Consolidated Case Nos. 14-17350, 14-17351, 14-17352 & 14-17354

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL MINING ASSOCIATION,

Plaintiff/Appellant,

v.

S.M.R. JEWELL, U.S. Secretary of the Interior, et al.,

Defendants/Appellees,

GRAND CANYON TRUST, et al.,

Intervenors/Appellees.

BRIEF OF THE STATES OF UTAH, ARIZONA, MONTANA, AND NEVADA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

Appeal from the United States District Court for the District of Arizona, the Honorable David G. Campbell, Presiding

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STATEMENT OF PRIOR OR RELATED CASES

The State of Utah is not aware of any pending Ninth Circuit Court of Appeals cases related to this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the State of Utah avers neither it nor any of the *amici* States is a corporation, but each, a sovereign state government.

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S.M.R. JEWELL, U.S. Secretary of the Interior, et al.,

Defendants/Appellees,

GRAND CANYON TRUST, et al.,

Intervenors/Appellees.

As permitted by Rule 29(a), Federal Rules of Appellate Procedure, Utah Attorney General Sean D. Reyes files this brief on behalf of the States of Utah, Arizona, Montana and Nevada, as *amici curiae* in support of Appellants' request for reversal of the district court's order granting summary judgment in favor of Defendants/Appellees in the consolidated cases entitled *Yount, et al., v. Jewell, et al.*, No. 3:11-cv-08171-DGC, 2014 WL 4904423 (D. Ariz. Sept. 30, 2014).

STATEMENT OF THE CASE

Pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1714, the Secretary of the Interior may withdraw public land from particular uses for up to twenty years. Withdrawals over 5,000 acres

require a report to Congress as well as the opportunity for Congressional approval. *Id*. at § 1714(c)(1). In 2009, the Department of the Interior (DOI) published its notice to withdraw 999,549 acres in northern Arizona in order "to protect the Grand Canyon watershed from adverse effects of locatable hard rock mineral exploration and mining." 74 Fed. Reg. 35,887-88 (July 21, 2009). On January 9, 2012, then Secretary Ken Salazar signed the Record of Decision (ROD) ordering the Northern Arizona Withdrawal (NAW) of 1,006,545 acres.

The amici States are particularly concerned with the magnitude of this withdrawal and its absence of verifiable justification. Neither available science nor data presented support the withdrawal's stated purpose: protecting the Grand Canyon watershed. Also, even if there were data to support protection of this watershed from hard rock mining, the reach of the withdrawal extends far beyond the area that might provide protection to include lands well outside the watershed. Lastly, the DOI employed geographically undefined American Indian interests to fill the void created by the lack of empirical support.

The Administrative Procedure Act (APA) requires an agency decision to be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 45 U.S.C. § 706(2)(A). *See Natural Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 877 (9th Cir. 2005). Misinterpretation of data or relying on inaccurate or unsupported data is arbitrary and capricious.

Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 806-07 (9th Cir. 2005) (holding Forest Service's misinterpretation of a timber market study ran counter to the evidence before the agency thereby rendering its management plan arbitrary and capricious).

Under FLPMA, land may be withdrawn to limit some activities while encouraging others so as to achieve a particular public purpose or program. *See* 43 U.S.C. § 1702(j). The Secretary of the Interior, in turn, "is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of [FLPMA]." *Id*. § 1714(a) (emphasis added). In the case of the NAW, the Secretary withdrew over one million acres of land "to protect the Grand Canyon watershed from adverse effects of locatable hard rock mineral exploration and mining." 74 Fed. Reg. 35,887-88 (July 21, 2009).

Lacking unlimited or unfettered withdrawal discretion, the Secretary must report to Congress the reasons justifying the withdrawal. 43 U.S.C. § 1714(c). Under its own rules, the DOI "withdrawals shall be kept to a minimum consistent with the demonstrated needs of the applicant." 603 DM 1.1(A) (Aug. 1, 2005) (Department of the Interior, Departmental Manual, Part 603: Land Withdrawal Program). Here, the Secretary abused the discretion given him by withdrawing a large tract of land 1) with insufficient data or science to support it, 2) which

included lands far afield from protectable watershed, and 3) placed unwarranted emphasis upon undefined American Indian interests.

INTEREST OF THE *AMICI* STATES

The *amici* States have a vital interest in the recognition and preservation of the rights reserved to them and their citizens. Among those interests are the promotion and preservation of local economies, reasonable and responsible mining and mineral development, and maintaining a proper balance between conservation and cultural interests in affected communities. To this end, FLPMA was designed to work in concert with, not in derogation of, the Mining Law of 1872, as amended, 30 U.S.C. § 22 *et. seq.*, and other pertinent federal laws. If permitted to the stand, the lower court decision will create imbalance between state and federal prerogatives and entitlements.

The NAW encompasses over 1 million acres of mineral-bearing lands that are typical of much of the arid west where state and local governments share in the mineral revenues produced from ubiquitous federal lands. These indirect payments are intended to partially compensate the "public land" states for revenue shortfalls that result from their inability to tax or otherwise obtain direct revenues from federally owned and managed lands within their borders. The district court's decision imposes a new resource-restrictive precedent with potentially immense economic impact throughout the western United States.

The economies of southern Utah and northern Arizona have been, and will be, further affected by the NAW. The projected negative economic impacts of the withdrawal are outlined in the BLM's own Final Environmental Impact Statement (FEIS), where Section 4.17.4 (the Preferred Alternative) predicts a significant loss of high paying mining jobs. Similarly, Tables 4.17-9 and 4.17-11 predict that the withdrawal will create a direct economic loss of over $3 billion during the 20 year withdrawal. AR002001 (FEIS 4-290, 4-292). Tables 4.17-13 and 4.17-14 predict a reduction in state and local revenue of $180 million over 20 years. *Id*. (FEIS 4-295 through 296). In contrast, for the communities most proximate to the North Parcel (Fredonia, Kanab, the Kaibab Paiute Tribe, and Colorado City) as well as Blanding, Utah (cite of the White Mesa uranium mill), "Alternative A could produce moderate to major economic benefits over the next 20 years." AR002001 (FEIS 4-278).

Uranium mining is essential to energy development in a modern society, and as environmental pressures result in reduced use of fossil fuels, uranium will become even more important as a source of clean energy. Allowing the NAW to stand will impose on Utah, Arizona, and potentially all western states the unnecessary negative economic consequences of this and other inevitable large-scale withdrawals of public lands.

Of equal concern to the *amici* States is the district court's use of generalized Native American interests to justify the NAW. The American West was once populated by the ancestors of numerous Native American tribes. These tribes have real interests, worthy of protection. But under the district court's ruling, the mere existence of these interests, without any substantiated demonstration of harm, may subject vast areas of public land to resource withdrawal in order to protect asserted tribal cultural and religious "areas" as opposed to sites.

Of particular concern to the State of Utah and the other *amici* States, is the district court's decision that elevated—without scientific support, data or reason—illusory environmental and other interests above the needs of the local economies and the interests, therefore, of the sovereign states. The lower court order is also at odds with other pronouncements of Congress, and that body's considered and consistent decision to leave open for mining development the large and uranium-rich lands that the Secretary, here, withdrew in derogation of the discretion given him under federal law. Those laws—the 1915 and 1975 Grand Canyon Enabling and Enlargement Acts, and the Arizona Wilderness Acts of 1984—reflect Congress's continuing interest in multiple-use, which interest the Secretary too easily cast aside.

This case presents an opportunity for an appellate court to determine whether the DOI must support its withdrawal decisions through application of

empirical data, the actual configuration of the watershed, and the actual application, not mere recitation, of core scientific principles. It also presents an opportunity for an appellate court to articulate the boundaries within which an executive agency may reasonably exercise its discretion, by finding the Secretary's actions below arbitrary and outside of these permissible boundaries.

The case raises the important question of whether the delegated large-scale withdrawal authority in FLPMA Section 204(c)(1), 43 U.S.C. §1714, survives and can be exercised by the Secretary when the authority is conditioned upon a legislative veto by which Congress unquestionably intended to retain the power to restrict unwarranted withdrawals, which veto power has since been deemed unconstitutional. Finally, this brief of the *amici* States provides the Court with their unique perspective on the interplay between promoting the vehicles of state and local economies while also paying respect to Native American history, culture, and interests that are affected by them.

ARGUMENT

I. THE DOI DID NOT UTILIZE OR RELY UPON AVAILABLE SCIENCE.

The FEIS and ROD each acknowledge a serious lack of data regarding mining and water in the NAW, but each justify their reason for not obtaining additional data, claiming the data was not essential to the decision making process.

(District Court Order, Doc 238, 20-21). This justification lacks merit and logic. It is also insufficient to sustain the withdrawal decision at issue here.

The DOI maintains its large-scale uranium withdrawal is necessary to protect the Grand Canyon watershed. But the FEIS contains incomplete or unavailable information regarding the real impact, if any, of uranium mining on any natural resource, including protectable watershed, (AR002001 (FEIS, Volume II at 4-6, 4-68-69, 4-135-136, 4-153, 4-253, 4-275-276)), and relies, instead, on a sampling of areas primarily outside the NAW or that lie near the unreclaimed Orphan Mine in Grand Canyon National Park. Citing to the North Parcel, where naturally-occurring uranium is most concentrated and where mining has historically occurred, the DOI points to water samples that indicate dissolved uranium there was 16 times higher than typical for the region. (District Court Order, Doc. 238, 25) But the DOI, in turn, points to no data—nor can it—to support its conclusion that mining is the cause of high uranium content. Even the United States Geological Survey (USGS) has acknowledged that high levels of dissolved uranium in springs and wells are the result of close or "direct contact with mineralized ore bodies, and those concentrations are related to natural processes, mining, or both." AR000202 (USGS Report). And notably, the FEIS acknowledges—as it must—that there is limited information about perched aquifers, the direction of groundwater movement in the regional aquifer, and

reclamation data for historic mines. *Id*. Making a withdrawal decision based on a concern for a watershed, without evidence of groundwater movements or a mining-related threat, but which harms the interest of the parties and the *amici* cannot stand.

The ROD fares no better; it also concedes that in making the withdrawal decision, data was lacking regarding water and environmental processes. AR000001 (ROD at 10). In particular, the ROD finds uncertainty with ground water flows, the impact of uranium mining on perched aquifers and the deep R-aquifer. *Id*. at 10, 12. But despite those uncertainties and an acknowledged lack of data, the ROD concluded that the missing data was non-essential. *Id*. at 10. Instead, it relied on data from six-previously mined sites and conservative assumptions, none of which provide an accurate description of water movement in the NAW. *Id*.

To state that the purpose of a withdrawal is to protect the watershed, but to conclude that a scarcity of data dealing with the actual impact on water in the withdrawal area is non-essential, belies reason; it is arbitrary and capricious. Information related to water and mining in the withdrawal area is not simply essential to appropriate decision-making; it is imperative. *See* 40 C.F.R. § 1502.22(b). In *Montana Wilderness Ass'n v. McAllister*, 666 F.3d 549 (9th Cir. 2001), the Ninth Circuit held that the U.S. Forest Service could not ignore a lack of data related to a travel management plan and its potential violation of the Montana

Wilderness Study Act of 1977. *Id* at 559. When an agency lacks data, it cannot just speculate out of caution, but must "do the best it can with the data it has." *Id*. Here, the DOI acknowledged a wholesale lack of data, but then made no attempt to obtain informative groundwater data for its deliberation. Instead, the DOI relied on upon an antiquated USGS study and its conclusions that are only tangentially applicable to groundwater in the withdrawn area. In the absence of data, or other scientific proof, the Secretary's decision must be reversed, or at a minimum, remanded with instructions that the DOI consider the absence of data that it deemed "non-essential," or more properly, that the DOI develop the essential information that would inform a decision based on scientific fact.

II. THE WITHDRAWAL'S PROTECTIONS IMPERMISSIBLY INCLUDE AREAS OUTSIDE THE WATERSHED.

More remarkable, perhaps, than being premised on an absence of data, the scope of the NAW is troubling for another reason. The withdrawal goes beyond its stated purpose of protecting the Grand Canyon watershed and includes in its reach areas that fall outside that watershed, but that are located in other disassociated watersheds to the north. Even accepting the DOI's purpose that the NAW "is to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development," AR000002 (ROD), by including areas outside of and unrelated to the watershed, the DOI's purpose exceeds its own rules—"withdrawals shall be kept to a minimum consistent with the demonstrated needs

of the applicant." 603 DM 1.1(A) (Aug. 1, 2005). Here, the DOI does not, and physically cannot, show a need to withdraw and reserve land outside the Grand Canyon watershed.

With approximately 200,000 acres in the North Parcel falling outside the Grand Canyon watershed, the NAW was not "kept to a minimum." Because the stated purpose of the withdrawal does not support the inclusion of these unrelated watershed areas, the Secretary's determination to include them was arbitrary and capricious.

Despite the lack of evidence for inclusion of this area, the DOI has, after the fact, tried to justify the expanded area by broadening the term "watershed" far beyond any definition found in current statute or regulation. The DOI's novel "watershed" definition encompasses all resources, including wildlife, visual, and cultural resources, and, therefore allows for expansion far beyond any hydrologic boundaries. Unlike the BLM Land Use Planning Handbook, which mandates that a watershed approach to planning "consider [] both ground and surface water flow within a hydrologically defined geographical area," the DOI's definition is potentially limitless. BLM H-1601-1, Land Use Planning Handbook, at Glossary-8 (Mar. 11, 2005). No longer bound by the scientific limitations of hydrology, the DOI contends that merely identifying an area as some broader, imaginary

"watershed", can now justify large-scale withdrawals of land with no evidence of hydrological effect.

If, as is stated in the ROD, the true purpose is to protect the Grand Canyon watershed, then the boundaries of the withdrawal should reflect what science recognizes as geographic boundaries related to an "area where all waters flow to a single point." *Norton Const. Co. v. U.S. Army Corps of Eng'rs*, 2007 WL 1431907, *5 (N.D. Ohio 2007), aff'd, 280 F. App'x 490 (6th Cir. 2008). But record evidence here illustrates that from the outset, the boundaries of the NAW had little if anything to do with watershed protection. Rather, the boundaries were originally drawn in 2008, by Arizona Congressman Raul Grijalva as part of a legislative proposal to protect areas around the Grand Canyon from hard rock mining. AR001623.

While Rep. Grijalva's proposal did not pass, the Secretary took up the mantle the following year, publishing his own notice of intent to withdraw the nearly identical area. 74 Fed. Reg. 35,887-88 (July 21, 2009). Despite stating the withdrawal was to protect the Grand Canyon watershed, the Secretary's boundaries were not redefined to reflect the watershed, but were left substantially as Rep. Grijalva originally drew them. AR072824. There being no basis to include 200,000 acres in the North Parcel under the guise of "watershed protection," the decision to include that area was arbitrary and capricious and should be overturned.

III. THE SECRETARY'S DECISION MISAPPLIED THE LAW PROTECTING AMERICAN INDIAN RESOURCES AS A MEANS OF JUSTIFYING THE NAW.

The State of Utah and other *amici curiae* contend the Secretary exceeded his authority and acted contrary to the law by employing the protection of Native American resources—including the religious belief that mining inherently and irreversibly alters and desecrates the land—as a separate justification for withdrawing a million acres of uranium-rich deposits from mining. In so doing, the Secretary ignored long-standing legal precedent and contravened a well-established statutory and regulatory scheme which is, and has been, sufficient to protect Native American religious and cultural interests without the need for withdrawal.

A one million-acre plus land and resource withdrawal cannot be justified as a means necessary to protect undefined Native American religious and cultural interests; nor can a generalized interest in protecting Native American interests be used to justify environmental or conservation management. The result on the *amici* States could be catastrophic; it should be rejected.

A. Citing protection of American Indian resources as a justification for a one-million acre withdrawal is without precedent and contrary to well-reasoned legal authority.

A federal action may be used to protect American Indian religious beliefs and traditions; however, a withdrawal on the scale of the one million acre NAW is

without precedent. As Appellants have pointed out, this Court has previously upheld lower court decisions rejecting Native American claims regarding much smaller areas. In a section entitled "Impacts on American Indian Resources," and relying upon National Park Service comments that drilling and mining "wound the earth" and "kill deities and sacred lands," AR002221-002223, 002225 (FEIS 4-219-221, 4-223), the ROD attempts to justify the withdrawal as necessary to prevent the impact of mining on American Indian religious and traditional resources which cannot be mitigated and "may degrade the values of those lands to the tribes that use them." AR000009-000011, (ROD at 9, 11).

In *South Fork Band Council of Western Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718 (9th Cir. 2009), this Court upheld a lower court's rejection of a tribal claim for protection of an area of sacred land surrounding Nevada's Mount Tenabo. At issue there, was BLM's approval of a gold mining operation on the side of the mountain. The Court noted that the BLM's order provided for protection of ceremonial uses of sacred sites, but stated: "The Tribes [ ] do not articulate the manner in which they seek agency accommodation for the entire mountain." *Id*. at 724.

Similarly, in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063-64 (9th Cir. 2007), this Court again rejected a tribal claim for protection of the 74,000 acre San Francisco Peaks area in the Coconino National Forest in Arizona, 777

acres of which the Snowbowl Ski Resort sought to use for artificial snowmaking. This Court recognized the tribe's claim, but held there was no substantial burden on the members' exercise of their religion, noting that to give the tribe a veto over the use of public land would "deprive others of the right to use what is, by definition, land that belongs to everyone." *Id*. at 1063-64.

Those decisions are not unique, but represent twenty-five years of considered jurisprudence. Namely, in 1991, in *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1486 (D. Ariz. 1990), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), this Court affirmed the trial court's rejection of a tribal claim for protection of a large area of sacred land. Relying on *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Court stated:

> As in *Lyng*, however, fee title of the land in this case remains with the government. *Union Oil Co. of California v. Smith*, 249 U.S. 337, 349, 39 S.Ct. 308, 311, 63 L.Ed. 635 (1919). "Whatever rights the Indians may have to use the area ... those rights do not divest the Government of its right to use what is, after all, *its* land." *Lyng*, 485 U.S. at 453, 108 S.Ct. at 1327. Moreover, the Havasupai apparently have thousands of other religious sites within their former aboriginal lands. V.3D–D.176–P.3766. Giving the Indians a veto power over activities on federal land that would "easily require de facto beneficial ownership of some rather spacious tracts of public property." *Id.* at 453, 108 S.Ct. at 1327.

Havasupai Tribe, 752 F. Supp. at 1486 (citations in original).

In this case, the Secretary of the Interior ordered the withdrawal of over one million acres of public land from uranium and other hard rock mining by presuming, without support, cultural and religious significance for the entire area. Distinguishing the cases cited above, the District Judge maintained that the DOI did not grant the tribes a veto over mining based on First Amendment grounds, but the court equated tribal religious interests with historical and archeological values, the protection of which is a proper secular purpose. However, it is clear that the practical effect of that ruling will enable public land agencies—when it suits the agency's purpose to do so—to grant tribes a veto over mining on expansive tracts of public land based upon a generalized Native American religious belief that drilling and mining damage sacred land which cannot be mitigated. Allowing, as the district court has here, an executive agency to supplant Native American cultural interests for science or other evidence is contrary to law, logic, or reason. No other court has ever gone so far as to uphold such a withdrawal and this Court should not do so.

B. The legal authorities relied upon by defendants and the Native American *amici* are distinguishable from this case, involving much smaller, discrete areas of public lands.

Below, the Defendants and the Native American *amici curiae* contended that the protection of areas of traditional religious and cultural importance to Native American tribes has been held to be a proper secular purpose, citing decisions from

this Court, *see Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036 (9th Cir. 2007) and *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004), and from the D.C. Circuit Court, *see Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745 (D.C. Cir. 2007). Each is distinguishable.

In *Access Fund*, this Court addressed a rock climbing ban on a discrete rock formation located near Lake Tahoe. That formation, Cave Rock, is a location known to be sacred to the Washoe Tribe. The Court's ruling, upholding that ban, noted "[t]he fact that Cave Rock is a sacred site to the Washoe does not diminish its importance as a national cultural resource." *Id*. at 1044. Noteworthy, is the fact Cave Rock involved a discrete and well-defined area with particular significance in Native American religious culture. The vast expanse that the Secretary embraced in this case does not compare.

Again, converse to an area covering over one-million acres, the decision in *Cholla Ready Mix* addressed the propriety of a resource withdrawal at a single site known as Woodruff Butte. 382 F.3d at 970. Upholding that discrete withdrawal, this Court noted that Woodruff Butte was an important cultural, historic, and religious site to several Native American groups, and was also eligible for placement on the National Register. *Id*. at 972. Finally, even the withdrawal at issue in *Mount Royal Joint Venture* involved a number of well-defined secular

purposes and an area just under 20,000 acres in Montana, less than two percent the size of the one million acre NAW. 477 F.3d at 112.

This case, by contrast, involves no specific or discrete sites with a detailed history of cultural and religious significance, but a vast withdrawal area of over one million acres, based on a general objection to the harm caused to sacred earth by mineral extraction. The distinction is substantial and this Court should reject the NAW as a means of protecting Native American cultural and religious interests.

As pointed out in the brief of plaintiffs/appellants Quaterra and AULEC, where appropriate, these interests will be adequately protected by a number of federal laws and regulations, including the Archeological and Historic Preservation Act (AHPA), 16 U.S.C. §§ 469; the Archaeological Resource Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm; the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3002(a); and the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f. In addition, traditional cultural properties (TCPs) may be eligible for listing on the National Register. 16 U.S.C. § 470a(d)(6)(A)-(B); 36 C.F.R. § 800.2(c)(2). The large withdrawn area at issue here has not been listed on the National Register as a TCP. As well, the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, provides for access to sacred sites, which is also assured under Exec. Order No. 13007, 61 F.R. 26771 (1996). Recognizing the breadth of these measures – none of which were relied

upon by the DOI here—underscores the arbitrary nature of the Secretary's decision. The *amici* States urge caution on this Court's review.

IV. THE *AMICI* STATES JOIN IN THE ARGUMENTS OF NMA THAT THE SECRETARY'S WITHDRAWAL WAS UNCONSTITUTIONAL AND MUST BE VACATED UNDER *INS V. CHADHA*.

Well-underscored by the NMA in its opening brief, FLPMA's purpose and design—and, therefore, the intent of Congress—was to preserve for itself oversight of withdrawals greater than 5,000 acres and also the ability for Congress itself to veto such large withdrawals. To accomplish this, Congress repealed the Executive's then-unfettered implied withdrawal authority, and intentionally replaced it with precisely delimited and restricted authority, subject to legislative review. 43 U.S.C. § 1714(c)(1). This legislative veto has been found unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983), and as discussed in NMA's brief, the plain language, structure, and legislative history of FLPMA demonstrate that the legislative veto is inseverable from the large-tract withdrawal authority with which it is integrated. Because Congress would not have enacted section 204(c)(1) authority to withdraw greater than 5,000 acres without the legislative veto—Congress's foremost means of securing its oversight goals—all of the provision must be stricken, and the instant withdrawal must be vacated.

FLPMA's text and history illustrate that, consistent with Congress's relationship with the western states, Congress intended and, in fact, reserved unto

itself—not ceded to the DOI—a substantive policy role in large withdrawals. It is clear that Congress did not intend an executive branch agency to have unfettered discretion with regard to large public land withdrawals.

And even despite FLPMA signaling a change in federal policy from the open disposal of public lands to their retention in federal ownership and control, Congress retained many pre-FLPMA laws for the benefit of the states and their use of the resource-rich federal public lands that lie within them. For example, despite a shift in land policy, the states today retain a vital regulatory and management role with respect to grazing permits, oil and gas leasing and development, and hard mineral extraction and development.

Those laws manifest Congress's considered decision-making under the Property Clause. Reflected in each, is a federal recognition that based on their own unique interests, the states should enjoy a level of involvement in public land management decisions. The mere fact that the sovereign states suffer a much more limited and attenuated role in decisions made by the Secretary of the Interior, warrants reversal by this Court and a retention by Congress of oversight over land or resource withdrawals in excess of 5,000 acres.

The continued vitality of the *amici* States' role in public land management illustrates the tacit bargain long ago struck between the U.S. and the states as federal land policy has evolved from disposal to retention. Until now that bargain

has allowed states, such as the *amici*, with large blocks of federal public lands within their borders to continue to benefit from, and to have input into decisions that materially impact that land and resources that lie within them. Vesting the Secretary of the Interior, as the district court did here, with an unchecked authority to make large scale withdrawals of land and the resources which bestow those benefits violates that bargain. The *amici* States ask this Court to restore the benefits of the states' bargain and the balance intended by Congress to govern the administration of the public lands.

CONCLUSION

The DOI's withdrawal is not supported by science. The withdrawal is over expansive and includes areas that are not in the watershed drainage area claimed to be affected by the uranium mining activities. The DOI illegally and improperly utilizes a generalized assertion of protection of American Indian religious resources, beliefs, and traditions to fill the void when science or verifiable data fall short. Because the Secretary's withdrawal was issued pursuant to FLPMA authority that is unconstitutional under *INS v. Chadha* and established severability principles, it is unlawful and must be vacated. For the reasons stated above and also for the reasons stated in the briefs of the Appellants, Quaterra Resources and the Arizona Utah Local Economic Coalition, and the Appellant National Mining

Association, the District Court's Order granting Summary Judgment in favor of the Appellees and against the Appellants should be reversed.

DATED this 17th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,815 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 word processing program, with 14 point font, and Times New Roman type style.

DATED this 17th day of April, 2015.

/s/ Anthony L. Rampton

CERTIFICATE OF SERVICE

I certify that on April 17, 2015, I electronically filed a copy of *Amicus Curiae's* Brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case.

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