of a statute ... rather than to emasculate an entire section." See Bennett v. Spear, 520 U.S. 154, 173 (1997); Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 931 (9th Cir. 2008) (rejecting agency's "interpretation of the jeopardy regulation" because it

[8] One of BLM's rationales for approving the 1988 Plan was EFN's mining history in the region. ER 573. Denison is a new operator without a history.

"reads 'and recovery' entirely out of the text"). Further, reading § 3809.424 so that the 1988 Plan remains in effect undermines the sole purpose of § 3809.423, which was to ensure approved plans do not "remain in effect indefinitely." See 64 Fed. Reg. at 6439.

Not only must § 3809.423 be given meaning, but § 3809.423 and the relevant portions of § 3809.424 do not conflict and can be harmonized. Section 3809.424 applies when a plan becomes ineffective under § 3809.423 because operations have stopped. Section 3809.424(a)(1) asks "what are my [the operator] obligations if I stop conducting operations," recognizing that obligations in an approved plan are no longer in effect. 43 C.F.R. § 3809.424(a)(1). Section 3809.424(a)(1) provides in relevant part:

> If (1) you stop conducting operations for any period of time.
>
> You must follow your approved interim management plan submitted under § 3809.401(b)(5).

Id. § 3809.424(a)(1).[9] Accordingly, § 3809.424(a)(1) ensures that when a plan becomes ineffective, the operator implements the interim management plan.

Section 3809.424(a)(3) can also be read to give it and § 3809.423 meaning. See Lands Council v. McNair, 395 F.3d 1019, 1033-34 (9th Cir. 2005) (finding

[9] An interim management plan is a required component of a plan of operations and contains certain management actions to be taken "during periods of temporary closure (including periods of seasonal closure)." 43 C.F.R. § 3809.401(a)(5).

"two standards do not necessarily conflict" and interpreting them to ensure both have meaning). This provision provides:

> If ... Your operations are inactive for 5 consecutive years.
>
> Then ... BLM will review your operations and determine whether BLM should terminate your plan of operations and direct final reclamation and closure.

43 C.F.R. § 3809.424(a)(3). In considering this provision, the district court queried: if § 3809.423 has already rendered a plan ineffective due to non-operations, what is left for BLM to "terminate" under § 3809.424(a)(3). ER 17. The district court, however, conflated the meaning of "inactive" in § 3809.424(a)(3) with not conducting operations in § 3809.423. However, an "inactive" mine is one that is "not operating (mining, exploring or reclaiming), but is following its interim management plan." 65 Fed. Reg. 69,998, 70,055 (Nov. 21, 2000). Accordingly, this provision builds on § 3809.423 and § 3809.424(a)(1), requiring BLM to review a non-operating mine that is adhering to its interim management plan, as required by § 3809.424(a)(1), and decide whether to "terminate the plan of operations and direct final reclamation and closure." 43 C.F.R. § 3809.424(a)(3).[10] The portion of the plan that remains to be terminated

[10] It is notable that BLM did not conduct the mandatory "review" of Arizona 1 that this provision requires after five years of inactivity. See 43 C.F.R. § 3809.424(a)(3). BLM's complete abdication of this mandatory duty underscores the significance of § 3809.423, which ensures that plans become ineffective and BLM provides new approvals before defunct mines resume.

under § 3809.424(a)(3), therefore, is the interim management plan. In this way, these two provisions are harmonized and neither is left without meaning.

In sum, the intent behind 43 C.F.R. § 3809.423 was to ensure that plans of operations do not continue in perpetuity. This provision precludes mines with very old plans of operations -- like the 1988 Plan at issue here -- to remain dormant for decades and simply resume without any review of their operations to reflect current technological or environmental conditions.

II. BLM VIOLATED NEPA IN APPROVING ARIZONA 1

Even if BLM was not required to issue a new plan approval, which itself would require NEPA compliance, BLM violated NEPA in three ways relating to Arizona 1:

> (1) BLM was required to supplement the 1988 Environmental Assessment because BLM undertook additional "major Federal actions" to approve Arizona 1, and there is new information concerning Arizona 1's environmental impacts;
>
> (2) BLM was required to comply with NEPA upon approving Arizona 1's Reclamation Bond in 2008; and
>
> (3) BLM was required under NEPA to review Arizona 1 mining and roadwork upon issuing the Gravel Permit, and not rely on a "categorical exclusion."

A. Statutory Background: NEPA

NEPA "promote[s] efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. Through the NEPA process, federal agencies

must (1) take a "hard look" at all environmental impacts of their decisions, and (2) disclose and provide an opportunity for public comment on such environmental impacts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 350 (1989); Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002). As this Court has ruled, "[t]he procedures prescribed both in NEPA and the implementing regulations are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act ... '[g]rudging, pro forma compliance will not do.'" Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1166 (9th Cir. 2003) (citations omitted).

NEPA required federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Major federal actions are "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Major federal actions include the "approval of specific projects ... by permit or other regulatory decision." Id. § 1508.18(b)(4).

Agencies must evaluate several factors to determine whether impacts are significant. 40 C.F.R. § 1508.27(b). The NEPA significance standard "is a low standard." Klamath Siskiyou Wildlands Ctr. v. Broody, 468 F.3d 549, 562 (9th Cir. 2006). An EIS is required if the action "may" have significant impacts. Nat'l Parks

& Conservation Ass'n v. Babbitt, 241 F.3d 722, 730-31 (9th Cir. 2001); Sierra Club v. Bosworth, 510 F.3d 1016, 1018 (9th Cir. 2007) (if action "may have a significant effect upon the ... environment, an [EIS] must be prepared") (emphasis in original). Agencies may first prepare an EA to determine if impacts may be significant. 40 C.F.R. § 1501.4(c). If an EIS is deemed unnecessary, agencies must detail the reasons why the impacts are insignificant in a "finding of no significant impact." Id. § 1508.13.

NEPA regulations articulate two scenarios where agencies must prepare a "supplemental" EIS or EA: (i) "the agency makes substantive changes in the proposed action that are relevant to environmental concerns" or (ii) there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i) & (ii); see Friends of the Clearwater, 222 F.3d at 557-58; Price Rd Neighborhood v. U.S. Dep't of Transp., 113 F.3d 1505, 1509-10 (9th Cir. 1997) (requiring supplementation for EAs). New information is reviewed for significance based on same factors for determining significant impacts under 40 C.F.R. § 1508.27(b). Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374-75 n.20 (1989). Supplemental NEPA applies when an agency maintains sufficient discretion that allows for "a meaningful opportunity to weigh the benefits of the project versus the

detrimental effect on the environment." Id. at 372 (emphasis in original); MPC, 292 F.Supp.2d at 55 n.31.

Some major federal actions may be categorically excluded from preparation of an EIS or EA. 40 C.F.R. § 1508.4. Categorically-excluded actions are limited to those "which do not individually or cumulatively have a significant effect on the human environment." Id. Before relying on a CE, agencies must assess the action's "indirect" and "cumulative" impact as well as the impacts of "connected actions" to determine whether impacts are significant. Id. §§ 1508.25(a) & (c), 1508.4; e.g., Ctr. for Food Safety v. Vilsak, 2010 WL 3835699, *7 (N.D. Cal. Sept. 28, 2010) (noting agency's reliance on CE violated NEPA's requirement to consider connected actions); Brady Campaign To Prevent Gun Violence v. Salazar, 612 F.Supp.2d 1, 16-17 (D.D.C. 2009) (in evaluating use of CE, court held "the DOI was required to consider all direct, indirect, and cumulative impacts" as well as "[p]ublic safety and protection of natural resources" because they are "indisputably encompassed within the definition of environmental impacts").[11] Each federal agency is required to develop a list of actions that may be categorically excluded,

[11] See also 40 C.F.R. § 1500.3 (these NEPA "regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2)"); S. Or. Citizens Against Toxic Sprays v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983) (rejecting BLM argument that 40 C.F.R. § 1502 only applies to EISs).

as well "extraordinary circumstances" that would preclude use of a CE. Id. § 1508.4.[12]

B. BLM Violated NEPA By Not Supplementing The 1988 EA

BLM's NEPA duty regarding Arizona 1 did not end with the 1988 EA, as a supplemental EA or EIS was required to evaluate significant new information. See 40 C.F.R. § 1502.9(c)(1)(ii).

1. Standard Of Review

The Court reviews BLM's failure to supplement the 1988 EA under 5 U.S.C. § 706(1) and the APA's "unlawfully withheld" standard. See Friends of the Clearwater, 222 F.3d at 560 (holding "action to compel an agency to prepare an SEIS ... is ... an action arising under 5 U.S.C. § 706(1), to 'compel agency action unlawfully withheld or unreasonably delayed'"). This is a "failure-to-act" claim also because BLM never decided whether to supplement the 1988 EA. Cf. Native Ecosystems Council v. Tidwell, 599 F.3d 926, 937-38 (9th Cir. 2010).

2. Significant New Information Exists Since the 1988 EA

NEPA supplementation occurs when the prior analysis becomes stale or outdated. As this Court has ruled, an agency "must be alert to new information that may alter the results of its original environmental analysis." Friends of the

[12] BLM's categorical exclusions are set forth in Chapter 11 of the Department of Interior's NEPA Manual. ER 416, 440-44.

Clearwater, 222 F.3d at 557-58. In adopting NEPA's supplementation regulation, the Council of Environmental Quality (CEQ) noted:

> As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.
>
> [A] supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal.

46 Fed. Reg. 18,026, 18,036 (Mar. 23, 1981); Clark, 720 F.2d at 1480 ("EIS concerning an ongoing action more than five years old should be carefully examined to determine whether a supplement is needed.").

NEPA supplementation ensures the law's companion mandate to use the best science available is fulfilled. See 40 C.F.R. § 1500.1(b) (providing that environmental "information must be of high quality" as "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA"); Id. § 1502.24 ("Agencies shall insure professional integrity, including scientific integrity, of the discussions and analysis in environmental impact statements"); Seattle Audubon Society v. Espy, 998 F.2d 699, 704-705 (9th Cir. 1993) (holding agency must re-examine decision "[b]ecause the Forest Service's EIS rests on stale scientific evidence"); City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 95 F.3d 892, 900 (9th Cir. 1995) (finding mitigation

plan "stale" and "out of date" because agencies adopted new definition of wetlands).

Here, the 1988 EA is over two decades old. It is outdated, reflecting the state of the regional environment and Arizona 1's impacts in 1988. Further, because the anticipated duration of Arizona 1 was 10 years (ER 588, 567), BLM's 1988 EA necessarily assessed impacts through 1988, not anticipating that impacts would only begin in 2009.

Indeed, since BLM prepared the 1988 EA, significant new information has arisen. See 40 C.F.R. § 1502.9(c)(1)(ii). The California condor -- a species listed under the Endangered Species Act -- was introduced to the Arizona Strip in 1996, condors are known to forage in and around the Arizona 1 mine site, and new data show condors are attracted to and harmed by uranium mine sites in the region. 61 Fed. Reg. 54,044 (Oct. 16, 1996); ER 390, 392, 394; ER 336; ER 324-25; ER 482. Further, Arizona 1 is located on lands that have been withdrawn from mining to protect Grand Canyon National Park and the Colorado River watershed. 77 Fed. Reg. 2563; ER 49. The Withdrawal was based on newly-identified threats to the National Park and the water supply of over 20 million people, and a finding that existing environmental laws do no adequately constrain mining operations. 74 Fed. Reg. 35,887; ER 333-34. In addition, new studies by the U.S. Geological Service show that reclamation actions taken at uranium mines like Arizona 1 -- the Hack,

Pigeon and Kanab North mines -- were deficient and elevated levels of radioactivity were found in nearby soils and stream segments. ER 258-60, 268-72, 277-79, 279-82, 288-89. Also since the 1988 EA, the Arizona Department of Environmental Quality required a permit for Arizona 1 due to impacts to groundwater. ER 342, 356. State law requires a permit where "there is a reasonable probability that the pollutant will reach an aquifer." A.R.S. at § 49-201(12) (emphasis added); id. § 49-241(A). No permit exception was issued, which is available if "the facility will be designed, constructed and operated so that there will be no migration of pollutants directly to the aquifer." Id. § 49-241(B).[13] Accordingly, significant new information exists under the NEPA significant factors, including impacts to a National Park, endangered species, and public health and safety. See 40 C.F.R. § 1508.27(b)(2), (b)(3), (b)(5), (b)(7), (b)(8) & (b)(9).

In sum, NEPA required BLM to supplement the 1988 EA because it was outdated and significant new information exists.

3. BLM Provided Additional Approvals For Arizona 1

The second requirement for NEPA supplementation is that the agency undertakes an additional "major Federal action." Marsh, 490 U.S. at 374. Actions

[13] BLM never reviewed this new information. Accordingly, the Court cannot defer to BLM as to whether this new information may alter the analysis and results in the 1988 EA. See Oregon Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1121 (9th Cir. 2010) (court "cannot defer to a void" when agency fails to analyze issue).

include those that the agency conducts itself, as well as an agency's approval of a specific project. 40 C.F.R. § 1508.18(a) & (b)(4). In Marsh, the Army Corps of Engineers had not completed constructing a dam -- the agency action at issue -- and thus additional agency action was required. Id. at 367, 373. Pursuant to Marsh, courts inquire whether "there remains 'major Federal action' to occur," "even after a proposal has received initial approval." Id. at 374.

When the agency action is the "approval" of a specific project, the inquiry focuses on whether additional approvals are needed. For instance, in SUWA, the court found that BLM's approval of the land use management plan had been completed and no additional BLM approvals were needed to implement the plan. SUWA, 542 U.S. at 72-73. Similarly, in Cold Mountain v. Garber, the Ninth Circuit concluded that supplemental NEPA was not required after the Forest Service issued a special use permit to the State of Montana for a bison capturing facility. 375 F.3d 884, 894 (9th Cir. 2004). The facility had been approved and constructed under the permit, and no additional approvals or permits were required. The same is true in Greater Yellowstone Coal. v. Tidwell, a case involving approvals from BLM and the Forest Service of an elk-feeding program. 572 F.3d 1115 (10th Cir. 2009). There, no supplemental NEPA was required because, after issuing the joint approval, no additional approvals were necessary for the program. Id. at 1128.

The principles set forth in these cases dictate that supplemental NEPA is required for Arizona 1 because BLM did provide additional approvals. After purchasing Arizona 1 in 2007, Denison initially believed BLM's approval of the 1988 Plan would be sufficient to mine immediately. ER 455 (Denison's September 2007 letter to BLM states: "Phase two mining activities will begin at the Arizona 1 Mine in the third quarter of 2007"); ER 474-75 (Denison's March 2007 press release announced it "[wa]s planning on restarting operations at Arizona 1 this year to complete the shaft and begin mining in 2008"); ER 457.

However, unlike SUWA and Garber, BLM's approval of Arizona 1 was not complete and Denison could not begin mining under the 1988 Plan approval. Additional BLM approvals were required and provided. See Ramsey v. Kantor, 96 F.3d 434, 444 (9th Cir. 1996) (finding "if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action"). Specifically, as detailed below, BLM issued a permit to extract gravel to rehabilitate 30 miles of Arizona 1's main access road, approved a new reclamation bond for Arizona 1, and fulfilled its UUD mandate by requiring Denson to obtain a new air permit. Each was needed before Denison could begin mining, as BLM acknowledged. ER 386-87 (requiring additional permits and reclamation bonding); ER 328 (noting UUD mandate required additional permits); ER 332 (state permits needed before operation could

commence); ER 203 ¶66 (Complaint), ER 175 ¶66 (BLM Answer). Each provided BLM with a "meaningful opportunity," after evaluating the environmental impacts, to decide whether Arizona 1 mining operations could go forward and whether additional terms and conditions on operations were necessary. Marsh, 490 U.S. at 372; Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation, & Enforcement, 791 F.Supp.2d 1158, 1176-78 (S.D. Ala. 2011) (finding agency "retained discretion to reject [leasing bids] and to consider noneconomic factors").

a. Issuing The Gravel Permit For Mt. Trumbull Road

The 3809 Regulations require an operator to describe all operations associated with a mine. A plan of operations must thus include "plans for access roads" and "construction of roads." 43 C.F.R. §§ 3809.401(b)(2)(viii), 3809.5 (defining operations). The 1988 Plan detailed that at Arizona 1, EFN would "improve and maintain the existing access roads from the Project Area to the Mt. Trumbull Road," using "[b]arren waste rock from excavation of the underground workings." ER 596 (emphasis added); ER 581 (describing upgrading and relocating portions 1.4 miles of Arizona 1 access road); ER 594.

Over 20 years later, the 1988 Plan was inadequate for Arizona 1's access roads, necessitating a new BLM approval. The main access road -- Mt. Trumbull Road -- had become impassable after years of non-use because it had not been maintained. ER 224 ¶10 (county "does not perform regular or routine maintenance

on the road"); ER 228 ¶10 (same); ER 484 (1992 BLM inspection report stating "access road from the Mt. Trumbull road has washed out in spots as it is no longer being maintained by EFN"). As a result, Denison could not begin Arizona 1 mining until Mt. Trumbull Road was repaired. ER 447, 451 (noting repairs and maintenance needed along 30 miles of Mt. Trumbull Road and 8 miles along Arizona 1 access road); ER 316 (Denison needed to "perform maintenance and minor road improvements to co[n]trol damage due to heavy truck traffic"); ER 43-44 (stating roadwork was "an absolute necessity for purposes of maintaining the operation of the mine"). Consequently, on June 18, 2008, BLM issued a permit to Mohave County that provided Denison with gravel from Robinson Wash to rehabilitate and maintain Arizona 1's access roads. ER 381.

By issuing this Gravel Permit, BLM undertook an additional major Federal action that requires NEPA supplementation. BLM conceded as much, relying on a NEPA categorical exclusion for the Gravel Permit. ER 396. Further, the relationship between the Gravel Permit and Arizona 1 is plain. The Gravel Permit compensates for the 1988 Plan's deficiencies regarding access roads. It explicitly states that the extracted gravel is "to be used for Road Maintenance." ER 381 (emphasis added). Concurrent with the Gravel Permit, Denison obtained a County right-of-way permit for Mt. Trumbull Road "for the purpose of grading and improvements for mine access." ER 449, 316. The record further shows that

Denison orchestrated BLM's issuance of the Gravel Permit and that rehabilitating Mt. Trumbull Road was paramount to mining operations at Arizona 1. ER 43-44; ER 447 ("Denison is currently working with the BLM to obtain approval for a [BLM gravel] borrow area."); ER 451 ("BLM approval of the borrow area and road improvement activities will be provided to the County prior to initiation of any work on the road.").

Accordingly, BLM was required to supplement the 1988 EA because the Gravel Permit was a major federal action approving roadwork for Arizona 1 access. See 40 C.F.R. § 1508.18(a) & (b)(4).

b. Approving Denison's Reclamation Bond

In addition to the Gravel Permit, other BLM approval actions were provided. One such approval concerns the reclamation bond, where BLM "determine[s] a final reclamation cost" based on certain factors. 43 C.F.R. § 3809.401(d). In February 2008, BLM approved a reclamation bond for Arizona 1 operations. ER 410. A previous reclamation bond for Arizona 1 was deemed inadequate and BLM's approval increased the amount. ER 388-89 (BLM's "determin[ation] that the amount appropriate for the cost of surface reclamation for these operations is $377,800").

As a matter of law, no mining at Arizona 1 could occur absent BLM approving Denison's Reclamation Bond. See Ramsey, 96 F.3d at 444. Under the

3809 Regulations, BLM's approval of a reclamation bond is a prerequisite to mining on public lands. 43 C.F.R. § 3809.500(b) ("you must provide BLM ... a financial guarantee that meets the requirements of this subpart before starting operations"); Id. § 3809.605(d) (prohibiting "[b]eginning operations prior to providing a financial guarantee"). Similarly, a BLM Instruction Memorandum dictates that "[o]perations may not commence until the operator has received written notification that BLM has accepted and obligated the operator's financial guarantee." ER 472. BLM's bonding approval explains that the approved bond amount must be posted if the operator intends to mine. ER 411 ("If you elect to appeal and do not post a financial guarantee in the amount stated in this decision, you must not begin operations."). Further, BLM expressly acknowledged that its approval was required before Denison could begin mining operations at Arizona 1. ER 202 ¶59 & ER 203 ¶66 (Complaint); ER 174 ¶59 & ER 175 ¶66 (admitting "BLM required Denison to post a new reclamation bond"); ER 178 ¶86 ("[B]efore Denison could take the Arizona 1 Mine off of stand-by status," company had to provide new approved bond); ER 386-87 ("before operations resume, the BLM will review the reclamation bond to ensure it is adequate").

In approving this Reclamation Bond, BLM authorized mining at Arizona 1 and, therefore, undertook an additional "major Federal action" under NEPA. See 40 C.F.R. § 1508.18(a) & (b)(4).

c. Requiring State Permit For Arizona 1

As part of its approval of Arizona 1, BLM had to ensure such mining activities avoid UUD. 43 U.S.C. § 1732(b); 43 C.F.R. § 3809.401(a) & (b); Ctr. for Biological Diversity, 623 F.3d at 644. The UUD standard requires BLM to ensure compliance with "other Federal or State laws related to environmental protection." 43 C.F.R. § 3809.415(a); id. § 3809.5. In promulgating the 3809 Regulations, BLM made clear that compliance with other environmental laws was a necessary component of plan approval, highlighting:

> BLM as the land manager of public land is ultimately responsible for ensuring that operations on land under its jurisdiction are in compliance with various Federal, State, tribal, or where delegated by the State, local government environmental requirements.

65 Fed. Reg. at 70052 (emphasis added); id. at 70042 ("BLM must ensure its actions (... and activities it authorizes) comply with all applicable Federal, State, tribal, and local" laws).

BLM complied with this aspect of UUD in approving the 1988 Plan. ER 573. Relevant here, in 1988, the Environmental Protection Agency issued a CAA permit for Arizona 1. ER 485. However, this permit expired because the mine's ownership changed and because the mine was closed. ER 486 ("If the mine becomes inactive, the Approval expires."); ER 235 ("The 1988 Approval is no longer valid or in effect because of the long period of inactivity of the mine and because of the transfer of ownership.").

As a result, BLM prohibited Denison from operating Arizona 1 until the company obtained a CAA permit for radon gas emissions. ER 202 ¶59 & ER 203 ¶66 (Complaint); ER 174 ¶59 & ER 175 ¶66 (admitting "BLM required Denison" to obtain new air permit "[b]efore Denison could renew operations at the Arizona 1 Mine."); ER 386-87 ("Before operations resume, BLM … will communicate to the operator the need to obtain all necessary Federal, State, and local permits"); ER 332 (BLM July 2009 email stating "the company [must first] receive[] their operating permits from ADEQ [before] they may commence operations").[14] After ADEQ issued Denison an air permit on August 31, 2009, BLM permitted mining operations to commence at Arizona 1. ER 192 ¶30 (Complaint), ER 159 ¶30 (Denison Answer).

By requiring that Denison first obtain a CAA permit, BLM undertook an additional "major Federal action" for Arizona 1. See 40 C.F.R. § 1508.18(a) & (b)(4).

4. Conclusion

In sum, BLM undertook additional "major Federal actions" that necessitated a supplemental EA or EIS. BLM's initial approval of Arizona 1 through the 1988 Plan was not sufficient to begin mining, requiring additional BLM approvals.

[14] Since 1988, EPA had delegated part of the CAA program to Arizona and thus the Arizona Department of Environmental Quality (ADEQ) issued the relevant CAA permit. See ER 235.

These BLM approval actions are comparable to the Army Corps' remaining dam construction at issue in Marsh, wherein where the agency had a "meaningful opportunity" to consider the "detrimental effect on the environment." 490 U.S. at 372, 374.[15] These approvals are also like those in Sierra Club v. Bosworth. 465 F.Supp.2d 931, 939-40 (N.D. Cal. 2006). In Bosworth, the Forest Service approved a logging project based on an EA. NEPA supplementation was required because additional approvals of an operating plan were required before logging could occur. Id. (distinguishing Garber, "which did not require an operating plan approval following the initial approval").

The district court's ruling improperly characterized these additional BLM approval actions as mere monitoring activities. ER 23. However, BLM monitoring of Arizona 1 involved distinct site visits, as documented in agency reports from 1990 through 2007. ER 360-76. These monitoring reports make no mention of BLM's additional approval actions, including the Gravel Permit, Reclamation Bond or State air permit. In short, BLM's approval actions were pre-requisites for Arizona 1 mining, not mere monitoring activities.

[15] For example, BLM had a meaningful opportunity to confer with the Kaibab Paiute Tribe to consider whether mining operations would affect cultural resources. See generally ER Volume 4 (filed under seal).

C. BLM Violated NEPA By Not Preparing An EA Or EIS Upon Approving Arizona 1's Reclamation Bond

While NEPA supplementation is required if there is an additional "major Federal action" and significant new information or changed circumstances (40 C.F.R. § 1502.9(c)(1)), such an agency action also triggers the duty to prepare an EIS if it "may" impact the environment. Thus, BLM's approval of the Arizona 1 Reclamation Bond not only requires NEPA supplementation, it is also an independent "major Federal action" for which BLM failed to comply with NEPA.

1. Standard of Review

Under § 706(2), courts must be set aside BLM actions that are "not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D). On February 21, 2008, BLM approved Denison's Reclamation Bond for Arizona 1. ER 410. BLM failed to comply with NEPA before taking this action. The Court should thus set aside the Reclamation Bond for Arizona 1, preventing all mining operations until BLM complies with NEPA.

2. BLM's Approval Of Arizona 1's Reclamation Bond Was A Major Federal Action

NEPA applies to agency actions that approve specific projects. See 40 C.F.R. § 1508.18(a) & (b)(4). If federal approval is needed to begin a project, that approval action is a "major Federal action." Ramsey, 96 F.3d at 444; Md. Conservation Council v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986) ("A non-

federal project is considered a ‘federal action' if it cannot begin or continue without prior approval of a federal agency."); Florida Wildlife Fed'n v. Army Corps of Engrs., 401 F.Supp.2d 1298, 1311 (S.D. Fla. 2005) (finding "proposed project could not be constructed in [permit's] absence").

As a matter of law, BLM approval of a reclamation bond was needed before Arizona 1 mining could occur. The 3809 Regulations make this abundantly clear. 43 C.FR. §§ 3809.500(b) ("must provide BLM ... a financial guarantee that meets the requirements of this subpart before starting operations"); 3809.605(d) (prohibiting "[b]eginning operations prior to providing a financial guarantee"); 3809.401(d) ("BLM will notify you where we have determined the final amount for which you must provide financial assurance."). BLM's policy on reclamation bonds reaffirms that "[o]perations may not commence until the operator has received written notification that BLM accepted and obligated the operator's financial guarantee." ER 472 (noting BLM must approved both plan of operations and reclamation bond before operations commence). The Reclamation Bond decision itself requires that a BLM-approved bond is posted before mining begins, even if BLM's decision on the Reclamation Bonding is appealed. ER 411 (informing Denison that could mine only if Reclamation Bond posted). Further, BLM admitted that it "required Denison to post a new reclamation bond before Denison could take the Arizona 1 Mine off of stand-by status." ER 178 ¶86.

Accordingly, BLM permitted Denison to begin mining by approving the Reclamation Bond on February 21, 2008. Denison could not initiate mining operations otherwise. See Ramsey, 96 F.3d at 444. Ignoring the 3809 Regulations, and BLM's Instruction Memorandum and actions, the district court wrongly surmised that BLM's approval of a plan of operations was the only major federal action needed for Arizona 1 mining operations. ER 35. In fact, under applicable law, BLM must approve both a plan of operations and a reclamation bond.

This Court's ruling in Sierra Club v. Penfold further supports requiring NEPA compliance for BLM's Reclamation Bond approval. 857 F.2d 1307 (9th Cir. 1988). In Penfold, the court determined that Notice-level mining operations do not involve major federal action because "BLM cannot require approval before an operation can commence developing the mine." Penfold, 857 F.2d at 1314. The regulatory provision governing Notice-level mining provides: "This subpart does not require BLM to approve your notice." 43 C.F.R. § 3809.312(a). Unlike the Notice-level operations in Penfold, the 3809 Regulations and BLM's Instruction Memorandum explicitly require a bond approval before an operator begins mining. Id. §§ 3809.500(b); ER 472. As such, BLM has complete control over Arizona 1, necessitating NEPA compliance prior to approving the Reclamation Bond.

The district court reasoned that BLM's process for determining the amount of Arizona 1's Reclamation Bond was simple. ER 36. Yet the complexity of the

agency action is not the relevant inquiry as to whether there is a major federal action, which asks instead whether a particular project requires an approval by "permit or other regulatory decision." See 40 C.F.R. § 1508.18(b)(4).

Further, in determining the appropriate reclamation bond, BLM had the discretionary authority to approve Arizona 1 and/or condition the mine. The 3809 Regulations provide: "BLM will review your reclamation cost estimate and notify you of any deficiencies or additional information that must be submitted in order to determine a final reclamation cost." 43 C.F.R. § 3809.401(d); id. § 3809.552(a) (bond must cover "any treatment facilities necessary to meet Federal and State environmental standards" and "interim stabilization and infrastructure maintenance costs"). Accordingly, not only do the 3809 Regulations not limit BLM's discretion in reviewing a Reclamation Bond, they provide BLM with broad authority to ensure compliance with environmental standards, including the UUD prohibition. As such, a NEPA analysis would have provided BLM with a "meaningful opportunity" to require additional mitigation and reclamation measures and decide whether a larger bond was necessary. See Marsh, 490 U.S. at 372. Indeed, recent studies at nearby mines demonstrate that reclamation measures BLM adopted in the late 1980s, the same ones included in Arizona 1's 1988 Plan, had proven to be unsuccessful. ER 258-60, 268-72, 277-79, 279-82, 288-89.

3. BLM's Reclamation Bond Approval May Result In Significant Impacts

An EIS for the Reclamation Bond decision is required if "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." Broody, 468 F.3d at 562. BLM's approval of the Reclamation Bond was the linchpin to the initiation of uranium mining at Arizona 1, which may result in significant environmental impacts.[16]

In sum, BLM was required to comply NEPA before approving the Arizona 1 Reclamation Bond.

D. BLM Violated NEPA By Failing To Assess Impacts Of Arizona 1 Roadwork And Mining Upon Issuing The Gravel Permit

1. Standard of Review

Under § 706(2), courts must be set aside BLM actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of the procedure required by law." 5 U.S.C. § 706(2)(A) & (D). BLM's reliance on a NEPA CE is arbitrary and capricious if BLM relied on factors Congress did not intend it to consider, failed to consider a relevant factor, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of

[16] BLM made no findings as to whether the Reclamation Bond decision may result in significant impacts. Accordingly, the Court cannot extend BLM deference on this issue. See Price Rd, 113 F.3d at 1511 (noting deference only available if rendered informed decision on significant impacts).

agency expertise. See Motor Vehicles Mfrs. v. State Farm, 463 U.S. 29 (1983); Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008).

2. Relevant Factual Background

Like all plans of operations prepared pursuant to the 3809 Regulations, the 1988 Plan included "plans for all access roads," including the "construction of roads" See 43 C.F.R. § 3809.401(b)(2)(viii); § 3809.5. The 1988 Plan as it pertains to Arizona 1's access roads, however, was limited. It did not include maintaining Mt. Trumbull Road and authorized EFN to use "barren waste rock" extracted from the mineshaft to "upgrade" and "relocate" 1.4 miles of the Arizona 1 access road. ER 581, 594, 596.

The limitations in the 1988 Plan reflect EFN's prior failures regarding maintenance of Mt. Trumbull Road. ER 608. In 1986, BLM determined that EFN was unable to "insure dependable and regular maintenance on the heavily traveled roadway which is the major access route in the area." Id. Mohave County was thus charged with maintaining the region's mining access roads. In 1986, BLM issued Mohave County an indefinite right-of-way along Mt. Trumbull Road to "construct, operate, [and] maintain" the road. ER 601. Soon thereafter, like EFN, Mohave County abandoned its maintenance responsibilities, which left Mt. Trumbull Road unusable for mining purposes. ER 224 ¶10 (county "does not perform regular or routine maintenance on the road"); ER 228 ¶10; ER 484 (1992 BLM inspection

report states: "access road from the Mt. Trumbull road has washed out in spots as it is no longer being maintained by EFN").

Consequently, Denison had to rehabilitate Mt. Trumbull Road before starting mining operations in 2009. ER 447, 451; ER 224 ¶11; ER 316 (Denison needed to "perform maintenance and minor road improvements to co[n]trol damage due to heavy truck traffic"). According to Denison, upgrading Arizona 1's main access road is "an absolute necessity for purposes of maintaining the operation of the mine." ER 43-44 (stressing passable Mt. Trumbull Road was "absolutely critical to the operation of the mine").

Denison required permission to conduct the needed Mt. Trumbull roadwork and secure a new gravel source. See ER 451 ("This maintenance will require gravel to repair the road base"). In late 2007, Denison informed both BLM and Mohave County of its plan to rehabilitate Arizona 1's access roads. ER 451, 447. Denison first obtained a permit from Mohave County to use the Mt. Trumbull right-of-way "for the purpose of grading and improvements for mine access" on December 5, 2007. ER 449, 316 (county 2010 permit renewal).

Denison then orchestrated the issuance by BLM of a "free use permit" to Mohave County so that Denison could use free gravel from nearby Robinson Wash. ER 447 (Denison letter explaining it, and not Mohave County, was "currently working with the BLM to obtain approval for a borrow area"); ER 451

at 1 (Denison letter to BLM indicating "BLM approval of the borrow area and road improvements will be provided to the County prior to the initiation of any road work"). Significantly, Denison rejected, as too costly, alternative gravel sources in Colorado City, Arizona. ER 447 (explaining "[t]he costs to haul material from the existing borrow area in Colorado City would be at least twice as high as the costs to obtain the material from a BLM approved borrow area").[17] BLM issued the Gravel Permit on June 16, 2008, allowing Denison to extract gravel from Robison Wash and rehabilitate Arizona 1's access roads. ER 381.

BLM invoked a NEPA "categorical exclusion" (CE) for the Gravel Permit. ER 396. The relied-upon CE covers the "[d]isposal of mineral materials such as ... gravel ... in amounts not exceeding 50,000 cubic yards or disturbing more than 5 acres, except in riparian areas." ER 398. While this CE may apply to a county maintaining a road for public use, it does not contemplate providing an international mining company a free gravel source so it may access and haul ore from a commercial mine site.

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[17] BLM's issuance of the Gravel Permit violated its regulations. The Gravel Permit was a "free use permit" that authorizes the removal of "mineral materials," defined to include "gravel," by government entities or non-profit organizations. 43 C.F.R. § 3604.12; id. § 3601.5. When issued to a government entity, the extracted gravel cannot be used for "commercial or industrial purposes." Id. § 3604.12(a). Here, the Gravel Permit provided Denison, not Mohave County, with a free gravel source so it could rehabilitate Arizona 1's access roads for a "commercial purpose."

3. NEPA Required BLM To Assess Impacts From Arizona 1 Roadwork And Mining, And Not Rely On A CE For The Gravel Permit

BLM's reliance on a CE for the Gravel Permit was unlawful because the agency cabined its analysis to the impacts of extracting gravel from Robinson Wash. NEPA, however, mandates a broader analysis. For any major federal action, NEPA requires agencies to evaluate its "indirect" and "cumulative" impacts, as well as the impacts of "connected actions." 40 C.F.R. § 1508.25(a) & (c); see id. § 1500.3; Clark, 720 F.2d at 1480. By limiting its analysis, BLM failed to take a "hard look" at all environmental impacts associated with Arizona 1 mining operations. As the CEQ recently declared, "[c]ategorical exclusions should not be established or used for a segment or an interdependent part of a larger proposed action." ER 216. As detailed below, BLM was required, but failed, to consider the impacts of Arizona 1 roadwork and mining. See Motor Vehicles, 463 U.S. at 43 (agency decision arbitrary when it fails to consider relevant factors).[18]

[18] The district court concluded that federal agencies need only consider indirect and cumulative impacts and impacts from connected actions when preparing an EIS. ER 30-31. BLM disagreed with this legal interpretation. ER 75 ("Federal Defendants have made no such assertion [requiring agencies to consider indirect impacts, cumulative impacts, or connected actions only when preparing an EIS]. Defendants have correctly asserted that when invoking a CE, an agency need not perform the same level of environmental analysis as it would when preparing an EIS.").

a. BLM Failed To Evaluate Indirect Impacts

BLM violated its NEPA duty to evaluate the Gravel Permit's indirect impacts. See 40 C.F.R. § 1508.25(c)(2). "Indirect effects" are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonable foreseeable." Id. § 1508.8(b). Impacts from rehabilitating Arizona 1's access roads and mining operations are indirect effects "caused by" the Gravel Permit, even if they occur "later in time" and are "removed in distance." See id; e.g., W. Land Exchange Project v. U.S. Bureau of Land Mgmt, 315 F.Supp.2d 1068, 1089-90 (D. Nev. 2004) (concluding private development was indirect effect of BLM land transfer); Sierra Club v. Dep't of Energy, 255 F.Supp.2d 1177, 1185 (D. Colo. 2002) (finding expanded mining operations were indirect effect of Department of Energy road easement).

The facts demonstrate Arizona 1 roadwork and mining are indirect effects of the Gravel Permit. As stated in the document itself, the Gravel Permit's only purpose is "road maintenance." ER 381. Denison obtained a County permit to use Mt. Trumbull Road "for the purpose of grading and improvements for mine access." ER 316, 449. The Gravel Permit and County permit were needed so that Denison could rehabilitate Arizona 1's main access road, which, according to Denison, was "absolutely critical to operation of the mine." ER 43-44 (Denison stating mining operations were "dependent upon" passable access roads).

Further, impacts from Arizona 1 roadwork and mining had to be analyzed because BLM has discretionary control over those impacts. See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1213-14 (9th Cir. 2008).[19] Indeed, BLM has discretionary control over activities on the public lands it administers, including rehabilitating Mt. Trumbull Road and mining operations at Arizona 1. See Dep't of Energy, 255 F.Supp.2d at 1185-86 (noting "DOE's action with respect to mining activities in the Buffer Zone underscore the agency's discretionary authority").[20]

BLM unlawfully limited its analysis to direct impacts -- those within Robinson Wash -- and did not assess, as it must, indirect impacts associated with Arizona 1 roadwork and mining. See 40 C.F.R. § 1508.8(b).

b. BLM Failed To Evaluate Cumulative Impacts

NEPA and BLM's regulations require an evaluation of cumulative impacts. 40 C.F.R. §§ 1508.25(c)(3); ER 443 (BLM regulations asking whether action "may have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effect"); 40 C.F.R. § 1508.27(b)(7)

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[19] The CBD v. NHTSA court distinguished Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004), a case where the agency has "no ability to prevent a certain effect" because the agency's action -- setting standards for trucks crossing the Mexican border -- was implementing a Presidential directive that the agency could not override. See also Oregon Natural Resources Council Fund v. Brong, 492 F.3d 1120, 1134 n. 20 (9th Cir. 2007) (holding "Public Citizen's limitation on NEPA does not apply" where agency has statutory authority to prevent relevant effects).

[20] See ER Volume 4 (sealed documents).

(requiring agencies to consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts"). "Cumulative impacts" are defined as the impacts of "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. 40 C.F.R. § 1508.7.

BLM violated this NEPA mandate by ignoring the cumulative impacts from Arizona 1 roadwork and mining. In relation to the Gravel Permit, BLM's 1986 right-of-way issued to the County and BLM's 1988 Plan approval are "past actions." Denison securing a permit to use the County's right-of-way is a "present" action. And, at the time of the Gravel Permit, Denison's roadwork on the access roads and mining at Arizona 1 were "reasonably foreseeable future actions." See 40 C.F.R. § 1508.7 (regardless of who takes such actions); CBD v. NHTSA, 538 F.3d at 1217 (requiring assessment of fuel standards' impact on climate change, while recognizing other contributing sources); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 896 (9th Cir. 2002) (finding "future road amendments are certainly reasonably foreseeable").

Whereas BLM's CE summarily states that there are "no" cumulative impacts, BLM's June 24, 2011 remanded explanation claims that Mt. Trumbull roadwork and Arizona 1 mining are "unrelated" to the Gravel Permit. ER 71-73. This assertion is wholly undermined by the facts. The Gravel Permit states the

extracted gravel will be used for road maintenance. Denison's letters to BLM and Mohave County state it required gravel to rehabilitate Arizona 1 access roads and begin mining operations at Arizona 1. Concurrently with BLM's issuance of the Gravel permit, Denison secured a County permit to rehabilitate Mt. Trumbull Road, which is where the gravel would be used. Denison testified that Arizona 1 could not operate unless its access roads were rehabilitated. BLM documents show that for over 20 years, Arizona 1's access roads had not been maintained and had become impassable. And these new approvals were necessary because the 1988 Plan did not authorize Robinson Wash as a gravel source or permit Denison to rehabilitate or maintain Mt. Trumbull Road.

In short, to claim that the Gravel Permit is unrelated to roadwork and mining, such that these cumulative impacts need not be evaluated, is unsupported. NEPA regulations and courts have expressly denounced similar attempts by agencies to piecemeal their environmental review. See 40 C.F.R. § 1508.27(b)(7) ("Significance cannot be avoided by terming an action temporary or by breaking it down into smaller component parts"); Brong, 492 F.3d at 1133 (agencies must "consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project"); Kern, 284 F.3d at 1078 (prohibiting "dividing a project into multiple actions").

c. BLM Failed To Evaluate Impacts From Connected Actions

NEPA requires agencies to evaluate "connected actions" in a single NEPA document. 40 C.F.R. § 1508.25(a)(1). Connected actions include those actions that "cannot or will not proceed unless other actions are taken previously or simultaneously." Id. § 1508.25(a)(1)(ii). "The purpose of this requirement is to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Hankins, 456 F.3d at 969.

Courts apply an independent utility test to determine whether actions are connected. Dombeck, 304 F.3d at 894-95. The test asks whether "each of two projects would have taken place with or without the other." N. Plains Resource Council v. Surface Transp. Bd., __ F.3d __, 2011 WL 6826409, *16 (9th Cir. Dec. 29, 2011). If either action would not have occurred without the other, they are connected actions. Id. In Thomas v. Peterson, this Court found that logging operations and the construction of the road were "connected actions" because "the timber sales [could not] proceed without the road, and the road would not be built but for the contemplated timber sales." 753 F.2d 754, 758-59 (9th Cir. 1988).

Here, BLM violated NEPA by not evaluating actions connected to the Gravel Permit. Arizona 1 mining, as approved by BLM under the 1988 Plan, could not proceed without passable roads for access and hauling uranium ore to an off-

site mill. ER 43 ("the mine is dependent upon its employees being able to traverse the road and ensure that the haul trucks can function by taking ore away from the mine") (emphasis added). Mt. Trumbull Road rehabilitation, as authorized under the 1986 right-of-way, would not have occurred but for the free gravel extracted pursuant to the Gravel Permit. Similarly, the Gravel Permit had no independent utility: the only reason BLM issued the Gravel Permit was because Denison required a free source of gravel to rehabilitate Mt. Trumbull Road that was unusable for mining operations, and Denison required passable roads to initiate mining operations at Arizona 1. In short, the Gravel Permit is inextricably linked to both Arizona 1 roadwork and mining. See e.g., Ctr. for Food Safety, 2010 WL 3835699, *6-7 (finding permits to plant seedlings of genetically engineer sugar beets connected to future commercial production); Dine CARE v. Salazar, 747 F.Supp.2d 1234, 1254 (D. Colo. 2010) (holding EA on mining permit failed to analyze road relocation, which would not have occurred except for mining permit); Dep't of Energy, 255 F.Supp.2d at 1184-85 (finding mine, road construction, and road easement were connected actions).

Further, the duty to evaluate connected actions is not dependent on their timing. Connected actions include those that are taken "previously or simultaneously." 40 C.F.R. § 1508.25(a)(1)(ii). The fact that BLM authorized Denison's roadwork in a 1986 right-of way, Arizona 1 mining in a 1988 plan

approval, and Mohave County issued a permit to use the right-of-way in 2008 does not allow BLM to avoid evaluating these connected actions.

CONCLUSION

For the foregoing reasons, the Court should reverse, finding BLM violated FLPMA, the 3809 Regulations and NEPA.

Respectfully submitted,

Dated: March 7, 2012

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STATEMENT OF RELATED CASES

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

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32-1

I certify that this brief contains 13,989 words in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I filed this Opening Brief using the Ninth Circuit's ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17843

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

DENISON ARIZONA STRIP LLC AND DENISON MINES (USA) CORP.,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA
Case No: 09-8207-DGC
District Judge David G. Campbell

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STATUTES

5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641 (b)(2), of title 50, appendix; and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) 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;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin

Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 2107(b)
….

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
….

30 U.S.C. § 22

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 26

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the

exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

42 U.S.C. § 4321

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4332(2)(A)

The Congress authorizes and directs that, to the fullest extent possible:
….

(2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment[.]

….

43 U.S.C. § 1714(a)

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.
….

43 U.S.C. § 1714(b)(1)
….

(b) Application and procedures applicable subsequent to submission of application

> (1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.
>
> (2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

….

43 U.S.C. § 1714(e)
….

> (e) Emergency withdrawals; procedure applicable; duration

> When the Secretary determines, or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

….

43 U.S.C. § 1732(b)

….

(b) Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands, including, but not limited to, long-term leases to permit individuals to utilize public lands for habitation, cultivation, and the development of small trade or manufacturing concerns: Provided, That unless otherwise provided for by law, the Secretary may permit Federal departments and agencies to use, occupy, and develop public lands only through rights-of-way under section 1767 of this title, withdrawals under section 1714 of this title, and, where the proposed use and development are similar or closely related to the programs of the Secretary for the public lands involved, cooperative agreements under section 1737 (b) of this title: Provided further, That nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of

the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, any regulations of the Secretary concerned relating to hunting and fishing pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department. Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species. Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.
….

REGULATIONS

40 C.F.R. § 1500.1(b)
….

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.
….

40 C.F.R. § 1500.3

Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National

Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

40 C.F.R. § 1501.4(c)

In determining whether to prepare an environmental impact statement the Federal agency shall:
….

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.
….

40 C.F.R. § 1502.9(c)(1)

Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.
….

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

40 C.F.R. § 1502.24

Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 C.F.R. § 1508.7

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from

individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.8(b)

Effects.

Effects include:
….

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.13

Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.18

Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

> (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.
>
> (2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.
>
> (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions

approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.25(a)

Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:
(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.
(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.
…..

(c) Impacts, which may be:

(1) Direct;
(2) indirect;
(3) cumulative.

40 C.F.R. § 1508.27(b)

Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

43 C.F.R. § 2300.0-5(h) & (m)

Definitions.

As used in this part, the term:
….

(h) Withdrawal means withholding an area of Federal land from settlement, sale, location, or entry under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than property governed by the Federal Property and Administrative Services Act (40 U.S.C. 472), from one department, bureau or agency to another department, bureau or agency.
….

(m) Segregation means the removal for a limited period, subject to valid existing rights, of a specified area of the public lands from the operation of the public land laws, including the mining laws, pursuant to the exercise by the Secretary of regulatory authority to allow for the orderly administration of the public lands.

43 C.F.R. § 3809.5

How does BLM define certain terms used in this subpart?

As used in this subpart, the term:
….

Casual use means activities ordinarily resulting in no or negligible disturbance of the public lands or resources. For example—

> (1) Casual use generally includes the collection of geochemical, rock, soil, or mineral specimens using hand tools; hand panning; or non-motorized sluicing. It may include use of small portable suction dredges. It also generally includes use of metal detectors, gold spears and other battery-operated devices for sensing the presence of minerals, and hand and battery-operated drywashers. Operators may use motorized vehicles for casual use activities provided the use is consistent with the regulations governing such use (part 8340 of this title), off-road vehicle use designations contained in BLM land-use plans, and the terms of temporary closures ordered by BLM.
>
> (2) Casual use does not include use of mechanized earth-moving equipment, truck-mounted drilling equipment, motorized vehicles in areas when designated as closed to “off-road vehicles” as defined in § 8340.0-5 of this title, chemicals, or explosives. It also does not include “occupancy” as defined in § 3715.0-5 of this title or operations in areas where the cumulative effects of the activities result in more than negligible disturbance.

Exploration means creating surface disturbance greater than casual use that includes sampling, drilling, or developing surface or underground workings to evaluate the type, extent, quantity, or quality of mineral values present. Exploration does not include activities where material is extracted for commercial use or sale.

Minimize means to reduce the adverse impact of an operation to the lowest practical level. During review of operations, BLM may determine that it is practical to avoid or eliminate particular impacts.

Mining claim means any unpatented mining claim, millsite, or tunnel site located under the mining laws. The term also applies to those mining claims and millsites located in the California Desert Conservation Area that were patented after the enactment of the Federal Land Policy and Management Act of October 21, 1976. Mining "claimant" is defined in § 3833.0-5 of this title.

Mining laws means the Lode Law of July 26, 1866, as amended (14 Stat. 251); the Placer Law of July 9, 1870, as amended (16 Stat. 217); and the Mining Law of May 10, 1872, as amended (17 Stat. 91); as well as all laws supplementing and amending those laws, including the Building Stone Act of August 4, 1892, as amended (27 Stat. 348); the Saline Placer Act of January 31, 1901 (31 Stat. 745); the Surface Resources Act of 1955 (30 U.S.C. 611-614); and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).
Mitigation, as defined in 40 CFR 1508.20, may include one or more of the following:

> (1) Avoiding the impact altogether by not taking a certain action or parts of an action;
>
> (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
>
> (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
>
> (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
>
> (5) Compensating for the impact by replacing, or providing substitute, resources or environments.

Operations means all functions, work, facilities, and activities on public lands in connection with prospecting, exploration, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the

mining laws; reclamation of disturbed areas; and all other reasonably incident uses, whether on a mining claim or not, including the construction of roads, transmission lines, pipelines, and other means of access across public lands for support facilities.

Operator means a person conducting or proposing to conduct operations.

Person means any individual, firm, corporation, association, partnership, trust, consortium, joint venture, or any other entity conducting operations on public lands.

Project area means the area of land upon which the operator conducts operations, including the area required for construction or maintenance of roads, transmission lines, pipelines, or other means of access by the operator.

Public lands, as defined in 43 U.S.C. 1702, means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the BLM, without regard to how the United States acquired ownership, except—

(1) Lands located on the Outer Continental Shelf; and

(2) Lands held for the benefit of Indians, Aleuts, and Eskimos.

Reclamation means taking measures required by this subpart following disturbance of public lands caused by operations to meet applicable performance standards and achieve conditions required by BLM at the conclusion of operations. For a definition of “reclamation” applicable to operations conducted under the mining laws on Stock Raising Homestead Act lands, see part 3810, subpart 3814 of this title. Components of reclamation include, where applicable:

(1) Isolation, control, or removal of acid-forming, toxic, or deleterious substances;

(2) Regrading and reshaping to conform with adjacent landforms, facilitate revegetation, control drainage, and minimize erosion;

(3) Rehabilitation of fisheries or wildlife habitat;

(4) Placement of growth medium and establishment of self-sustaining revegetation;

(5) Removal or stabilization of buildings, structures, or other support facilities;

(6) Plugging of drill holes and closure of underground workings; and

(7) Providing for post-mining monitoring, maintenance, or treatment.

Riparian area is a form of wetland transition between permanently saturated wetlands and upland areas. These areas exhibit vegetation or physical characteristics reflective of permanent surface or subsurface water influence. Typical riparian areas include lands along, adjacent to, or contiguous with perennially and intermittently flowing rivers and streams, glacial potholes, and the shores of lakes and reservoirs with stable water levels. Excluded are areas such as ephemeral streams or washes that do not exhibit the presence of vegetation dependent upon free water in the soil.

Tribe means, and Tribal refers to, a Federally recognized Indian tribe.

Unnecessary or undue degradation means conditions, activities, or practices that:

(1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal and state laws related to environmental protection and protection of cultural resources;

(2) Are not “reasonably incident” to prospecting, mining, or processing operations as defined in § 3715. 0-5 of this chapter; or

(3) Fail to attain a stated level of protection or reclamation required by specific laws in areas such as the California Desert Conservation Area, Wild and Scenic Rivers, BLM-administered portions of the National Wilderness System, and BLM-administered National Monuments and National Conservation Areas.

43 C.F.R. § 3809.10

How does BLM classify operations?

BLM classifies operations as—

(a) Casual use, for which an operator need not notify BLM. (You must reclaim any casual-use disturbance that you create. If your operations do not qualify as casual use, you must submit a notice or plan of operations, whichever is applicable. See §§ 3809.11 and 3809.21.);

(b) Notice-level operations, for which an operator must submit a notice (except for certain suction-dredging operations covered by § 3809.31(b)); and

(c) Plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval.

43 C.F.R. § 3809.11(a)

When do I have to submit a plan of operations?

(a) You must submit a plan of operations and obtain BLM's approval before beginning operations greater than casual use, except as described in § 3809.21. Also see §§ 3809.31 and 3809.400 through 3809.434.
….

43 C.F.R. § 3809.21(a)

When do I have to submit a notice?

(a) You must submit a complete notice of your operations 15 calendar days before you commence exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. See § 3809.301 for information on what you must include in your notice.
....

43 C.F.R. § 3809.312(a)

When may I begin operations after filing a complete notice?

(a) If BLM does not take any of the actions described in § 3908.313, you may begin operations no sooner than 15 calendar days after the appropriate BLM office receives your complete notice. BLM may send you an acknowledgement that indicates the date we received your notice. If you don't receive an acknowledgement or have any doubt about the date we received your notice, contact the office to which you sent the notice. This subpart does not require BLM to approve your notice or inform you that your notice is complete.
….

43 C.F.R. § 3809.401

Where do I file my plan of operations and what information must I include with it?

(a) If you are required to file a plan of operations under § 3809.11, you must file it with the local BLM field office with jurisdiction over the lands involved. BLM does not require that the plan be on a particular form. Your plan of operations must demonstrate that the proposed operations would not result in unnecessary or undue degradation of public lands.
….

(b) Your plan of operations must contain the following information and describe the proposed operations at a level of detail sufficient for BLM to determine that the plan of operations prevents unnecessary or undue degradation:

> (1) Operator Information. The name, mailing address, phone number, taxpayer identification number of the operator(s), and the BLM serial number(s) of any unpatented mining claim(s) where disturbance would occur. If the operator is a corporation, you must identify one individual as the point of contact. You must notify BLM in writing within 30 calendar days of any change of operator or corporate point of contact or in the mailing address of the operator or corporate point of contact;

(2) Description of Operations. A description of the equipment, devices, or practices you propose to use during operations including, where applicable—

(i) Maps of the project area at an appropriate scale showing the location of exploration activities, drill sites, mining activities, processing facilities, waste rock and tailing disposal areas, support facilities, structures, buildings, and access routes;

(ii) Preliminary or conceptual designs, cross sections, and operating plans for mining areas, processing facilities, and waste rock and tailing disposal facilities;

(iii) Water management plans;

(iv) Rock characterization and handling plans;

(v) Quality assurance plans;

(vi) Spill contingency plans;

(vii) A general schedule of operations from start through closure; and

(viii) Plans for all access roads, water supply pipelines, and power or utility services;

(3) Reclamation Plan. A plan for reclamation to meet the standards in § 3809.420, with a description of the equipment, devices, or practices you propose to use including, where applicable, plans for—

(i) Drill-hole plugging;

(ii) Regrading and reshaping;

(iii) Mine reclamation, including information on the feasibility of pit backfilling that details economic, environmental, and safety factors;

(iv) Riparian mitigation;

(v) Wildlife habitat rehabilitation;

(vi) Topsoil handling;

(vii) Revegetation;

(viii) Isolation and control of acid-forming, toxic, or deleterious materials;

(ix) Removal or stabilization of buildings, structures and support facilities; and

(x) Post-closure management;

(4) Monitoring Plan. A proposed plan for monitoring the effect of your operations. You must design monitoring plans to meet the following objectives: To demonstrate compliance with the approved plan of operations and other Federal or State environmental laws and regulations, to provide early detection of potential problems, and to supply information that will assist in directing corrective actions should they become necessary. Where applicable, you must include in monitoring plans details on type and location of monitoring devices, sampling parameters and frequency, analytical methods, reporting procedures, and procedures to respond to adverse monitoring results. Monitoring plans may incorporate existing State or other Federal monitoring requirements to avoid duplication. Examples of monitoring programs which may be necessary include surface- and ground-water quality and quantity, air quality, revegetation, stability, noise levels, and wildlife mortality; and

(5) Interim management plan. A plan to manage the project area during periods of temporary closure (including periods of seasonal closure) to prevent unnecessary or undue degradation. The interim management plan must include, where applicable, the following:

(i) Measures to stabilize excavations and workings;

(ii) Measures to isolate or control toxic or deleterious materials (See also the requirements in § 3809.420(c)(12)(vii).);

(iii) Provisions for the storage or removal of equipment, supplies and structures;

(iv) Measures to maintain the project area in a safe and clean condition;

(v) Plans for monitoring site conditions during periods of non-operation; and

(vi) A schedule of anticipated periods of temporary closure during which you would implement the interim management plan, including provisions for notifying BLM of unplanned or extended temporary closures.

(d) Reclamation cost estimate. At a time specified by BLM, you must submit an estimate of the cost to fully reclaim your operations as required by § 3809.552. BLM will review your reclamation cost estimate and notify you of any deficiencies or additional information that must be submitted in order to determine a final reclamation cost. BLM will notify you when we have determined the final amount for which you must provide financial assurance.

43 C.F.R. § 3809.412

When may I operate under a plan of operations?

You must not begin operations until BLM approves your plan of operations and you provide the financial guarantee required under § 3809.551.

43 C.F.R. § 3809.415(a)

How do I prevent unnecessary or undue degradation while conducting operations on public lands?

You prevent unnecessary or undue degradation while conducting operations on public lands by—

(a) Complying with § 3809.420, as applicable; the terms and conditions of your notice or approved plan of operations; and other Federal and State laws related to environmental protection and protection of cultural resources[.]
….

43 C.F.R. § 3809.423

How long does my plan of operations remain in effect?

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

43 C.F.R. § 3809.424(a)(1), (a)(3)

What are my obligations if I stop conducting operations?

(a) To see what you must do if you stop conducting operations, follow this table:

If—	Then—
(1) You stop conducting operations for any period of time	(1) You must follow your approved interim management plan submitted under § 3809.401(b)(5); (ii) You must submit a modification to your interim management plan to BLM within 30 calendar days if it does not cover the circumstances of your temporary closure per § 3809.431(a); (iii) You must take all necessary actions to assure that unnecessary or undue degradation does not occur; and (iv) You must maintain an adequate financial guarantee.
….	….
(3) Your operations are inactive for 5 consecutive years	BLM will review your operations and determine whether BLM should terminate your plan of operations and direct final reclamation and closure.

43 C.F.R. § 3809.500(b)

In general, what are BLM's financial guarantee requirements?

To see generally what BLM's financial guarantee requirements are, follow this table:

If—	Then—
….	….
(b) You conduct operations under a notice or a plan of operations	You must provide BLM or the State a financial guarantee that meets the requirements of this subpart before starting operations operations. For more information, see §§ 3809.551 through under a 3809.573.

43 C.F.R. § 3809.552(a)

What must my individual financial guarantee cover?

(a) If you conduct operations under a notice or a plan of operations and you provide an individual financial guarantee, it must cover the estimated cost as if BLM were to contract with a third party to reclaim your operations according to the reclamation plan, including construction and maintenance costs for any treatment facilities necessary to meet Federal and State environmental standards. The financial guarantee must also cover any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third-party contracts are developed and executed.
….

43 C.F.R. § 3809.605

What are prohibited acts under this subpart?

Prohibited acts include, but are not limited to, the following:

(a) Causing any unnecessary or undue degradation;

(b) Beginning any operations, other than casual use, before you file a notice as required by § 3809.21 or receive an approved plan of operations as required by § 3809.412;

(c) Conducting any operations outside the scope of your notice or approved plan of operations;

(d) Beginning operations prior to providing a financial guarantee that meets the requirements of this subpart[.]

….