Case Nos. 14-17350, 14-17351, 14-17352, 14-17374

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL MINING ASSOCIATION, *et al.*,
Plaintiffs - Appellants,

v.

S.M.R. JEWELL, Secretary of the Interior, *et al.*,
Defendants - Appellees,

and

GRAND CANYON TRUST, *et al.*,
Intervenor - Defendants - Appellees.

On Appeal from the U.S. District Court for the District of Arizona,
Case Numbers 3:11-cv-08171-DGC, 3:12-cv-08038-DGC,
3:12-cv-08042-DGC, 3:12-cv-08075-DGC

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GLOSSARY

AEMA	Plaintiff-Appellant American Exploration & Mining Association
APA	Administrative Procedure Act
BLM	Bureau of Land Management
Coalition	Plaintiff-Appellant Arizona Utah Local Economic Coalition
Commission	Public Land Law Review Commission
EIS	Environmental Impact Statement
ER	Excerpts of Record
FLPMA	Federal Land Policy & Management Act
Metamin	Plaintiff-Appellant Metamin Enterprises USA, Inc.
Multiple-Use Act	Multiple-Use Sustained-Yield Act
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NMA	Plaintiff-Appellant National Mining Association
Quaterra	Plaintiff-Appellant Quaterra Alaska, Inc.
SER	Supplemental Excerpts of Record

Secretary	Secretary of the Interior
Service	United States Forest Service
RFRA	Religious Freedom Restoration Act
USGS	United States Geological Survey
Yount	Plaintiff-Appellant Gregory Yount

JURISDICTIONAL STATEMENT

The district court's jurisdiction was invoked under 28 U.S.C. 1331 for claims arising under the Federal Land Policy and Management Act ("FLPMA"), National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), and the United States Constitution. The district court entered judgment on September 30, 2014. NMA-ER:1.[1] Timely notices of appeal were filed within 60 days of the judgment under FRAP 4(a)(1)(B). NMA-ER:88; AEMA-ER:135-36; Metamin-ER:35-37; SER:723-24. This Court's jurisdiction rests on 28 U.S.C. 1291.

ISSUES PRESENTED

Plaintiffs-appellants challenge a decision by the Secretary of the Interior ("Secretary"), with the consent of the Chief of the Forest Service ("Service") as to lands under his jurisdiction, to withdraw approximately one million acres of federal lands in the region of the Grand Canyon from entry and location under the Mining Law for 20

[1] We cite the excerpts of record ("ER") filed by the National Mining Association ("NMA"), American Exploration and Mining Association ("AEMA"), Metamin Enterprises USA, Inc. ("Metamin"), and our own supplemental excerpts of record ("SER"). To improve readability, we omit internal quotation marks, citations, and brackets from quoted material without so noting, except where the brackets are ours.

years while additional information might be learned about the effects of uranium mining—which could still occur where mining claimants have valid existing rights—on natural resources in the area, including groundwater, surface water, and wildlife. The issues presented are:

1. Was the withdrawal arbitrary and capricious or beyond the Secretary's authority under FLPMA?

2. Was the withdrawal arbitrary and capricious under NEPA?

3. Was the Service's consent to the withdrawal arbitrary and capricious under NFMA?

4. Did the withdrawal violate the Establishment Clause?

STATEMENT OF FACTS

A. Statement of the Case and Proceedings Below

On July 21, 2009, the Department of the Interior published notice in the Federal Register of the Secretary's proposal to withdraw approximately one million acres of federal land near the Grand Canyon from the location and entry of new mining claims under the Mining Law for up to twenty years, subject to valid existing rights. 74 Fed. Reg. 35,887. After soliciting public comments and preparing an environmental impact statement ("EIS" or "impact statement") under

NEPA,[2] the Secretary issued an order withdrawing the lands from operation of the Mining Law, subject to valid existing rights, "to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development." 77 Fed. Reg. 2,563 (Jan. 18, 2012).

Four lawsuits were filed and consolidated before the district court. The plaintiffs include: Gregory Yount, a *pro se* miner; mining industry associations (NMA, AEMA); Arizona Utah Local Economic Coalition ("Coalition"), an organization of local government entities whose members include Mohave County, Arizona, located in the withdrawal area; and Metamin, a holder of mining claims on some of the withdrawn lands.[3] Plaintiffs alleged that the Secretary's decision violated FLPMA, NEPA, and the Administrative Procedure Act ("APA"), and that the Service violated NFMA in consenting to the withdrawal of national forest lands. Yount alleged violations of the Establishment Clause. On the government's motion, the district court dismissed the NEPA claims

[2] The complete EIS is available at http://www.blm.gov/az/st/en/info/nepa/environmental_library/eis/naz-withdraw.html.

[3] AEMA was formerly the Northwest Mining Association. SER:722. Metamin's mining claims were formerly held by Quaterra Alaska, Inc. ("Quaterra"). Metamin has been substituted for Quaterra on appeal.

by AEMA, Metamin, and Yount as outside the statute's zone of interests. *Yount v. Salazar*, 2013 WL 93372, at *25-27 (D. Ariz. 2013).

The Association plaintiffs (AEMA and NMA) moved for partial summary judgment on their claims that the statute prescribing procedures for the withdrawal decision includes an unconstitutional legislative-veto mechanism. Although the district court held that the legislative veto was "clearly unconstitutional," the court concluded that the veto mechanism was severable from the rest of the withdrawal provision given the statute's inclusion of a severability clause and that the statute was fully operative without the legislative veto. *Yount v. Salazar*, 933 F.Supp.2d 1215, 1235 (D. Ariz. 2013). The court held that the plaintiffs had failed to present the "strong evidence" required to overcome the presumption of severability in this context. *Id.*

On subsequent cross-motions for summary judgment, the district court upheld the Secretary's withdrawal and the Service's consent against the plaintiffs' remaining challenges. *Yount v. Salazar*, 2014 WL 4904423 (D. Ariz. 2014). The court rejected the Coalition's NEPA arguments that the Secretary failed to consult adequately with local governments, and that the final EIS failed to address scientific

controversies concerning the effect of uranium mining on water resources, the estimates of the uranium endowment, the amount and distribution of mineable uranium, and the economic impacts of the withdrawal, among other arguments. *See id.* at *10-17.

The court also rejected the plaintiffs' arguments that the withdrawal violated FLPMA, holding that the decision's rationale was supported by substantial evidence in the record and that the Secretary complied with other requirements of the statute. *Id.* at *19-22. The court rejected the plaintiffs' other arguments, including the challenge to the Service's consent, *id.* at *23, and Yount's Establishment Clause claim. *Id.* at *27. These appeals followed.

B. Legal Background

1. Locatable Mining on Federal Lands

The Mining Law of 1872 authorizes citizens to locate claims for "valuable mineral deposits in lands belonging to the United States" that are open to location, 30 U.S.C. 22, by making the "discovery" of a valuable deposit and complying with other applicable statutes and regulations. 30 U.S.C. 23; *see Chrisman v. Miller*, 197 U.S. 313, 320-21 (1905). A valid mining claim confers the "right of possession and

enjoyment of all the surface included within the lines of their locations." 30 U.S.C. 26, and is "property in the fullest sense of that term," *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930), although the government retains title to the underlying lands. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 575 (1987). Uranium is a mineral locatable under the Mining Law. AEMA-ER:115.

2. Early Executive-Branch Withdrawal Authority

From an early time in our government, the President and other principal officers of the Executive Branch have exercised the authority to reserve or withdraw portions of the public domain from the operation of public land laws, including laws for mineral exploration. *See, e.g.*, *Grisar v. McDowell*, 73 U.S. 363, 381 (1867); *Wolcott v. Des Moines Navigation & R. Co.*, 72 U.S. 681, 688-89 (1866); *Wilcox v. Jackson ex dem. McConnel*, 38 U.S. 498, 512-13 (1839). Sometimes withdrawals were made under the authority of statutes or constitutional provisions. But in other instances, lands were temporarily withdrawn where not expressly prohibited by statute or the Constitution and where Congress had acquiesced by failing to disapprove of the practice—an "implied grant of power" that the Supreme Court recognized "was not only useful

to the public, but did not interfere with any vested right of the citizen." *United States v. Midwest Oil Company*, 236 U.S. 459, 475 (1915).

3. Federal Land Policy and Management Act

In 1976, Congress enacted FLPMA, repealing the implied withdrawal authority of the Executive Branch recognized in *Midwest Oil*. Pub. L. No. 94-579, 90 Stat. 2792. In its place, Congress authorized the Secretary to "make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations" of FLPMA Section 204. 43 U.S.C. 1714(a). That section allows the Secretary to make withdrawals aggregating less than 5,000 acres without notifying Congress. 43 U.S.C. 1714(d).

Large-tract withdrawals of 5,000 acres or more, however, which may be made or extended for periods of up to 20 years, require the Secretary to notify Congress by the withdrawal's effective date. 43 U.S.C. 1714(c)(1). Along with the notice, the Secretary must provide Congress: an explanation of the proposed use of the land, an inventory and evaluation of the site's uses and values, an identification of present users and how they will be affected, an analysis of the incompatibility of present uses with the withdrawal, statements about available

alternatives, consultation with various stakeholders, and the withdrawal's duration, the time and place of public hearings, the place where the records on withdrawal can be examined, and a report on the mineral character and potential of the withdrawal area. 43 U.S.C. 1714(c)(2)(1)–(12).

Additionally, when the Secretary determines, or the pertinent House or Senate committee 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 "shall" make an emergency withdrawal and notify Congress, but it need not furnish the information required by Section 204(c)(2) until three months after the withdrawal. 43 U.S.C. 1714(e). All new, non-emergency withdrawals require an opportunity for a public hearing, 43 U.S.C. 1714(h), and notice of the proposed withdrawal to be published in the Federal Register. 43 U.S.C. 1714(b)(1). Publication has the effect of segregating the land from the operation of the public land laws for up to two years or until the proposal is rejected by the Secretary. *Id.*

Section 204(c)(1) further provides that a large-tract, non-emergency withdrawal "shall terminate and become ineffective" at the

end of 90 days from submission of the notice "if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal." *Id.* As discussed below, the Supreme Court and the courts of appeals have held that similar legislative-veto mechanisms in other statutes violate constitutional separation-of-powers principles.

With limited exceptions, FLPMA also requires the Secretary to manage the public lands according to "principles of multiple use," 43 U.S.C. 1732(a), a "deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).[4] For lands managed by the Secretary, "multiple use" allows consideration of "renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values," coordinated "without permanent impairment of the

[4] FLPMA's multiple-use-management requirements apply only to the "public lands" managed by the Secretary, a term that excludes national forests because they are managed by the Secretary of Agriculture. *See* 43 U.S.C. 1702(e), (g). *Cf.* 43 U.S.C. 1702(k), (p).

productivity of the land and the quality of the environment." 43 U.S.C. 1702(c). The term does not require management for the "greatest economic return or the greatest unit output." *Id.*

4. National Environmental Policy Act

NEPA imposes purely procedural requirements upon federal agencies to take a "hard look" at the environmental impacts of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). To that end, an EIS must be prepared before an agency undertakes major federal action "significantly affecting" the environment. 42 U.S.C. 4332(2)(C). Although NEPA requires agencies to identify and evaluate the environmental effects of proposed actions, the statute does not constrain an agency's substantive choices. *Robertson*, 490 U.S. at 350.

5. Management of the National Forests

Congress authorized the Executive Branch to establish and manage "forest reserves" from the public domain beginning in 1891. 26 Stat. 1103. In 1897, Congress enacted the Organic Administration Act, directing such forests to be administered for securing water flows and furnishing timber, 16 U.S.C. 475, and authorizing the Executive Branch

to make rules needed to regulate forest occupancy and use and preserve the forests from destruction. 16 U.S.C. 551.[5] Congress also reapplied the Mining Law to forest reserves (later called national forests), subject to other statutes and regulations, 16 U.S.C. 482, and provided that the government may not prohibit anyone from entering those lands for "prospecting, locating, and developing" the forests' mineral resources. 16 U.S.C. 478.

In 1960, Congress passed the Multiple-Use Sustained-Yield Act ("Multiple-Use Act"), which supplemented the purposes for which national forests are managed to include recreation, range, timber, watershed, wildlife and fish. 16 U.S.C. 528. Nothing in the Multiple-Use Act, however, may be construed "to affect the use or administration of the mineral resources of national forest lands." *Id.* In 1976, Congress passed NFMA, requiring the development and, as appropriate, revision of "land and resource management plans," or forest plans, for the

[5] Authority over forest reserves, originally vested in the Secretary of the Interior, was transferred to the Secretary of Agriculture in 1905. 16 U.S.C. 472. The Secretary of Agriculture has promulgated rules governing use of the surface of the national forests for locatable mineral operations. 36 C.F.R. part 228A.

national forests. 16 U.S.C. 1604(a). Such plans must "provide for multiple use and sustained yield" of renewable forest products and services in accordance with the Multiple-Use Act. 16 U.S.C. 1604(e)(1); *see* 16 U.S.C. 1604(g). Once a forest plan is adopted, "instruments for the use and occupancy" of national forests "shall be consistent" with the plan. When plans are revised, those instruments, "when necessary," may be revised, too. 16 U.S.C. 1604(i).

C. Overview of the Region and Uranium Mining

The area surrounding the Grand Canyon is a high-desert plateau dominated by deeply incised canyons, isolated mesas and buttes, and volcanic peaks, drained principally by the Colorado River. Metamin-ER:132. Virtually all of the area's perennial surface-water flow comes from springs and seeps, which are recharged by precipitation and ephemeral streams. SER:117; *see* Metamin-ER:1744. The area is the aboriginal home of several federally recognized Indian tribes which, along with other tribes having long-standing ties to the region, continue to use the area for traditional purposes. SER:616-17; *see* AEMA-ER:175; see Metamin-ER:171-73; SER:200-202.

Beginning around the 1940s, uranium was discovered in association with many old copper mines in the Grand Canyon region, located in geologic features known as breccia pipes.[6] SER:8. The region became the subject of uranium exploration, and during later decades, uranium was mined from a few nearby breccia pipes. *Id.*; *see* NMA-ER:50. Some of the highest-grade uranium ore in the country is still believed to be located in the area. *Id.*; *see* SER:441.

In June 2008, in response to a dramatic increase in uranium prices and the location of thousands of new mining claims in the region, the Chairman of the House Committee on Natural Resources provided then-Secretary Kempthorne with a resolution indicating that an emergency situation existed regarding uranium mining near the Grand Canyon National Park and that extraordinary measures must be taken to preserve values that would otherwise be lost. SER:486-88; *see* Metamin-ER:111. The Chairman directed the Secretary to immediately withdraw approximately one million acres of public lands and national

[6] Breccia pipes are narrow, vertical structures formed when a cavity in a limestone formation collapses and fills with overlying rock debris. SER:433; *see* Metamin-ER:134-35.

forests near the Park from location and entry under the Mining Law, subject to valid existing rights. Department officials at the time, however, declined to do so. SER:490-92.

D. Proposed Withdrawal

About a year later, in July 2009, then-Secretary Salazar proposed withdrawing approximately the same area addressed by the resolution. 74 Fed. Reg. at 35,887. The purpose of the withdrawal, as proposed, was "to protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining." *Id.* Publication of the notice segregated the area proposed for withdrawal for two years to allow time to prepare analyses to determine whether the withdrawal was warranted. *Id.*; *see* 43 U.S.C. 1714(b)(1). The Service consented to the proposal for the approximately 360,000 acres of National Forest System lands that the proposal included. AEMA-ER:214.

In addition to accepting public comments on the proposed withdrawal, Interior held two public meetings, five meetings with cooperating agencies (including local counties), and three additional meetings or hearings with the plaintiff Coalition. SER:405-407. Some of

the counties provided input during the administrative process. *See* Metamin-ER:366-384, 525-26, 695-96.

In 2010, Secretary Salazar directed the United States Geological Survey ("USGS") to develop the scientific basis for analyzing effects of the proposed withdrawal. AEMA-ER:170. USGS prepared a detailed study estimating the undiscovered uranium endowment underlying the withdrawal area, investigating the effects of past mine development to determine whether mining operations affected local environments (including groundwater and surface water), and compiling available information on the biological effects of uranium on wildlife in the area. SER:8.

With the Service, National Park Service, USGS, local governments, and others acting as cooperating agencies, the Bureau of Land Management ("BLM") prepared a draft EIS and, after accepting and considering public comments, issued a final EIS analyzing four alternatives in detail: (A) no action; (B) the proposed withdrawal of approximately one million acres; and (C) and (D), partial withdrawals of approximately 850,000 and 300,000 acres, respectively. AEMA-ER:226-45. Under the proposed withdrawal, BLM determined that, over the

next 20 years, 11 uranium mines would likely be developed, and that 30 would likely be developed if the lands were not withdrawn. See AEMA-ER:332-33. At the direction of the Secretary (SER:608), the EIS identified the proposed withdrawal as the preferred alternative.[7] AEMA-ER:229.

E. Withdrawal

On January 9, 2012, the Secretary signed an order withdrawing 1,006,545 acres of public and National Forest System lands from location and entry under the Mining Law, subject to valid existing rights, for 20 years. NMA-ER:52; *see* 77 Fed. Reg. at 2,563-66. The withdrawal area includes three parcels—the North, East, and South Parcels—all adjacent to the Grand Canyon National Park. NMA-ER:53. The entire South Parcel and portions of the East Parcel are located on the Kaibab National Forest, while the remainder of the East Parcel and entire North Parcel are located on public lands managed by BLM, along with other non-federal lands overlying federally owned minerals. *Id.*;

[7] Because the segregation expired after two years, the Secretary issued an order withdrawing the lands on an emergency basis several months before a final decision could be made. 76 Fed. Reg. 37,826 (June 28, 2011).

see NMA-ER:49. The Service consented to the withdrawal of the national forest lands. AEMA-ER340.

The Secretary explained that the withdrawal was supported by four main factors—(1) protection against uncertain but potentially high threats from uranium mining to water resources, (2) protection of cultural and tribal resources, (3) the need for further study of possible impacts to wildlife and other resources, and (4) the ability of local communities to realize the economic benefits from continued uranium mining under the withdrawal. NMA-ER:54-57. The withdrawal has not resulted in the cessation of uranium mining, as the decision is subject to the exercise of valid existing rights. 77 Fed. Reg. at 2,563; *see* NMA-ER:56-57. Statutes governing the disposal of other minerals through leases and sales also remain applicable to the lands. *Id.*

F. District Court Decisions

As previously mentioned, the district court granted summary judgment to the government, upholding the Secretary's decision against challenges under FLPMA, NEPA, and the Establishment Clause, and upholding the Service's consent under NFMA. First, the district court granted summary judgment to the government on the claim by the

mining associations (NMA, AEMA) that the withdrawal was *ultra vires* because the unconstitutional legislative-veto provision required invalidation of the Secretary's large-tract withdrawal authority altogether. The court examined the severability clause, the text, structure, and context of Section 204, along with the legislative history, and held that the veto mechanism was severable. *Yount*, 933 F. Supp. 2d at 1223-35; *see id.* at 1236-43 (denying reconsideration).

On the remaining FLPMA claims, the court held that the claims were reviewable except for challenges to the information provided to Congress under Section 204(c)(2), which the court held were precluded from review by Section 701(i)), a provision stating that the "adequacy of reports required by this Act to be submitted to the Congress or its committees shall not be subject to judicial review." 90 Stat. at 2787 (codified at 43 U.S.C. 1701 note); *see Yount*, 2014 WL 4904423, at *19, *22. The court found sufficient evidence in the record to support the withdrawal's purpose of protecting the area's water resources, and it further held that the Secretary's consideration of tribal resources, other natural resources, and the contribution of future mining to the local economy were also valid. *Yount*, 2014 WL 4904423, at *20 & n.8. The

court rejected arguments that the Secretary had relied on an underestimate of the uranium endowment and had failed to coordinate with local counties. *Id.* at *21-22.

Under NEPA, the court concluded that only the Coalition alleged an Article III injury that fell within NEPA's zone of interests. *Id.* at *7; *see also Yount*, 2013 WL 93372, at *25-27.[8] The court, however, rejected the Coalition's NEPA claims, holding that its member counties were not denied meaningful participation in the environmental-review process, that local land-use plans were sufficiently considered, and that the EIS satisfied the regulations concerning missing information for water resources. *Yount*, 2014 WL 4904423, at *10-13.[9]

The court also rejected the NFMA claims, holding that because the Service lacked authority to close lands to mining, the withdrawal did not have to conform to the Service's forest plans, and that the Service's consent letter was neither arbitrary nor capricious. *Id.* at *24-

[8] Only Yount (Br. 34-35) challenges the zone-of-interests holding.

[9] The Coalition, which advances NEPA arguments on appeal through a brief joined by Metamin (Br. 53-77), does not challenge the district court's rejection of its NEPA claims about other scientific controversies. *Yount*, 2014 WL 4904432, at *14-15, *17.

25. Finally, the court rejected the Establishment Clause claims, holding that the withdrawal decision's four purposes were all secular and that they did not have a primary effect of endorsing or entangling the government with Native American religion. *Id.* at *27.

STANDARD OF REVIEW

The district court's summary judgment ruling is reviewed *de novo*. *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013). The challenged agency actions are reviewed under the APA, which allows courts to set aside those actions if they are arbitrary, capricious, contrary to constitutional right, or in excess of statutory authority. *See* 5 U.S.C. 706(2)(A)-(C). Review under the arbitrary-and-capricious standard is narrow—the Court does not substitute its judgment for that of the agency but seeks only to ensure that the agency has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Insur. Co.*, 463 U.S. 29, 43 (1983).

Interior's fact-based conclusions must be upheld if supported by substantial evidence—a standard that, as a practical matter, is

incorporated through arbitrary-and-capricious review. *Ursack Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958-959 n.4 (9th Cir. 2011); *see San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 608 (9th Cir. 2014). The substantial-evidence standard requires only enough evidence "to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling Stamping Co.*, 306 U.S. 292, 300 (1939); *see INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (decision reviewed for substantial evidence can be reversed only if the evidence presented "was such that a reasonable factfinder would have to conclude" in the challenger's favor). The substantial-evidence standard is even more deferential than the clearly-erroneous standard for appellate review of trial-court findings. *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999).

SUMMARY OF ARGUMENT

The Secretary acted within the authority recognized by FLPMA to make the withdrawal, which was neither arbitrary nor capricious in violation of any statute or constitutional right.

1. a. Although the statute's legislative-veto mechanism is unconstitutional because it fails to satisfy the requirements for presentment, the mechanism is severable from the rest of Section 204(c), the provision in FLPMA recognizing the Secretary's large-tract withdrawal authority. Courts must retain those constitutionally valid portions of a statute that are capable of functioning independently and consistent with Congress' basic objectives in enacting the statute. Legislative-veto mechanisms operate separately from the substantive provisions of their statutes and easily satisfy the first requirement for severability. FLPMA includes a severability clause, which raises a presumption that the legislative-veto mechanism is severable from rest of Section 204(c). Severability is also consistent with the text and structure of Section 204, which absent the legislative veto, still retains requirements for published notice, opportunity for hearings, and reporting to Congress—procedures that aid that body's oversight of the

Secretary's authority, consistent with the intent behind the statute. The legislative history also supports a conclusion that Congress would not have wanted to divest the Secretary of large-tract withdrawal authority altogether, and in any event, it does not contain the strong evidence required to defeat the presumption raised by the severability clause.

b. The district court correctly rejected the plaintiffs' other FLPMA challenges. Many of those challenges fail to state a claim under FLPMA because they are merely challenges to the sufficiency of the evidence that do not allege a violation of the statute. Other challenges are attempts to superimpose requirements in Section 204(c)(2) applicable to congressional reporting—for which Section 701(i) of FLPMA precludes judicial review—upon the Secretary's withdrawal decision itself. Those challenges are implicitly precluded from review because they would enable a plaintiff to circumvent the express limitations on review through artful pleading. Regardless, the sufficiency-of-the-evidence challenges fail, because the Secretary's decision is supported by enough evidence for a reasonable fact-finder to conclude that the withdrawal was permissible. Specifically, the withdrawal would: reduce possible impacts from uranium mining to

water resources while allowing additional time to study those possible impacts; protect landscapes that are culturally important to multiple federally recognized Indian tribes; reduce the possibility of impacts to additional resources including air and wildlife; and allow communities to continue realizing economic benefits from uranium mining occurring in the case of valid existing rights. Plaintiffs' remaining claims—loosely based on county-coordination requirements for land-use planning, as well as assorted regulatory provisions and an agency manual—lack merit, as the various authorities invoked are inapplicable, the claims were forfeited, or, as with the manual provisions, they lack the force and effect of law.

2. The Secretary's environmentally protective decision satisfies NEPA. The EIS complies with the requirements applicable when there is incomplete information because it reasonably determines that such information is not essential for making a reasoned decision to withdraw the lands from entry and location of new mining claims while the effects of uranium mining on natural resources can be further studied. Additionally, the record supports a conclusion that the Secretary satisfied any responsibilities it has concerning the Coalition's members

acting as cooperating agencies, which had opportunities for voicing their opposition to the withdrawal at meetings or hearings and in writing. Further, Yount's NEPA claims were correctly rejected as falling outside the statute's zone of interests because they are premised upon economic, not environmental interests.

3. The Service's consent to the withdrawal does not violate NFMA. That statute concerns only renewable resources, not minerals—a nonrenewable resource unaffected by the Service's multiple-use policies. NFMA does not require withdrawals to be consistent with forest plans, because the statute's consistency requirement only applies to instruments for the occupancy and use of national forests. Neither the withdrawal nor the consent letter fits that description. But if the consistency requirement applies, any claim that the withdrawal was inconsistent with the former forest plan is moot, because the plan has been revised, and a remand for the Service to re-issue its consent letter under the current forest plan would serve no purpose. Regardless, the substance of the consent letter was neither arbitrary nor capricious.

4. Finally, the withdrawal does not violate the Establishment Clause. All four purposes of the withdrawal are secular. But even if the

one purpose challenged here—protecting cultural resources important to Indian tribes—were not, no reasonable fact-finder could conclude that the other secular purposes of the withdrawal were anything other than genuine, or that the withdrawal had the effect of advancing or endorsing tribal religion.

ARGUMENT

I. THE WITHDRAWAL SATISFIES FLPMA.

A. FLPMA Authorizes the Withdrawal Despite the Unconstitutional Legislative-Veto Provision.

Plaintiffs (AEMA Br. 20-30, NMA Br. *passim*) argue that FLPMA Section 204(c), 43 U.S.C. 1714(c), contains an unconstitutional legislative-veto mechanism and that, as a result, the entire provision recognizing large-tract withdrawal authority in the Secretary must be severed from the statute. Accordingly, plaintiffs contend that the withdrawal was beyond the Secretary's statutory authority. That argument is incorrect. Although the legislative-veto mechanism is unconstitutional, the inclusion of a severability clause, plus the text, structure, and legislative history of the Act, all demonstrate that retaining the Secretary's large-tract withdrawal authority without the

veto mechanism is more consistent with the Act's intent than invalidating that authority altogether.

1. The Legislative-Veto Portion of Section 204(c) Is Unconstitutional.

In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court held unconstitutional a legislative-veto provision in the Immigration and Nationality Act, explaining that the action taken by the House of Representatives under the veto provision was an exercise of legislative power that failed to comply with the procedures for exercising that power under Article I, Section 7—*i.e.*, bicameral passage and presentment to the President for signature or the opportunity to veto. 462 U.S. at 956-57; *see* U.S. Const. Art. I, sec. 7, cl. 2. Under the rationale of *Chadha*, the legislative-veto provision in FLPMA Section 204(c) is unconstitutional. Although the concurrent resolution specified in Section 204(c) satisfies bicameralism, it does not allow for presentment. However, as in *Chadha* and other cases discussed below, the legislative-veto mechanism is severable from the rest of the statute.

2. The Unconstitutional Portion Of Section 204(c) Is Severable From The Large-Tract Withdrawal Authorization.

When confronting a constitutional flaw in a statute, courts must "try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010). "[T]he normal rule," therefore, "is that partial, rather than facial, invalidation is the required course such that a statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006). Accordingly, when invalidating part of a statute, courts "must retain" those constitutionally valid portions of the Act that are "capable of functioning independently" and "consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-259 (2005).

Because a legislative-veto provision "by its very nature is separate from the operation of the substantive provisions of a statute," whether the legislation is capable of functioning independently in the veto provision's absence "is not a concern" in determining severability.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684-85 (1987). Rather, the relevant inquiry is "whether the statute will function in a manner consistent with the intent of Congress," considering both the "importance of the legislative veto in the original legislative bargain" and "the nature of the delegated authority" at issue. *Id.* at 685. The legislative-veto provision "must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.*

a. Inclusion of a Severability Clause Raises a Presumption That the Legislative-Veto Mechanism Is Severable.

Deciding whether the legislative-veto portion of the statute should be severed is "eased" where, as here, "Congress has explicitly provided for severance by including a severability clause in the statute." *Id.* at 686; *see Chadha*, 462 U.S. at 932. The clause here provides: "If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby." 90 Stat. at 2794. Such a clause "creates a presumption" that validity of the statute was not intended to depend upon validity of the legislative-veto provision, which may be excised "unless there is strong

evidence that Congress intended otherwise." *Alaska Airlines*, 480 U.S. at 685-86; *see Chadha*, 462 U.S. at 932.

Plaintiffs argue that the severability clause supports invalidating the entirety of Section 204(c), eliminating *all* authority for the Secretary to make withdrawals over 5,000 acres. According to plaintiffs, the veto mechanism is part of the same "provision" as the recognition of withdrawal authority. NMA Br. 20-22; AEMA Br. 24-25. That argument, however, turns severability analysis on its head. "Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte*, 546 U.S. at 328-29. Congress' express recognition of the Secretary's large-tract withdrawal authority, however, is not a constitutionally "problematic" portion of the statute, *id.*, but rather, a valid exercise of Congress' power under the Property Clause. The word "provision" is not a legal term of art restricted to statutory subsections and cannot support the granular

approach to discerning legislative intent that plaintiffs suggest.[10] *Cf. Alaska Airlines*, 480 U.S. at 687-97; *Chadha*, 931-35. Nor is there a rule precluding severance of unconstitutional text from the first in a pair of sentences or even from the middle of a sentence. *Cf. Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1305 n.5 (11th Cir. 2002) (severing legislative-veto mechanism appearing mid-sentence); *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 n.25 (Temp. Emerg. Ct. App. 1984) (same). The severability clause here does not support invalidating the Secretary's large-tract withdrawal authority.

b. Statutory Text and Structure Support Severability.

In addition to the severability clause, the text, structure, and legislative history of Section 204 also all demonstrate that the legislative-veto mechanism is severable from the recognition of withdrawal authority. Textually, Congress recognized the Secretary's large-tract withdrawal authority through the first sentence of Section 204(c)(1). That sentence is complete in itself and does not refer to the

[10] The definitions that AEMA cites (Br. 25) are circular, defining "provision" as a "clause," and vice versa. *See* BLACK'S LAW DICTIONARY 243, 1240 (7th ed. 1999).

legislative-veto mechanism. The second sentence begins, "The Secretary shall notify both Houses of Congress of such a [large-tract] withdrawal no later than its effective date." 43 U.S.C. 1714(c)(1). Everything to that point is constitutionally valid. The remainder of the second sentence—"and the withdrawal shall terminate and become ineffective at the end of ninety days . . . if the Congress has adopted a concurrent resolution" of disapproval—and the text that follows describing additional features of the veto mechanism, operate unconstitutionally when a resolution has been passed. *Id.* But if, as here, a resolution is not passed, the legislative-veto portion does not delay or otherwise affect the withdrawal. Thus, Section 204(c)'s legislative-veto language has even more modest effect than the report-and-wait provisions found severable in *Chadha* and *Alaska Airlines*.

Other provisions of Section 204 also support severability. Section 204(a), for instance, authorizes the Secretary to make withdrawals "but only in accordance with the provisions and limitations of this section." 43 U.S.C. 1714(a). Notably, the text does not condition the withdrawal authority on the legislative-veto procedure alone because there are "provisions and limitations" in Section 204 in addition to the legislative

veto. For example, withdrawal authority may be delegated only to "individuals in the Office of the Secretary who have been appointed by the President," *id.*, and non-emergency withdrawals of land managed by other departments may only be made with the concurrence of their heads. 43 U.S.C. 1714(i). Also, notice of proposals for non-emergency withdrawals must be published in the Federal Register and state the extent to which land is segregated while the proposal is considered. 43 U.S.C. 1714(b)(1). Additionally, large-tract withdrawals may be made or extended for up to 20 years at a time, and the Secretary must notify both Houses of Congress of such a withdrawal by its effective date. 43 U.S.C. 1714(c)(1). Along with the notices, the Secretary must furnish to the congressional committees information about the land's uses and values, affected users, withdrawal alternatives, stakeholder consultation, the land's mineral character and potential, and other topics mentioned *supra*. 43 U.S.C. 1714(c)(2). All these requirements are "provisions and limitations" that apply after the veto language is severed. 43 U.S.C. 1714(a).[11]

[11] There is no limit to how many times a large-tract withdrawal may be extended, but extensions may only be made: (1) in compliance with Section 204(c)(1)'s notification requirements; (2) if the purpose for which

Where Congress wanted to reserve exclusive authority to itself over withdrawals, it did so expressly—Section 204(j) provides that the Secretary "shall not": make, modify, or revoke any withdrawal created by Act of Congress; modify or revoke any withdrawal creating national monuments under the Antiquities Act; or modify or revoke various withdrawals adding lands to the National Wildlife Refuge System. 43 U.S.C. 1714(j).[12] By contrast, Congress knew that the Executive Branch had long exercised withdrawal authority in which Congress had acquiesced. And while eliminating much of that authority through FLPMA, Congress expressly recognized the Secretary's large-tract withdrawal authority subject to some procedural requirements. Severing the veto mechanism would retain most of those requirements,

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the withdrawal was first made requires the extension; and (3) for a period no longer than the original withdrawal. 43 U.S.C. 1714(f).

[12] Separate statutes reserve to Congress the authority to set aside areas as wilderness and other nationally important areas. *See, e.g.*, 16 U.S.C. 1132(b), (c) (recommendations of the President for designation as wilderness "shall become effective only if so provided by an Act of Congress"); 16 U.S.C. 1244(a) ("National scenic and national historic trails shall be authorized and designated only by Act of Congress."); 16 U.S.C. 1273(a) (wild-and-scenic-rivers system comprises rivers "authorized for inclusion . . . by Act of Congress" or by an act of a state legislature and certain findings by the Secretary).

but invaliding the large-tract withdrawal authority altogether would curtail Executive Branch withdrawal authority in a manner that is historically unprecedented and at odds with FLPMA's text and structure.

Section 102(a)(4) does not command a different result. Although that provision declares a congressional policy that Congress "delineate the extent to which the Executive may withdraw lands without legislative action," eliminating large-tract withdrawal authority altogether is different from "delineat[ing]" it. 43 U.S.C. 1701(a)(4). And as discussed, enough procedural limitations remain in place for large-tract withdrawals to provide meaningful congressional "delineat[ion]."[13]

Furthermore, severing the legislative-veto mechanism would not render the emergency and small-tract withdrawal provisions anomalous, as NMA contends (Br. 31-32). Unlike withdrawals under Section 204(c), the maximum duration of emergency withdrawals is only three years rather than twenty; they are not subject to public

[13] The legislative-veto language has not provided more meaningful constraints, as Congress has never vetoed a large-tract withdrawal despite 82 opportunities. SER:637-38.

hearing requirements; and the information required by Section 204(c)(2) need only be provided within three months after the withdrawal, rather than concurrently. *See* 43 U.S.C. 1714(e), (h). Nor would severance render anomalous the Secretary's small-tract withdrawal authority, because that authority would remain unfettered by the reporting requirements for larger tracts in Section 204(c)(2). Thus, emergency withdrawals would continue to have their own unique requirements, and small-tract withdrawals would still have fewer procedural requirements to aid congressional oversight than large-tract withdrawals. Additionally—contrary to NMA's argument (Br. 32)—Section 202(e)(3) is consistent with severability, as it merely requires land removed from, or restored to, the Mining Law's operation be accomplished "only by withdrawal action pursuant to section 1714" or other applicable law. 43 U.S.C. 1712(e)(3). That would continue to occur after the legislative-veto mechanism is severed.

c. Legislative History Supports Severability.

Contrary to plaintiffs' arguments (AEMA Br. 28-29; NMA Br. 37-44), FLPMA's legislative history lacks any "strong evidence" supporting invalidation of the Secretary's large-tract withdrawal authority. *Alaska*

Airlines, 480 U.S. at 685-86. The Senate bill did not contain any restrictions on the Secretary's withdrawal authority or a legislative-veto mechanism. S. 507, 94th Cong. (1975). The House bill, however, included a repeal of much of the Executive's withdrawal authority and also included a one-house veto provision applicable to withdrawals over 5,000 acres, which were limited to five years. H.R. 13777, 94th Cong. 204(c)(1), 604(b) (1976). Much of the debate concerned the burden on Congress of reviewing withdrawal proposals. *See, e.g.*, H.R. Rep. No. 94-1163, at 231 (1976), (dissenting views of the committee); 122 Cong. Rec. 23,399, 23,441, 23,438, 23,440-41 (1976). Many representatives believed that the burden would be reduced by lengthening the term of withdrawals or increasing the acreage triggering oversight. *See, e.g.*, 122 Cong. Rec. at 23,437-38, 23,440.[14] Ultimately, the conferees agreed on a two-house veto applicable to withdrawals over 5,000 acres, while limiting such withdrawals to 20 years' duration, subject to renewal. H.R. Rep. 94-1724, at 11, 58 (1976).

[14] AEMA (Br. 28-29) and NMA (Br. 40-42) highlight statements by individual legislators about the importance of congressional oversight, but the presence of "heated debates" about such issues is insufficient to defeat severability. *Gulf Oil*, 734 F.2d at 804.

The legislative history contains no indication that, presented with a choice of large-tract withdrawal authority without a legislative-veto mechanism but with the other procedural requirements of Section 204 in place, Congress would have instead preferred eliminating the Secretary's large-tract withdrawal authority altogether. The House Report refers to the objective of "[e]stablish[ing] procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary," but where it discusses the legislative veto, it does so in the context of other "procedural controls," including the notice-and-information requirements, the opportunity for hearings, and the restriction on delegation. H. Rep. No. 94-1163, at 9-10 (1976); *see id.* at 3-4.

Although the conference report identifies the changes to the House bill's withdrawal and legislative-veto provisions adopted by the conference, that discussion is merely descriptive. *See* H.R. Rep. 94-1724, at 58-59, 66. Floor debate about the conference report similarly sheds no light on the issue. *See* 122 Cong. Rec. at 34,216-18, 34,511-12. While the legislative history generally reflects the importance of congressional oversight, it supports a conclusion that withdrawal authority should

remain with the Secretary for two reasons. First, only the Secretary could act quickly enough when necessary to protect federal lands from private interests. *See id.* at 23,453 (Rep. Seiberling) ("The purpose of the withdrawal by the Secretary, without waiting for the lengthy process of legislation, is to be able to act promptly to set aside lands that have higher values for other public uses."); *id.* (Rep. Melcher) ("The bill does not in any way limit or interfere with [the Secretary's] authority to make the withdrawal"). And second, as already discussed, it is unlikely that Congress would want to bear the burden of exercising all non-emergency large-tract withdrawal authority given the likely workload that would result. *Cf. Chadha*, 462 U.S. at 934 (finding legislative-veto provision severable given the "onerous burdens of private bills" that Congress would otherwise be asked to enact).

d. Plaintiffs' Remaining Arguments Lack Merit.

NMA argues (Br. 15, 41-42) that the legislative-veto mechanism is part of a congressional compromise that recognized withdrawal authority only on the condition of the oversight that the legislative veto would provide. *See also Amici* Br. 20-21. That a statute containing an unconstitutional provision, however, "like much federal legislation,

embodies a compromise," *New York v. United States* 505 U.S. 144, 183 (1992), is not determinative of severability. *See id.* at 186-87 (finding provision severable where one of three incentives for states to dispose of waste generated within their borders was unconstitutional). The valid, remaining procedures in Section 204(c) still serve FLPMA's statutory purpose by aiding Congress in its oversight of Executive withdrawals.

AEMA (Br. 5-6, 26, 28) and NMA (Br. 44-45) rely on the report of the Public Land Law Review Commission ("Commission"), which recommended that large scale withdrawals "of a permanent or indefinite term" be accomplished only by Congress, and that other withdrawals should be delegated "with statutory guidelines" insuring proper justification, providing for public participation, and establishing criteria for the action. Pub. Land L. Rev. Comm'n, *One Third of the Nation's Land* 9 (1970); *see id.*at 44 (NMA-ER:95) (referring to general absence of statutory restriction on "the asserted permanent withdrawal authority of the Executive"). The Commission's recommendations, however, are only part of the legislative history of FLPMA to the extent those recommendations were adopted in the Act. *Cf.* S. Rep. No. 94-583, at 44-48, 50 (1975) (discussing other provisions in the report, but not

withdrawal recommendations). The withdrawal here also is not permanent, and it was subject to requirements for notice, congressional reporting, and public hearings. *See* 43 U.S.C. 1714(b), (c)(2), (h). Thus, the Commission's report does not provide strong evidence that, in enacting FLPMA, Congress intended to preclude large-tract withdrawal authority absent a legislative-veto mechanism.[15]

Contrary to NMA's argument (Br. 46-47), the Property Clause—which gives Congress power to make needful rules respecting federal property—provides no reason to invalidate the Secretary's withdrawal authority. Congress' exercise of its Property-Clause power must be considered along with the Executive Branch's long-standing exercise of withdrawal authority before FLPMA and Congress' acquiescence in that practice. *See Midwest Oil*, 236 U.S. at 469-72. Although FLPMA reflects Congress' intent to limit that authority, *see* 90 Stat. at 2792, FLPMA also expressly recognized the Secretary's withdrawal authority and,

[15] The report contemplates (at 56) that decisions renewing withdrawals could be subject to a legislative-veto mechanism, but that reference says nothing about original withdrawal authority or whether, absent legislative-veto language, such authority should lie exclusively with Congress.

with respect to large tracts, generally left it free from substantive limitations. 43 US.C. 1714. That express recognition cannot reasonably be understood as demonstrating a preference for eliminating the Executive's large-tract withdrawal authority altogether.[16]

NMA argues (Br. 52-53) that relegating Congress to voicing its objection to withdrawals through the regular process of passing legislation that is presented to the President is an inadequate remedy for the unconstitutional legislative-veto provision. Severability, however, is not determined by whether Congress would have preferred a statute including a legislative-veto mechanism to one without, but "whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." *Gulf Oil*, 734 F.2d at 804; *see Leavitt v. Jane L.*, 518 U.S. 137, 143 (1996). Reliance on the normal legislative process is workable even without a waiting

[16] Nor, contrary to AEMA's argument (Br. 30) does severance raise separation-of-powers concerns. While Congress has broad powers to make needful rules respecting federal property, nothing in the Property Clause compels it to exercise the full extent of that authority in every instance. *Cf. Cal. Coastal Comm'n,* 480 U.S. at 588 (finding it "concededly not the case" that federal statute preempted the field of State-law regulation of mining in national forests).

period, for the withdrawal simply preserves the *status quo* and does not cause irreparable harm after it becomes effective. *Cf. id.* at 804-805 n.26 ("retain[ing] the opportunity to review Presidential proposals" and "disapprove of such actions through use of the constitutional legislative process" was "not only workable" but preserved legislative intent).

The cases that NMA cites (Br. 42-43, 49, 52) addressing severability do not advance its argument. In *American Federation of Government Employees, AFL-CIO v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982), the court declined to uphold a district court decision that severed the legislative-veto clause within a sentence, where—unlike here—the statute did not contain a severability clause and there was insufficient evidence that the legislation would have been enacted without the legislative-veto provision. *Id.* at 307 n.5; *see also City of New Haven v. United States*, 809 F.2d 900, 905 n.15 (D.C. Cir. 1987) (noting that Congress "did *not* include a severability clause in the challenged statute") (emphasis in original). In *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), cited by NMA, the court's conclusion that held that a transfer of the authority between federal agencies to enforce equal pay requirements was not severable from a legislative-veto provision. Two

other appellate courts, however, reached a contrary conclusion, and ultimately Congress ratified the transfers, "strongly suggest[ing]" that the provisions were severable. *EEOC v. Westinghouse Elec. Corp.*, 765 F.2d 389, 92-93 n.2 (3d Cir. 1985); *see also Muller Optical Co. v. EEOC,* 743 F.2d 380 (6th Cir. 1984); *EEOC v. Hernando Bank*, 724 F.2d 1188 (5th Cir. 1984). The decision in *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), also cited by NMA, was criticized by yet another appellate court, which found a contrary analysis to be more persuasive and consistent with *Chadha. Am. Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 806 F.2d 1034, 1039 n.* (Fed. Cir. 1986).

AEMA (Br. 23) and NMA (Br. 26-30) rely on *Nguyen v. INS*, 533 U.S. 53 (2001) and *Miller v. Albright*, 523 U.S. 420 (1998) (Scalia, J., concurring), to argue that the legislative-veto provision is not severable. *Miller* upheld the constitutionality of a proof-of-paternity requirement for citizenship of illegitimate children against an equal protection challenge in a highly fragmented decision that did not result in a majority opinion. Justice Scalia concurred in the judgment on the grounds that the judiciary "has no power" to confer citizenship on a basis not prescribed by Congress, the outcome if the challenged

provision were invalidated. 523 U.S. at 453.[17] No similar result would occur here. Severability is permissible, as the Supreme Court has recognized Executive-Branch withdrawal authority that is subject to even fewer restrictions than would result from severing FLPMA's legislative-veto language. *See Midwest Oil*, 236 U.S. at 471. Nor does *Nguyen* help plaintiffs, as the Court there found the statute constitutional without relying on severability considerations. *Nguyen*, 533 U.S. at 72.

B. The Withdrawal Was Neither Arbitrary Nor Capricious.

1. Plaintiffs' Challenges Are Limited to Violations of Law That Are Not Precluded by Section 701(i).

Apart from arguments that the withdrawal is beyond the Secretary's authority as a result of the legislative-veto mechanism,

[17] NMA argues (Br. 30-31 n. 13) that Justice Scalia's concurrence in *Miller* is precedential as the narrowest ground supporting the Court's judgment, but that is not so. The *Miller* plurality ruled that the statute was constitutional, whereas Justice Scalia ruled that the Court lacked power to order a remedy if the statute were found unconstitutional. Justice Scalia's opinion cannot meaningfully be regarded as narrower—it neither "represent[s] a common denominator of the Court's reasoning," nor is it the "logical subset of other, broader opinions such that it embodies a position implicitly approved by at least five Justices who support the judgment." *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012).

AEMA, Metamin, and Yount argue that the withdrawal is arbitrary and capricious. Many of those arguments fail at the threshold because they are either: (1) stand-alone claims purportedly brought under the APA that are not based upon any violation of law; or (2) claims for which judicial review is precluded by statute.

First, AEMA (Br. 31-46), Metamin (Br. 36-53), and Yount (Br. 23-28, 34-36) challenge the sufficiency of evidence in the record. However, there is "no right to sue for a violation of the APA in the absence of a relevant statute whose violation forms the legal basis for [the] complaint." *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir. 1991). Whether an agency action "has overlooked an important aspect of the problem" so as to render its decision arbitrary and capricious "turns on what a relevant substantive statute makes important." *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996).

Accordingly, courts may review agency action under the APA for alleged abuse of discretion involving violations of "constitutional, statutory, regulatory or other legal mandates or restrictions," but not "when the alleged abuse of discretion consists only of the making of an

informed judgment by the agency." *Ness Inv. Corp. v. U.S. Dep't of Agric.*, 512 F.2d 706, 715 (9th Cir. 1975); *see Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1078 (9th Cir. 2014). Thus, plaintiffs must identify a relevant statute or other authority having the force and effect of law as the basis for their claims. To the extent they do so, we address those arguments below. But to the extent they simply argue that the record does not support the Secretary's decision, those contentions fail to state a claim.

Second, to the extent that AEMA and Metamin base their FLPMA claims upon requirements in Section 204(c)(2), which concerns information that "the Secretary shall furnish to the committees" of Congress when she provides them notice of the withdrawal, 43 U.S.C. 1714(c)(2), FLPMA precludes judicial review. Section 701(i) states that the "adequacy of reports required by this Act to be submitted to the Congress or its committees shall not be subject to judicial review." 90 Stat. at 2787. Because FLPMA precludes review, the APA does, too. *See* 5 U.S.C. 701(a)(1) (APA's judicial review provisions do not apply where other statutes "preclude judicial review").

Although plaintiffs no longer challenge the notices to Congress directly (*cf. Yount*, 2014 WL 4904423, at *22), they attempt to superimpose the requirements applicable to notices to Congress under Section 204(c)(2) of FLPMA as additional requirements upon the Secretary's withdrawal decision. For example, Metamin cites several of the requirements in Section 204(c)(2) as authority for arguing that the Secretary may only withdraw federal lands if environmental degradation would otherwise result or where potential uses are in conflict, Br. 34 (citing 43 U.S.C. 1714(c)(2)(1)–(3)), and for arguing that the Secretary did not allow adequate participation by local governments. Br. 67 (citing 43 U.S.C. 1714(c)(2)(2), (7), (8)).

Similarly, plaintiffs challenge the adequacy of the information prepared in response to requirements for notifying Congress as a proxy for non-statutory challenges to the withdrawal decision itself. For example, AEMA argues that the withdrawal was "[n]ot [n]ecessary" to protect water, cultural, wildlife, and other resources (Br. 35-44), and that it would have substantial economic impacts on mining. Br. 44-46. Yount (Br. 27-28, 35-36) makes similar arguments about the lack of a need to protect water resources. And both AEMA (Br. 18, 31, 35, 46)

and Metamin (Br. 52-53) argue that the withdrawal violates FLPMA's principles of multiple-use management.

Interior's analysis of these topics, however, is no different than that required by various provisions of Section 204(c)(2). Specifically, Interior's "analysis of the manner in which [the withdrawn] lands will be used in relation to the specific requirements for the proposed use" of those lands must be provided to Congress, 43 U.S.C. 1714(c)(2)(5), along with Interior's "analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use." 43 U.S.C. 1714(c)(2)(4). Interior must also provide Congress with an evaluation of how current natural resource uses and values of the withdrawal area "will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use," 43 U.S.C. 1714(c)(2)(2), as well as "an identification of present users" of the withdrawal area "and how they will be affected by the proposed use." 43 U.S.C. 1714(c)(2)(3).

The analyses and information required by Section 204(c)(2) are "reports required by this Act to be submitted to the Congress or its

committees," whose "adequacy," Congress has directed through Section 701(i), "shall not be subject to judicial review." 90 Stat. at 2787. That plaintiffs challenge the withdrawal decision rather than the formal reports to Congress does not matter—review of the decision's reliance on the reports is precluded implicitly by the provision that expressly precludes review of the reports themselves. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (in determining "[w]hether and to what extent a particular statute precludes judicial review," courts do not look "only [to] its express language"). If it were otherwise, plaintiffs could circumvent the express limitation on review through artful pleading, thereby rendering that provision meaningless. *Cf. Pescosolido v. Block*, 765 F.2d 827, 832 (9th Cir. 1985) ("narrowly constru[ing]" statutory review provision "to avoid evasion of the statute's clear intent to preclude generally such actions" brought outside the statutory framework). Regardless, plaintiffs' FLPMA claims lack merit, as explained below.

2. The Rationale for the Withdrawal Was Supported by Substantial Evidence.

a. The Record Supports Withdrawal as a Precaution against Uncertain Impacts to Water Resources.

Plaintiffs argue that because the Secretary's decision acknowledged the uncertainty that uranium mining might contaminate the area's water resources, the withdrawal was unnecessary and not supported by the record. AEMA Br. 33-39; Yount Br. 27-28, 35-36; Metamin Br. 36-38. That contention lacks merit.

As the district court observed, Interior "never attempted to disguise the uncertainty or the low probability of contamination" to water resources from leaving lands open to mineral location and entry, but rather "simply determined that even a low risk was too great given the proximity of potential mining operations to the Grand Canyon." *Yount*, 2014 WL 4904423, at *15. For example, the Secretary acknowledged the uncertainty of impacts due to limited data about subsurface water movement, radionuclide migration, and biological, toxicological pathways. AEMA-ER:173. Although the "likelihood of a serious impact may be low," the Secretary found that "should such an event occur," it would be "significant" given that "[m]illions of people

living in seven states depend on the Colorado River for drinking, irrigation, [and] industrial use." *Id.*

As part of developing its 2010 report, USGS analyzed water quality samples at hundreds of locations in the study area and a six-mile buffer around the withdrawal parcels and concluded that there was a small but potentially major risk to some of those water sources. Specifically, historical water data for about 1,014 water samples from 428 sites indicated that about 70 sites have exceeded primary or secondary maximum contaminant levels[18] for certain major ions and trace elements such as arsenic, iron, lead, manganese, sulfate, radium, and uranium. AEMA-ER:174; *see* SER:46, 98. Samples from 15 springs and five wells in the region contained dissolved uranium concentrations

[18] Maximum contaminant levels are the "maximum permissible level of a contaminant in water which is delivered to any user of a public water system." 40 C.F.R. 141.2; *see* AEMA-ER:294. Under the Safe Drinking Water Act, the Environmental Protection Agency establishes those levels as close as feasible to the concentrations at which "no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." 42 U.S.C. 300g-1(b)(4)(A), (B). Although virtually no area springs are public water systems, Interior referenced maximum contaminant levels as indicators for quantifying effects to springs (AEMA-ER:294-95) because toxicity indicators were unavailable or limited for many wildlife species. *See* AEMA-ER:174; SER:100-103.

exceeding maximum contaminant levels for drinking water. AEMA-ER:173; *see* SER:46, 99. Historical dissolved uranium concentrations in the northwest corner of the area (80 µg/L uranium) were 16 times higher than those typical for the region (5 µg/L uranium). *See* SER:46, 99. Flash floods and debris flows occur in the region and can transport substantial volumes of trace elements and radionuclides. SER:48. Fractures, faults, sinkholes, and breccia pipes in the area are also potential pathways for water migration. SER:51. Considering all these factors, as well as the lack of data for toxicological effects data for wildlife species, the Secretary concluded that although low in probability, the risk of impacts to animals or humans using the waters was sufficient to justify the withdrawal. AEMA-ER:174.

Interior fully disclosed its methodology and assumptions used for calculating impacts to the quantity and quality of water discharged to the two main types of aquifers in the area.[19] AEMA-ER:274-98. Absent

[19] The regional aquifer (also called the "Redwall-Muav" or "R-aquifer") is the most productive and reliable source of groundwater underlying the area and generally occurs deep (2,000 feet) below the surface. SER:172. Perched aquifers—small, thin, discontinuous zones associated with small drainage areas but supporting sensitive, unique

the withdrawal, as a result of anticipated increased mining operations throughout the area, impacts to the water quality of the regional aquifer would range from none to moderate and would be long-term in duration. Metamin-ER:250. Possible increases in the high end of the range of ambient concentrations of uranium in regional aquifer springs could occur in all three parcels (*see* Metamin-ER:244, 250), although contributions would be negligible at most in some particular areas. *See, e.g.*, Metamin-ER:250 (to the Virgin River from the regional aquifer in the north parcel). Likewise, impacts to water quality in perched aquifers absent the withdrawal would range from negligible to moderate for springs, and none to major for wells. Metamin-ER:244. Those factual conclusions adequately support the Secretary's decision to exercise a cautious approach, acknowledging the low probability of highly significant impacts.

Yount contends (Br. 27) that Interior should have assumed that future mining would occur near known breccia pipes and that mines could be placed to avoid perched-aquifer impacts altogether. Interior's

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ecological environments—occur at shallower depths. Metamin-ER:222; *see* Metamin-ER:134.

determination to base its analysis on a random geographic distribution of future mines was reasonable, however, because it "is not known exactly where future mines might be constructed." AEMA-ER:282. Specifically, Interior predicted that 16 mines could be foreseeably developed to extract currently undiscovered uranium (SER:446), whereas only three of the 19 confirmed mineralized pipes, and none of the 10 pipes with unconfirmed mineralization, would develop into mines. SER:443-44. Precise locations of those future mines cannot be known with certainty because, with locatable mining operating under principles of "self-initiation," Metamin-ER:94, the timing and precise location of future mineral development is dictated, at least initially, by the claimant's decision to develop the claim, not by Interior.

Also, Interior acknowledged that site-specific analyses would likely address perched-aquifer-spring impacts on an individual basis but determined that some impacts might not be avoided. *See* SER:430. That is so because the location, conditions, and configurations of perched aquifers are not all known (*id.*; *see* SER:431), and some breccia pipes do occur within estimated drainage areas for perched-aquifer springs. *See* AEMA-ER:285-87. Additionally, contrary to Yount's

contention (Br. 28), Interior did establish a non-zero impact threshold for radionuclides in analyzing wildlife. *See* SER:300.

Contrary to plaintiffs' assertions (AEMA Br. 18, 31, 35, 46; Metamin Br. 37, 52-53), the Secretary's rationale of withdrawing the lands to prevent adverse water-resource impacts[20] does not violate FLPMA's multiple-use-management principles.[21] A withdrawal, by definition, "withhold[s] an area" from "location, or entry" under the general land laws. 43 U.S.C. 1702(j). And the term "[m]ultiple use" includes "the use of some land for less than all of the resources," considering the "long-term needs of future generations for renewable and nonrenewable resources," as well as management "without permanent impairment of . . . the quality of the environment," and "not necessarily . . . the combination of uses that will give the greatest economic return." 43 U.S.C. 1702(c). Accordingly, a withdrawal is allowed not only by the terms of its own definition but also by the

[20] We address arguments about multiple-use management of cultural resources *infra*.

[21] Plaintiffs' multiple-use-management arguments are raised only under FLPMA and therefore do not apply to the withdrawal of national forests, which, as discussed *supra*, are governed by multiple-requirements in other statutes. *See, e.g.*, 16 U.S.C. 528, 1604(e)(1), (g).

definition of multiple use. Regardless, mining operations on valid existing claims may continue, and the lands remain open to operations for developing other minerals subject to sale and lease. AEMA-ER:175-76, 190. Thus, mining has not been eliminated from the area.

Metamin's assertion (Br. 37) that FLPMA "does not authorize a conservative approach" when withdrawing federal land from the Mining Law lacks merit. The Act does not prescribe any particular methodology that Interior must follow in analyzing what "public values" might be maintained by the withdrawal, or for what "public purpose or program" the withdrawal area might be reserved. 43 U.S.C. 1702(j). Additionally, multiple-use-management provisions confer considerable discretion upon agencies in managing federal lands. *Cf. Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (Service's multiple-use requirement "breathe(s) discretion at every pore."). Nor does the APA prohibit a conservative approach. *See, e.g.*, *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 157 (2d Cir. 2008) (when facing uncertainty about the scope of adverse effects from federal action, "nothing in the APA prevents an agency from considering a worst case scenario.").

Moreover, Interior's choice of methodology in its decisionmaking must be upheld so long as it is "supported by reasoned analysis." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 665 (9th Cir. 2009); *see S. Fork Band Council of W. Shoshone Indians v. U.S. Dep't of the Interior*, 588 F.3d 718, 725 (9th Cir. 2009) (declining to "second-guess" Interior's weighing of resource-management factors "in light of its experience and expertise"). And courts may not impose their own procedures—including scientific methodologies—upon agency decisionmaking. *See Lands Council v. McNair*, 537 F.3d 981, 993-94 (9th Cir. 2008) (*en banc*) (citing, *inter alia*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)). A conservative approach is particularly appropriate here since allowing further mineral entry and location could result in the establishment of additional valid mining claims, and prohibiting mining on those claims could subject Interior to allegations of uncompensated takings of the claimants' property interests. *See United States v. Locke*, 471 U.S. 84, 107 (1985).

AEMA (Br. at 37-44) and Metamin (Br. at 36-38) argue that the Secretary did not place meaningful importance on the effectiveness of existing environmental laws. Nothing in FLPMA, however, prevents the

Secretary from making withdrawals to ensure a greater degree of environmental protection than would occur through compliance with the minimum requirements of other statutes and regulations. *See* 43 U.S.C. 1702(j), 1714. Interior did acknowledge that existing laws and regulations protect the environment from some of the known effects of locatable mining. *See* AEMA-ER:300-302, 339; Metamin-ER:230, 238, 243; SER:292-94. That did not, however, prevent the Secretary from withdrawing the lands to address impacts that are possible even under compliance with existing regulations (*see*, *e.g.*, SER:157, 420)—yet another reason to reject the *status quo* that could have resulted in the recognition of new property rights in mining claimants and limited Interior's ability to prevent mining those claims. *See* AEMA-ER:176.

AEMA (Br. 33-34) and Yount (Br. 35) argue that the Secretary gave insufficient weight to comments by a Park Service hydrologist and his managers stating that the impact statement overestimates impacts to water resources due principally to the low permeability of rock surrounding uranium-containing breccia pipes. AEMA-ER:354-56. The hydrologist's comments were not among those that the Park Service provided through the administrative process (*cf.* SER:494-98). That

alone refutes the suggestion that the comments render the Secretary's decision arbitrary and capricious. *See Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1174-1175 (9th Cir. 2004) (agency need not adopt suggestions in a draft memorandum that "was preliminary and not the official view of any agency"). Regardless, the hydrologist's comments fail to consider the USGS report's observations that fractures, faults, sinkholes, and breccia pipes themselves provide paths for water migration (SER:51), while floods, flash floods, and debris flows can transport substantial volumes of radionuclides as well. SER:48. Even the hydrologist's manager recognized that the EIS could take a cautious approach to uranium development. AEMA-ER:354. That is consistent with the Secretary's decision (AEMA-ER:354), relying on the scientific analysis conducted by BLM and USGS. *See Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378 (1989) (facing scientific disagreement, agencies "must have discretion" to rely on their chosen experts).

Yount's contention (Br. 36) that Interior's analysis of water resources was based on "very little hard science" is incorrect. Throughout the EIS, Interior relied on the best science available,

identified gaps in the data, and exercised its best professional judgment in making conservative assumptions that Interior identified and explained. *See* SER:419 (impact statement "was prepared using the best peer-reviewed scientific studies available"); SER:423 ("The purpose of this EIS was to evaluate the best scientific information available . . . ."); SER:429 (analysis of impacts to groundwater "uses the best available science in its formulation" and "represents an exhaustive compilation of available data for these resources and, to our knowledge, does not omit any significant data sources"). That is all the APA requires. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

AEMA argues (Br. 38 n.12) that there is "no support" for the Secretary's determination that potential impacts to water resources in the East Parcel support withdrawal. But the record documents that "Negligible" and "Negligible to moderate" impacts could occur for aquifer springs and surface water resources, respectively. AEMA-ER:303; *see* AEMA-ER:246-51; AEMA-ER:275-76. Other rationales—cultural resources and wildlife, air, and visual impacts, discussed below—also support withdrawal of that parcel. *See, e.g.*, AEMA-ER:325-26, AEMA-ER:332-33; Metamin-ER:197-202; SER:318, 325.

b. The Record Supports Withdrawal to Protect American Indian Resources.

In addition to protecting water resources, a second reason for the withdrawal was the cultural importance of the area to Indian tribes. AEMA-ER:173, 175. AEMA and Metamin challenge that aspect of the withdrawal decision on two main statutory grounds—(1) that the Secretary lacks statutory authority to withdraw federal lands to protect cultural values, and (2) that the record fails to demonstrate a need to withdraw the area from the Mining Law to protect cultural values. Those arguments lack merit.[22]

First, Metamin argues (Br. 47-53) that the Secretary lacks authority to withdraw federal lands from the Mining Law to protect tribal interests in those lands. That is incorrect. Federal lands may be withdrawn "to maintain other public values in the area" or to reserve the area "for a particular public purpose." 43 U.S.C. 1702(j). The phrases "public values" and "public purpose" are not defined by FLPMA, and their ordinary meaning is broad enough to encompass the consideration given tribal interests here. Indeed, that breadth is

[22] We address Yount's constitutional arguments *infra* at Part IV.

demonstrated by comparison to the statute's definition of the "multiple use[s]" for which the public lands are managed as including "natural scenic . . . and historical values," along with "recreation" and "wildlife and fish." 43 U.S.C. 1702(c). Similarly, congressional policy allows managing the public lands to protect the quality of "historical" and "archaeological values," 43 U.S.C. 1701(a)(8). Those values and uses are broad enough to encompass tribal concerns. *A fortiori*, the broader phrases "public values" and "public purpose" must include tribal concerns, too.[23] The "public values" and "public purpose" behind withdrawals must also be interpreted in light of the Secretary's responsibility to provide direction on behalf of the United States concerning "the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. 2. Nothing in FLPMA's withdrawal provision limits the Secretary's authority in that regard.

[23] We reference FLPMA's multiple-use and congressional-policy provisions for managing the public lands as reflecting the "public values" for which *all* federal lands may be withdrawn to protect, not to imply that such provisions dictate management for anything other than the public lands.

Next, the Secretary's decision was supported by substantial evidence demonstrating that the withdrawal was for the public purpose of protecting cultural values associated with tribes. As the decision notes, the greater ecosystem that surrounds the Colorado River and the Grand Canyon "is known as a home or sacred place of origin to many Native Americans," including federally recognized tribes—Southern Paiute, Havasupai, Hualapai, Navajo, Hopi, and Pueblo of Zuni—"and its cultural significance goes back thousands of years." AEMA-ER:168; *see* SER:564. Virtually all of the withdrawal area consists of aboriginal lands of two of those tribes, and the other four tribes maintain significant cultural ties to the broader region. SER:616-17. Many tribes in the area include the Grand Canyon in their creation stories. AEMA-ER:175; *see* Metamin-ER:169-70, 172; SER:564. And all of the area tribes "continue to use all or portions of the withdrawal area for traditional tribal purposes" such as hunting, gathering, trade, travel, and other uses. AEMA-ER:175; *see* Metamin-ER:171-73; SER:200-202.

The Secretary found that "[a]ny mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them." AEMA-ER:173; *see also* AEMA-

ER:336; SER:565; SER:507. All of the tribes in the area "uniformly believe that continued uranium mining will result in the loss of their functional use of the area's natural resources" (AEMA-ER:175)—not merely because environmental impacts would result, but because the tribes regard themselves as intimately connected with the landscape. *See, e.g.*, Metamin-ER:168. For example, the Southern Paiute Tribe considers the Colorado River the "blood vein of the earth," Metamin-ER:171, and the Hopi have stated that region's lands "contain the testimony of our ancestors' stewardship through thousands of years" in the form of prehistoric ruins, petroglyphs, artifacts, and ancestral remains. SER:564. The "Havasupai believe themselves to be a part of the Grand Canyon and that they cannot be separated from it," and they traditionally lived within the Canyon for part of the year. Metamin-ER:169. Other tribes maintain close ties with the landscape as well. *See, e.g.*, Metamin-ER:170 (the "Zuni are intimately connected to [the] Grand Canyon").

To that end, Interior identified many cultural landscapes and features within the withdrawal area—the Colorado Plateau, Grand Canyon region landscape, stream-and-river systems, along with dance

sites, trails, camps, springs, culturally-important plants and wildlife—that are important to tribes and warrant protection against mining's impacts. *E.g.*, Metamin-ER:170-73, SER:200-202; *see* SER:621-24. And Interior noted that indicators of impacts to traditionally important places are "not easily definable or quantifiable," because different groups can experience the same place in different ways, and because the groups' reactions alone may determine impacts' existence and extent. SER:202-203. If the lands were not withdrawn, Interior determined that disturbance to the landscape might impact tribal resources, territories, and ceremonial use of lands such that, even if the scale of the impacts seems small in size or duration, the significance would be greater than non-tribal individuals perceive. *See* Metamin-ER:278 (potential small-scale disturbance in the north parcel could be significant because "the area is seen by the Southern Paiute as an interconnected series of places"); Metamin-ER:279 (in the south parcel, disruption in ceremonial activities would be "detrimental to [tribal] culture" even though it "may only take place for a few years per mine"); *id.* (cumulative effects of mining "could reduce the functionality of traditional cultural and sacred places").

Metamin (Br. 48) and AEMA (Br. 39-40) cite statutes protecting traditional cultural interests associated with specific sites to argue that Interior lacked authority under FLPMA to withdraw lands unconnected with such sites, and that withdrawing the lands was unnecessary because the statutes provide for mitigation of any harm that would occur at specific sites. Absent impacts on property rights or violations of federal law, protecting specific sites may be all that is required of the Secretary before she may allow mining to proceed. *See e.g., Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006) (government's general trust responsibility to tribes is ordinarily satisfied by compliance with generally applicable statutes). Nothing in FLPMA, however, prevents the Secretary from undertaking broader protections than are otherwise required when withdrawing lands to maintain "public values" or for a "public purpose" other than mining. 43 U.S.C. 1702(j).[24] That she may do so out of a solicitude for tribes is consistent

[24] Cases cited by Metamin (Br. 50-51) and *amici* (Br. 21-22) do not address discretionary protections whatsoever, much less hold that the Secretary's withdrawal authority is so constrained. *See S. Fork Band*, 588 F.3d at 724 (mining project approval was not arbitrary or capricious in relation to executive order requiring accommodation of tribes' use of and access to sacred sites); *Te-Moak Tribe of W. Shoshone Indians v. U.S. Dep't of the Interior*, 565 Fed. Appx. 665, 668 (9th Cir. 2014)

with—albeit not compelled by—her role in managing "all matters arising out of Indian relations." 25 U.S.C. 2.

That broader exercise of authority is supported by the record, which recognizes that the places that are culturally important to tribes "may be individual landforms or larger geographic features," Metamin-ER:1912, and may include impacts to places that tribes define as traditionally important "regardless of their . . . eligibility" for protection under other statutes. Metamin-ER:1913. Indeed, the "precise boundaries" of the landscapes important to the tribes often cannot be established because they vary for each tribe. *Id.* And as already discussed, the impacts to sense of place are difficult to define and quantify. SER:202-203.

Metamin argues (Br. 53) that if any mining degrades the land's cultural value to the tribes, then the Secretary's decision to withdraw

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(same); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (Religious Freedom Restoration Act does not require the government to prohibit ski operator from using reclaimed wastewater to make snow on lands that tribes considered sacred); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (the government was not required to provide access to tribal sites as a condition of obtaining the tribe's aboriginal title).

the area from location under the Mining Law but not from mineral leasing (*e.g.*, oil and gas) or sale (*e.g.*, sand and gravel) was arbitrary. As already explained, however, the Mining Law's principle of self-initiation gives the government no discretion to prevent the location of new mining claims on "open" federal lands, 30 U.S.C. 22, and requires the government to recognize any property rights in mining claimants to develop those lands. *See Locke*, 471 U.S. at 107. By contrast, the government retains complete discretion as to whether to offer minerals for sale or lease. Metamin-ER:94; *see United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931). Additionally, the development of sale-and-lease minerals "is expected to occur incrementally" and result in cumulative effects that are "minor," Metamin-ER:212, whereas uranium could be mined intensely over the next two decades, *see* Metamin-ER:211, with little authority, absent withdrawal, of the Secretary to control. *See* Metamin-ER:94.

AEMA argues (Br. 40) that the Secretary did not discuss what "evidence supports the tribe[s'] beliefs" or how those beliefs would be impacted by mining. That argument lacks merit—the record is replete with citations to ethnographic studies and other literature documenting

the tribes' beliefs and the sincere importance of the withdrawal area to tribes, as well as the impacts from mining. *See* Metamin-ER:168-73, 275-79; SER:507, 565. Inquiry into the truth of such beliefs or their consistency with the tribes' conduct, however, is impermissible. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (prohibiting governmental inquiry into whether religious beliefs are "acceptable, logical, consistent, or comprehensible to others"); *United States v. Seeger*, 380 U.S. 163, 184 (1965); *United States v. Ballard*, 322 U.S. 78, 86 (1944).

c. The Record Supports Withdrawal to Protect Other Resources.

The record demonstrates that the Secretary's decision will also reduce effects to other environmental resources. For example, under the withdrawal, only 11 uranium mines, as opposed to 30, would likely be developed. *See* AEMA-ER:332-33. Accordingly, truck traffic—much of which occurs on unpaved roads—would be reduced by 98% for exploration, 63% for mining, and 67% for ore transport, resulting in about 60% fewer air emissions in the area than if the lands were not withdrawn. AEMA-ER:175; *see* Metamin-ER:201-202; SER:324. And

visual impacts from the additional mine development would be reduced from moderate (AEMA-ER:331) to minor. SER:324.

The Secretary's decision was also based on the ground that the uncertainty of potential effects from uranium mining on wildlife, livestock, or humans was sufficient to justify the withdrawal. AEMA-ER:174. The effects of exposing native plants and animals to increased levels of radionuclides are largely unknown—during the USGS study, minimal chemical toxicity data were available for microbes, aquatic vascular plants, terrestrial invertebrates, and amphibians, and no data were available for reptiles, birds, or mammals. AEMA-ER:174; *see* SER:100-103. Plus, some wildlife spend considerable time in underground burrows, raising particular concerns that they might inhale or ingest radionuclides. AEMA-ER:175. The withdrawal offers more protection of aquatic species (SER:304), and the magnitude of impacts to terrestrial wildlife would be "significantly less" than if the lands were not withdrawn. SER:310. That is sufficient evidence to uphold the Secretary's decision. *See Elias-Zacarias*, 502 U.S. at 481.

d. The Record Supports the Conclusion That Economic Benefits of Mining Would Still Be Realized.

AEMA (Br. 44-45) and Yount (Br. 24-27, 34) argue that Interior underestimated the amounts of total and economically developable uranium that have not yet been discovered beneath the withdrawn lands. That argument fails for several reasons. As already discussed, the Secretary must provide Congress notice of the withdrawal, along with a report including information on, *inter alia*, "known mineral deposits, past and present mineral production," and "evaluation of future mineral potential." 43 U.S.C. 1714(c)(2)(12); *see* 43 C.F.R. 2310.3-2(b)(3)(iii). Interior's estimates of the uranium underlying the withdrawal area were provided to Congress as part of Interior's reporting obligations under the statute. *See, e.g.*, SER:481-84. As already discussed, the adequacy of that information, therefore, is not subject to judicial review. *See* 90 Stat. at 2787.

In any event, Yount's and AEMA's challenges to Interior's estimates of the amount of uranium underlying the withdrawal area fail because the estimates are supported by substantial evidence. The basis for the total uranium projection was the USGS study

commissioned by the Secretary in 2010, after the withdrawal was proposed. *See* AEMA-ER:170. That study estimated the mean undiscovered uranium endowment underlying the withdrawal area as 162,964 tons of uranium oxide. SER:34. The term "endowment" refers to rock containing more than 0.01% grade uranium. SER:444. To calculate the amount of economically developable uranium in the withdrawal area, Interior estimated that 15% of the undiscovered endowment might be mined and added that amount (0.15 × 162,964 = 24,507 tons) to both the confirmed uranium reserves (10,658 tons) and the uranium estimated to be mined from known breccia pipes without reserve estimates (4,500 tons) for a total of about 39,665 tons. SER:170.

Yount (Br. 24-26) challenges Interior's assumptions about how much of the undiscovered endowment could be economically mined as contrary to the record. Yount's arguments, however, are incorrect. The difference between the amounts of the total endowment and the economically developable uranium is based, initially, on a paper estimating that 10% of mineralized breccia pipes (and 0.8% of all pipes) contained economically developable quantities of uranium. SER:458; *see* SER:569. That estimate is supported by other observations in the

record. SER:443-44 (noting that 1,296 breccia pipes were identified in northern Arizona, resulting in 14 developed ore bodies, or 1.1% development); *see* SER:575 (estimating that the probability that pipes will be economically mined "is a little better than 1%, but not much"). *Compare* SER:578 (opinion by Quaterra's consultant that success rate for finding mineralized pipes "could reach as high as 80%") *with* SER:576 (another geologist who "works closely" with a Quaterra executive "[d]oesn't really think there's a good rule of thumb out there for [estimating the] % of exploration that could become mines").

As Interior explained, the approximate ore grade for mined breccia pipes was at least 0.5%, but more recent mining operations have been approved with ore grades as low as half of that. SER:445-46. Accordingly, Interior increased the 10% estimate by half to 15% before it calculated the percent of the estimated uranium endowment that was likely to be economically developable. SER:458; *see* SER:427-28.

Yount argues (Br. 25-26) that Interior based its estimate on incorrect assumptions about whether ore bodies in the withdrawal area are likely to contain high-grade concentrations of uranium. Interior, however, acknowledged that there is a high potential for uranium in the

withdrawal area. *See, e.g.*, SER:440, 441 (northern Arizona deposits are "higher in grade than 85% of uranium deposits worldwide"). A high potential for higher-than-usual-grade uranium to occur, however, does not necessarily mean that there is a corresponding likelihood for uranium to be found in economically developable quantities—the latter depends upon the ability to physically access and mine those deposits, among other factors. *See* SER:440. Also, the documents Yount cites (Br. 25-26) refer to lower-grade ore than what is considered developable. *See, e.g.*, SER:514 ("Low-grade rock (0.01–0.05 percent U_3O_8) is generally a small part of the entire deposit."); SER:519 ("The amount of low-grade (<0.10 U_3O_8) material in ore-grade deposits is small."). *Cf.* SER:574 (noting that the "ore-grade that was routinely mined" by one company during the 1980s and 1990s was "0.58% to 1.02%"); SER:445-46 (but in more recent operations as low as 0.23%).

Yount (Br. 24) and AEMA (Br. 44-45) argue that the total amount of undiscovered uranium is underreported because, they contend, the estimate does not include "hidden" breccia pipes. Not so. As the FEIS explained, hidden pipes were "not explicitly described" in the methodology for estimating the uranium endowment, "but they are

incorporated into the numerical estimate." SER:427. Interior estimated the endowment by extrapolating from quantities of uranium occurring within a known control area, and "the uranium resources within the control area also included . . . a hidden pipe." *Id.* Thus, such features were included in the basis for Interior's estimate.

Yount's argument (Br. 26) that BLM has no expertise in determining the economic value of a mineral deposit is incorrect. The Secretary has full authority over administration of the public lands, including minerals underlying those lands. *See, e.g., Hoefler v. Babbitt*, 139 F.3d 726, 728 (9th Cir. 1998). Aspects of that authority—such as preparing expert opinions on the validity of mining claims—are delegated to BLM in the first instance for the public lands. *See* 43 C.F.R. 3809.100(a) (requiring mineral examination reports before mining operations may proceed on withdrawn lands managed by BLM); AEMA-ER170 (stating that surface-managing agencies will conduct mineral examinations in some circumstances); *see also* 43 C.F.R. 4.451-1 (allowing the government to "initiate contests for any cause affecting

the legality or validity of any . . . mining claim").[25] The same expertise that allows BLM to assess valuable mineral discovery also informs its judgment about the withdrawal area's potential for developable uranium.

USGS—an agency that Congress charged with the "examination of the geological structure, mineral resources, and products of the national domain," 43 U.S.C. 31(a)—was a cooperating agency in the environmental-review process. SER:159; *see* 40 C.F.R. 1501.6, 1508.5. BLM found USGS's 2010 report authoritative, calling it "a peer-reviewed publication," that "contains the best credible information available regarding the uranium endowment estimate," which BLM used as the basis for the reasonably foreseeable-development scenarios in the EIS. SER:426; *see* SER:424 ("USGS has expertise recognized by the federal government that qualifies them to produce scientific investigations."). AEMA's assertion (Br. 44-45) that the uranium estimate is based on an older study is misguided—the estimate from the

[25] Validity of mining claims on the national forests is initially evaluated by the Service, subject to final determination by the Secretary of the Interior. *See Cameron v. United States*, 252 U.S. 450, 460 (1920).

earlier 1990 study by USGS was re-examined and adjusted to reflect additional information, including a more accurate calculation of the surface area subject to the withdrawal. SER:32; *see Yount*, 2014 WL 4904423, at *21.

Nor does the withdrawal "thwart Congress's purposes" in enacting various statutes facilitating mineral development as a policy goal, as AEMA argues (Br. 45). The Arizona Wilderness Act of 1984 provided that some of the lands in the withdrawal area no longer had to be managed to avoid impairing their wilderness suitability, but that statute did not mandate keeping the lands open to mineral entry in perpetuity. Pub. L. 98-406, 98 Stat. 1485, 1494; *see* 43 U.S.C. 1782(c). And that Act's congressional reports indicate awareness of the environmental sensitivity of some released areas and the possibility that they still might be managed for purposes other than development, mineral or otherwise. *See* H.R. Rep. No. 98-643, at 36-37 (1984); S. Rep. No. 98-463, at 8, 29 (1984). The other statutes AEMA cites (Br. 45) reaffirm the importance of mining generally, along with protecting the environment and studying mining's impacts, *see, e.g.*, 43 U.S.C. 1701(a)(8), 30 U.S.C. 21a, but they likewise do not limit the Secretary's

withdrawal authority. *See* 43 U.S.C. 1701(b) (general policies are "effective only as specific statutory authority for their implementation is enacted" elsewhere in FLPMA).

AEMA is also incorrect in arguing (Br. 45-46) that Interior's consideration of the increased cost of establishing validity of an existing mining claim in the withdrawal area before operations for that claim may proceed was inadequate. Interior disclosed that a validity determination would "significantly lengthen" the typical time required for processing a plan of operations, thus "represent[ing] a factor of uncertainty" in the analysis. SER:448. Because validity determinations often involve case-by-case adjudication, Interior's inability to include more precise information about the cost of that process is understandable. *See, e.g., Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963) (hearing required).

Finally, AEMA contends (Br. 46 n.18) that Interior acted arbitrarily by failing to consider the potential impacts of the withdrawal on mining locatable "uncommon varieties" of building stone. *See* 30 U.S.C. 161. However, the comments AEMA submitted during the administrative process (AEMA-ER:487-95) never raised that issue,

which is therefore forfeited. *See Great Basin Mine Watch*, 456 F.3d at 968. Regardless, Interior determined that uranium was the primary commodity that would drive mine development in the area, and the reference to some locatable building stone does not undermine that conclusion. SER:435, 440.

3. Challenges to the Withdrawal-Area Boundaries Should Be Rejected.

Metamin argues (Br. 39-46) that the withdrawal is arbitrary and capricious because part of the withdrawal area falls outside the hydrologic boundary of the area that drains into Grand Canyon National Park and because other areas are about 45 miles from the Canyon and, according to Metamin, not justified on any ground in the decision. As a preliminary matter, Quaterra—Metamin's predecessor-in-interest—did not adequately raise those contentions in its public comments, mentioning them fleetingly at best. *See* SER:579-605. Metamin has therefore forfeited the opportunity to raise those claim in the litigation. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 968 (9th Cir. 2006) (*citing Vt. Yankee Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54 (1978)).

Regardless, Metamin's argument lacks merit. As discussed, protecting the water quality of the Grand Canyon watershed was one of several public purposes supporting the withdrawal. *See* Metamin-ER:113. About 120,000 acres of the western portion of the north parcel is located in the watershed for the Virgin River, which drains into the Colorado River downstream of the National Park boundary. *See* Metamin-ER:138, 140. Interior, however, identified a possible hydrologic connection between this area and the Grand Canyon watershed—namely, that groundwater might flow east–west through the regional aquifer and contribute to spring flows in the Virgin River watershed and near Littlefield, Arizona. *See* AEMA-ER:280 (noting that "it is possible that R-aquifer groundwater in the North Parcel reaches springs along the Virgin River of northwestern Arizona"). Granted, there are fault zones that are hypothesized to act as barriers to such movement, but ultimately the "potential for a hydraulic connection in the R-aquifer between the North Parcel and these spring complexes is not known." *Id.* Although the contribution to spring flow from such a connection would "likely be small" if it exists—*see id.*; AEMA-ER:306, 310, 313—including the area in the withdrawal is consistent with the

Secretary's conservative approach.[26] That is especially so given that Interior did examine an alternative ("Alternative C") that would not have withdrawn the acreage that appears to have groundwater connections to the Virgin River. But Interior ultimately determined that such an alternative would involve the use of 29 percent more water due to the mining operations predicted in that area absent the withdrawal. SER:305.

Although Metamin correctly points out (Br. 45) that the term "watershed" ordinarily refers to the geographic boundaries of an area whose surface waters drain to the same point, that does not mean that the Secretary's decision was limited to protecting only water resources. Indeed, the decision notes the importance of both the "Grand Canyon and the greater ecosystem that surrounds it" to both the Nation and the region. Metamin-ER:86-87. The decision is also based on protection of cultural resources, wildlife, and other values (Metamin-ER:93-94), many of which are not confined by the ridgetops that bound the basin.

[26] While the watershed boundaries generally are drawn based on topography and therefore reflect surface-water runoff, the boundaries for groundwater movement are not so precise and are less understood. *Cf.* SER:175 (diagram showing hypothesized groundwater movement).

For example, the "Grand Canyon area" that is important to tribal cultures is broader than the watershed. *See, e.g.*, Metamin-ER:168 ("Grand Canyon area," for purposes of the analysis, "encompasses the Grand Canyon, the proposed withdrawal area, and the lands immediately adjacent to both"); Metamin-ER:171-72. Additionally, the "Grand Canyon region landscape," defined as "the watersheds that drain into the Colorado River," in the tribes' views, "consists of myriad connected places throughout the entire area." Metamin-ER:171-72; *see* SER:628. Indeed, their aboriginal boundaries far exceed the withdrawal area. *See* SER:616. As already discussed, tribes may regard even small disturbances as significant because they view the area "as an interconnected series of places." *See* Metamin-ER:278. And although the northern and western portions of the north parcel do not include as many culturally-important sites as other areas, some sites are present there. *See* AEMA-ER:264.

Other resource values also support including the entire north parcel in the withdrawal area. For example, Alternative C (which would have excluded areas within the Virgin River watershed), would result in over 1,000 tons and 100,000 tons more, respectively, of nitrogen-oxide

and carbon-dioxide emissions over a 20-year period than the selected alternative. SER:284. Likewise, the selected alternative would result in fewer impacts to wildlife than Alternative C, too, as it would involve fewer acres disturbed by mining exploration and development. *See* SER:164a-164b; AEMA-ER:253. Thus, the boundaries of the withdrawal are not arbitrary or capricious. *See J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1052 (9th Cir. 2007) (courts generally defer to "agency's line-drawing [that] does not appear irrational").

4. FLPMA Was Not Violated By Any Failure to Coordinate with Counties.

a. FLPMA's Coordination Requirements Do Not Apply to Withdrawals.

Metamin argues (Br. 67-69) that the Secretary was required to coordinate with local county governments and that FLPMA was violated by inadequately doing so. Section 204(c)(2) requires the Secretary to furnish Congress with certain information about consultation with local governments and the effects of the withdrawal on their interests and the regional economy. 43 U.S.C. 1714(c)(2)(2), (7), (8). As explained *supra*, however, the adequacy of the information provided under Section 204(c)(2) is precluded from judicial review by

Section 701(i). 90 Stat. at 2787. Metamin relies on Section 202(c)(9), which provides that "[i]n the development of land use plans," the Secretary shall, "to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs" of the "local governments within which the lands are located." 43 U.S.C. 1712(c)(9); *see* 43 U.S.C. 1712(e)(3) (providing that withdrawals "may be used in carrying out management decisions"). Mohave County is the only member among the plaintiffs that is a local government "within which" the withdrawn lands "are located." *Id.*; *see* Metamin-ER:126-27.[27]

Section 202(c) supplies criteria for "development and revision of land use plans," not withdrawal decisions. 43 U.S.C. 1712(c). The withdrawal decision here was not issued through any land-use-plan development or revision process and thus is not subject to Section

[27] Metamin also cites Section 309(e), which requires the Secretary to establish procedures providing public notice and the opportunity for comment and participation in public-lands management. 43 U.S.C. 1739(e). For withdrawals, the Secretary has established such procedures, 43 C.F.R. 2310.3-1, which Metamin does not challenge.

202(c). Although Section 202(c)(9) references the coordination of land use "management activities" with local governments, 43 U.S.C. 1712(c)(9), such coordination is a responsibility that the Secretary provides for "[i]n the development and revision of land use plans." 43 U.S.C. 1712(c). Plus, withdrawals themselves are not "activities"—they withhold areas from operation of the general laws for the purpose of "limiting activities." 43 U.S.C. 1702(j). And while the Secretary "may issue management decisions to implement land use plans" for BLM-managed lands and withdrawals may be used in carrying out such "management decisions," 43 U.S.C. 1712(e), (e)(3), that does not make withdrawals "activities" that are required to be coordinated other than through a land-use-plan-development or revision process.

b. Interior Adequately Coordinated with Counties.

If Section 202(c)(9) applies to withdrawals, Interior satisfied any responsibility to "coordinate" its decision with local county governments. Although not required to do so, *see* 40 C.F.R. 1508.5, Interior designated numerous counties—Mohave and Coconino Counties in Arizona, where the withdrawn lands are situated, and Garfield, Kane, San Juan, and Washington Counties in Utah, which are

likely to provide economic services for mining and tourism in the withdrawal area—as cooperating agencies in the NEPA process. SER:161-62, 406-407; *see* Metamin-ER:475-524.[28]

Interior held two public meetings, five meetings with cooperating agencies (including the counties), and three additional meetings or hearings with the Coalition, whose members include the five counties opposing the withdrawal. SER:405-407; *see* Metamin-ER:589-96 (meeting notes). Like other members of the public, counties could also provide input during the public comment process. *See* Metamin-ER:366-384 (comments by some counties on draft impact statement); *see also* SER:405-406, 410-12 (describing public involvement). The counties submitted additional letters as well throughout the process providing their views on the withdrawal. *See, e.g.*, Metamin-ER:525-26, Metamin-ER:695-96.

Ultimately, FLPMA reserves withdrawal decisions principally to the Secretary and does not require the counties' concurrence in those

[28] Cooperating agencies may involve themselves in the NEPA process, for example, by requesting meetings with the lead agency and participating early in the process. *See* 40 C.F.R. 1501.6.

decisions. 43 U.S.C. 1714(a).[29] The counties' involvement here satisfied any "coordinat[ion]" required by FLPMA for the withdrawal. Moreover, as explained *infra*, the impact statement adequately considered impacts to the counties, disclosed that some, but not all, counties opposed the withdrawal, and adequately analyzed the economic impacts of the withdrawal under NEPA.

5. The Regulatory Challenges Lack Merit.

AEMA contends (Br. 32-34) that the withdrawal decision violates Interior's regulations because, according to AEMA, the decision was not consistent with the need for the withdrawal as described in BLM's application for the withdrawal. That argument fails for several reasons.

Administrative decisions may be reviewed under the APA for compliance with agency regulations. *See KOLA, Inc. v. United States*, 882 F.2d 361, 364 (9th Cir. 1989). AEMA, however, forfeited any claim based upon a violation of the regulations by not squarely presenting the claim to the district court. AEMA's complaint does not allege a violation of Interior's regulations. AEMA-ER:138-64. Nor did AEMA's summary

[29] The Deputy Secretary and various Assistant Secretaries may also make withdrawals. *See* 209 DM 2.1.C, 4.1.B, 6.1.B, 7.1.B, 8.1.B.

judgment briefs raise such an argument or cite the principal regulation on which AEMA now relies, 43 C.F.R. 2310.3-3. *See* SER:639-719.

At most, AEMA incorporated arguments raised by other parties, but it did so only "as [the other parties' arguments] relate to" AEMA's "claims for relief." SER:649 n.2; *see* SER:690 n.2. However, none of the claims alleged in AEMA's complaint or argued in its summary judgment briefs "relate to" another party's allegations that the withdrawal violated the regulations. Having failed to properly raise any regulatory violations to the district court, AEMA has forfeited those claims on appeal. *See, e.g.*, *In re E.R. Fegert, Inc.,* 887 F.2d 955, 957 (9th Cir. 1989).

In any event, AEMA's claimed regulatory violations lack merit. The regulations provide that a withdrawal application must contain, *inter alia*, the "public purpose or statutory program for which the lands would be withdrawn." 43 C.F.R. 2310.1-2(c)(7); *see* 43 C.F.R. 2310.1-3(c).[30] The application stated that the purpose of the proposed

[30] If the request for withdrawal originates within the Department of the Interior, as it did here, a petition for withdrawal is submitted to the Secretary to obtain her permission to begin considering the withdrawal application. *See* 43 C.F.R. 2300.0-5(p), 2310.1(a)(2), 2310.1-3. The application may be submitted simultaneously with the petition. *See* 43

withdrawal "would be to protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining." AEMA-ER:212. The application further explained that the temporary segregation of the lands for two years while the request was being considered "allows time for various studies and analysis," including under NEPA, and those actions "will be used to support a final decision on the withdrawal application." *Id.*

The application clearly stated the public purpose as required by the regulation. AEMA argues (Br. 32), however, that the Secretary's withdrawal decision violates the regulations because it includes purposes not also set forth in the application. Not so. Nothing in the regulation AEMA cites limits the Secretary's discretion in approving withdrawals to the purposes stated in the application. *See* 43 C.F.R. 2310.3-3. Regardless, the purposes as stated in the decision and in the application are virtually identical. *Compare* AEMA-ER:212 (application's purpose is "to protect the Grand Canyon watershed from

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C.F.R. 2310.1-3(c). Once the Secretary approves the petition, "the petition shall be considered a Secretarial proposal for withdrawal." *Id.* 2310.1-3(e); *see id.* 2300.0-5(q).

adverse effects of locatable hardrock mineral exploration and mining") *with* 77 Fed. Reg. at 2,563 (withdrawing lands "in order to protect the Grand Canyon Watershed from adverse effects of locatable mineral exploration and development") *and* AEMA-ER:166 (stating the same in record of decision).[31]

6. The Departmental Manual Challenges Lack Merit.

a. The Manual Is Not Enforceable.

AEMA (Br. 32-35), Metamin (Br. 35), and several States as *amici curiae* (Br. 11) argue that the withdrawal fails to comply with Interior's Departmental Manual, which includes a statement of policy on withdrawals. That policy, however, like similar agency pronouncements, does not have the force or effect of law required to bind Interior. *See Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981); *McMaster v. United States*, 731 F.3d 881, 888 (9th Cir. 2013) ("BLM manuals are not legally binding" or enforceable against agency); *River*

[31] AEMA argues (Br. 33-34) that the withdrawal decision relies upon a "precautionary principle" that was not part of the application's purpose. Although the Secretary's decision is based on a cautious approach involving the study of uncertain impacts, that approach does not alter the decision's purpose—protecting the Grand Canyon region from possible adverse effects from uranium mining. As already explained, that purpose was rational and supported by the record.

Runners for Wilderness v. Martin, 593 F.3d 1064, 1072-73 (9th Cir. 2010) (same for National Park Service policies); *W. Radio Servs. Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (Forest Service Manual).[32]

To have the force and effect of law, enforceable against an agency, a statement in an agency manual "must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *United States v. Fifty-Three Eclectus Parrots,* 685 F.2d 1131, 1136 (9th Cir. 1982).

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[32] AEMA (Br. 32) cites a mineral-and-energy policy (AEMA-ER:477-80) that has been incorporated into BLM's internal manual, which is separate from the Departmental Manual. *Cf.* BLM Manual 3809 ch. 1.6, *available at*: http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.32340.File.dat/3809%20Manual%20final%209%207%2012.pdf. Like the Departmental Manual chapter here, however, BLM's manual is unenforceable. *McMaster*, 731 F.3d at 888.

The Departmental Manual's chapter on withdrawals meets neither requirement. First, the chapter, labeled "Policy," is not a legislative rule because it is not "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The chapter prescribes, primarily, the contents of what must accompany applications for withdrawal submitted by Interior's departmental offices to the Secretary. 603 DM 1.1.A.[33] For example, withdrawals should be kept to a minimum consistent with an applicant's "demonstrated needs"—a phrase defined in terms of what must be submitted with the application. *See id.* Those provisions supply direction on the information that the Secretary's subordinates should provide to withdrawal decisionmakers, but they neither restrict the Secretary's discretion to make withdrawals nor do they establish individual rights or obligations.

Additionally, the Manual chapter states that the various "[b]ureaus and offices" of the Department must follow the Manual's internal policies (011 DM 1.2.B), but the Manual chapter does not bind the Secretary herself. The Secretary, of course, is the head of an

[33] Available at: http://elips.doi.gov/elips/browse.aspx.

executive department of the United States—not merely one of that department's bureaus and offices. *See* 43 U.S.C. 1451; *see also* 5 U.S.C. 101; U.S. Const. Art. II, sec. 2. The Manual chapter recognizes this by providing that Departmental components need not comply with Manual provisions that are "superseded by appropriate authority," including "a Secretary's Order." 011 DM 1.2.B. And here, the withdrawal—and the petition and segregation that preceded it—were all approved by the Secretary. AEMA-ER:187, 207, 209.

The Manual chapter is not enforceable against Interior for the additional reason that it was not promulgated through notice-and-comment rulemaking. *Cf.* 5 U.S.C. 553. Manual chapters are not ordinarily published in the Federal Register or the Code of Federal Regulations, but rather, they are typically placed in Interior's library. *See* 011 DM 4.7; *cf.* 71 Fed. Reg. 4,159, 4,161 (Jan. 25, 2006). The lack of formal publication further demonstrates that the Manual does not have the force and effect of law. *Cf. River Runners*, 593 F.3d at 1071. In any event, as discussed below, the withdrawal is exempt from the Manual's policy by its own terms and regardless, the withdrawal fully satisfied the Manual's provisions.

b. The Withdrawal Was Exempt from the Manual's Provisions.

The Manual's chapter on withdrawals does not apply to withdrawals that are "expressly directed by . . . the Secretary of the Interior." 603 DM 1.1.C. The withdrawal here was expressly directed by the Secretary and therefore was exempt from the Manual chapter's provisions. On June 20, 2011, the Secretary stated that based on input from various agencies within Interior as well as from the Service, "I am directing the BLM to identify the full one million acre uranium withdrawal as the preferred alternative in the final EIS." SER:608. Subsequently, the withdrawal was identified in the final EIS as "the Secretary's proposal" or the "Secretary's proposed withdrawal." AEMA-ER:219.

That approach is consistent with the regulations for processing withdrawal applications that originate within the Department, which provide that such applications may only be filed as "[w]ithdrawal petitions" to the Secretary. 43 C.F.R. 2300.0-5(p); *see* 43 C.F.R. 2310.1-3. If the petition is granted, allowing the submission of an application by an agency within the Department, then "the petition shall be considered as a Secretarial proposal for withdrawal." 43 C.F.R. 2310.1-

3(e). Here, the Secretary approved the petition and also signed the decision and order of withdrawal. AEMA-ER:187, 207, 209. Because the withdrawal was approved, proposed, and expressly directed by the Secretary, it was exempt from the Manual's provisions. *See also* 011 DM 1.2.B (Bureaus and offices need not comply with Manual provisions that are "superseded by appropriate authority," *e.g.*, "a Secretary's Order.").

c. The Withdrawal Satisfies the Manual's Provisions.

Even if the Departmental Manual imposed requirements enforceable against the Secretary that applied to the withdrawal—which it does not—the withdrawal still complies with the Manual. First, Metamin argues (Br. 36-38) that the withdrawal decision is contrary to the Manual provision that withdrawals be accompanied by "an explanation of why existing law or regulation cannot protect or preserve the resource" that the withdrawal intends to protect. 603 DM 1.1.A(3). Second, Metamin argues (Br. 39-46) that the withdrawal was not "kept to a minimum consistent with the demonstrated needs" for the withdrawal. 603 DM 1.1.A. Neither contention has any merit.

As already discussed, FLPMA itself imposes no requirement that existing laws must be found to inadequately protect a resource before

the resource may be protected through a withdrawal. But even if the Secretary had to follow such a requirement, the record supports a conclusion that the withdrawal was appropriate. A significantly high demand for uranium is predicted in the future such that more uranium would be mined, Interior estimated, absent the withdrawal. *See* Metamin-ER:212. Additionally, there is evidence of elevated uranium concentrations above the limits for safe drinking water, and mining cannot be eliminated as a contributor to those levels. AEMA-ER:173-74; *see* SER:46, 98-99. Hydrologic processes in the area, like groundwater movement, are "poorly understood." *See* SER:98. And although operating-plan regulations require mining operators to comply with existing laws, SER:430, the lack of a comprehensive understanding of the effects of uranium mining on the landscape supports the Secretary's cautious approach given the region's importance to the Nation—including Indian tribes—and the importance of the Colorado River in supplying millions with drinking water.

Second, as already discussed, the boundaries for the withdrawal were reasonable and were appropriate considering that potential impacts to resources other than water—air quality, terrestrial wildlife,

visual quality, landscapes of importance to tribes—do not necessarily conform to hydrologic boundaries. *See, e.g.*, Metamin-ER:168, 171-72; SER:616 (showing aboriginal-area boundaries). Ample evidence exists for concluding that there was a demonstrated need for the withdrawal. *See Elias-Zacarias*, 502 U.S. at 481.[34]

II. THE WITHDRAWAL SATISFIES NEPA.

A. The Withdrawal Satisfies the Regulations Concerning Incomplete and Unavailable Information.

The Coalition argues, through a brief joined by Metamin (Br. 53-64) that the Secretary violated NEPA by determining that missing information about environmental impacts from uranium mining was not "essential" to obtain before approving the withdrawal. That argument makes little sense, as it would require the Secretary to wait to obtain more information before deciding to withdraw the area from the Mining Law to perform the studies needed to provide the additional information. NEPA's procedural requirements ensure that the "agency will not act on incomplete information, only to regret its decision after it

[34] Long-term withdrawals of greater size, post-FLPMA, are not unprecedented. *See, e.g.*, 45 Fed. Reg. 9,562 (Feb. 12, 1980) (multiple withdrawals totaling 40 million acres).

is too late to correct." *Marsh*, 490 U.S. at 371 (citing 42 U.S.C. 4321); *see S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (NEPA requires a hard look "*before* the environmentally harmful actions are put into effect") (emphasis in original). The withdrawal limits additional environmental impacts from mining until those effects are better understood—an approach entirely consistent with NEPA's purposes. *Cf. Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (agency's "propos[al] to increase the risk of harm to the environment and then perform its studies . . . has the process exactly backwards").

Regulations implementing NEPA provide that when an agency is evaluating reasonably foreseeable adverse environmental effects in an EIS and there is "incomplete or unavailable information," the agency "shall always make clear that such information is lacking." 40 C.F.R. 1502.22.[35] If the incomplete information is both "relevant" to those impacts and "essential to a reasoned choice among alternatives," then

[35]NEPA created the Council on Environmental Quality, an agency charged with issuing regulations to guide federal agencies' implementation of NEPA. 42 U.S.C. 4342; *see* 40 C.F.R. parts 1500-08.

the agency "shall include the information" in the EIS so long as the overall costs of obtaining the information are not exorbitant. *Id.* 1502.22(a). Other procedural requirements apply if the information "cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known." *Id.* 1502.22(b).

Interior complied with the applicable regulations. First, Interior candidly disclosed that information about water quality (among other resources) was incomplete and unavailable. Metamin-ER:239-40. Next, the Secretary expressly addressed Section 1502.22 and concluded that the incomplete information was not "essential to making a reasoned choice among alternatives" because data were available regarding dissolved uranium concentrations near six previously-mined sites, and because the analysis had used conservative assumptions to estimate impacts where additional data was unknown. Metamin-ER:174. Indeed, the EIS used the "best available information and conservative assumptions" about water-resource impacts to make reasonable assessments that would "provide the decision-maker with an adequate basis for weighing the relative potential for impacts." Metamin-ER:239-40. Such an approach is entirely rational. *See Native Village of Point*

Hope v. Jewell, 740 F.3d 489, 498 (9th Cir. 2014) (upholding agency's conclusion that information missing from EIS was "not essential to informed decisionmaking"); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir. 1999); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1358 & n.21 (9th Cir. 1994) (EIS that "overestimates the risks posed" by missing information satisfies Section 1502.22).

The Coalition contends (Br. 61-62) that the Secretary lacked factual support for the conclusion that environmental impacts resulting from uranium mining supported the withdrawal. As already discussed, Interior's conclusions are supported by substantial evidence, including evidence of elevated concentrations for uranium and other contaminants that were found at about 70 groundwater sites, and samples from 15 springs and five wells in the region that contained uranium levels exceeding maximum contaminant levels for drinking water (SER:98-99)—concentrations that "are related to natural processes, mining, or to both." SER:46.

Ultimately, USGS found that any evidence of a relationship between contaminant concentrations in the groundwater and mining

operations was "limited and inconclusive," (SER:98), and that additional investigations were required to better understand the contributions of contaminants from mining activities. SER:99; *see* Metamin-ER:137 (calling for "[f]requent and comprehensive monitoring, data collection, and reporting" to document subsurface conditions in mines); SER:98 (hydrologic processes in the area are "poorly understood"). That lack of additional information, however, did not make it unreasonable for the Secretary to withdraw the area from the Mining Law until further studies could be performed. *Native Village of Point Hope*, 740 F.3d at 498; *see also Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733.

B. Interior Adequately Cooperated with the Counties.

The Coalition argues (Br. 64-77)[36] that Interior violated NEPA by inadequately involving local counties in the decisionmaking process and insufficiently considering their views. That argument lacks merit. Regulations implementing NEPA require the federal government to cooperate with local agencies "to the fullest extent possible to reduce duplication between NEPA and State and local requirements,"

[36] The Coalition's arguments are in the brief joined by Metamin.

including through joint planning, studies, and public hearings. 40 C.F.R. 1506.2(b). Impact statements shall discuss "any inconsistency of a proposed action with any approved State or local plan and laws," and "[w]here an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law." 40 C.F.R. 1506.2(d); *see* 40 C.F.R. 1502.16(c) (requiring discussion of "possible conflicts" with local "land use plans, policies, and controls for the area concerned").

Interior satisfied its NEPA responsibilities toward the counties. As already mentioned, Interior designated the counties as cooperating agencies and held several meetings or hearings that the counties attended. SER:161-62, 405-407; *see* Metamin-ER:475-524. The final EIS discussed in detail the relationship between the withdrawal and the counties' economic interests, plans, and policies—for example, it disclosed inconsistency with resolutions by Mohave and Kane Counties, and by the Coalition. Metamin-ER:126-27. The EIS discussed the support for continued mining (SER:352-53), and other economic impacts from the withdrawal. *See* Metamin-ER:281-97; SER:374-84. Notably, Interior observed that the counties "have different economic strategies

which, at times, differ from federal land management policies," SER:351, and it acknowledged that the withdrawal could "conflict with study area economic development goals" that would be supported if there were no withdrawal. SER:354.

Contrary to the Coalition's argument (Br. 74-75), Interior need not "resolve the inconsistencies" with local plans and laws, but need only "describe the extent to which the agency would reconcile" its action with them. 40 C.F.R. 1506.2(d). Interior disclosed the withdrawal's inconsistency with local ordinances and discussed the land use plans for the two counties where the withdrawal is located. Metamin-ER:126-27. And Interior declined to discuss the plans for other counties because the withdrawal was "not within [their] jurisdiction," Metamin-ER:127—a reasonable explanation given that the regulations require consideration of conflicts with plans, policies, and controls only "for the area concerned." 40 C.F.R. 1502.16(c). *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (determining the geographic scope of EIS "is properly left to the informed discretion of the responsible federal agencies"); *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 960 (9th Cir. 2003) (upholding geographic limits agency placed on its analysis).

The Coalition (Br. 69-71) criticizes Interior's economic analysis because it did not rely on a report commissioned by a private citizens' group supporting uranium mining.[37] Where specialists express conflicting views, of course, Interior may rely on its own experts, to whom courts usually defer. *Marsh*, 490 U.S. at 378; *see Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983) ("a reviewing court must generally be at its most deferential" when examining predictive judgments implicating technical expertise); *McNair*, 537 F.3d at 988. In response to criticism by the counties and others on the economic analysis in the draft impact statement, Interior retained additional socioeconomic expertise, reviewed the draft analysis, and prepared a new analysis to address deficiencies found in the draft. Metamin-ER:283. The Coalition quibbles with changes in the final models, but disagreement with the analysis does not prove a NEPA violation. *See Marsh*, 490 U.S. at 378; *McNair*, 537 F.3d at 1001. As Interior

[37] The report was prepared for the American Clean Energy Resources Trust (Metamin-ER:606-07)—a "coalition of concerned private citizens who, together with uranium exploration and mining companies, believe in the importance of maintaining a viable and environmentally responsible minerals industry" to benefit the Nation's economy and energy security. http://acertgroup.com.

explained, the "largest differences in the analysis of the economic benefits of mining are in terms of direct and total mining-related jobs—where the [final impact statement] estimates are considerably higher" than in the draft. *Id.* Moreover, because the draft and final impact statements each applied its own model consistently to all alternatives, "the relative economic impacts of the alternatives . . . are similar in both analyses." *Id.*

The Coalition contends (Br. 72) that Interior did not involve the counties in developing alternatives, but the regulations do not grant cooperating agencies authority to dictate the alternatives considered. *See* 40 C.F.R. 1501.6, 1506.2. Regardless, the Coalition does not argue that Interior's consideration of alternatives violated NEPA, so the alleged infirmity does not support the Coalition's NEPA claim. *See* 5 U.S.C. 706 ("[D]ue account shall be taken of the rule of prejudicial error."); 40 C.F.R. 1500.3 ("[A]ny trivial violation of these regulations [does] not give rise to any independent cause of action.").

Finally, in arguing that Interior inadequately cooperated with the counties, the Coalition (Br. 3-4, 13, 73, 75) relies on several declarations (Metamin-ER:917-29, 935-59) that were not part of the administrative

record and do not fit any of the four narrow exceptions to the rule limiting judicial review of Interior's decision to that record. *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). The Court should disregard those documents and Metamin's reliance on them. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604 (9th Cir. 2014).

C. Yount's Claims Are Outside NEPA's Zone of Interests.

Yount contends (Br. 34-35) that the district court erred in dismissing his NEPA claims as outside the statute's zone of interests. That contention is incorrect. NEPA claimants must satisfy the APA requirement of showing that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). "[P]urely economic interests do not fall within NEPA's zone of interests." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005). Yount's claims are premised on his economic interest in mining uranium in the

withdrawal area. The district court therefore correctly rejected Yount's NEPA claims as outside the statute's zone of interests.[38]

That Yount might experience aesthetic enjoyment when exploring for uranium makes no difference to the zone-of-interests inquiry because mining operations affect, rather than preserve, the environment. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (plaintiff "cannot invoke NEPA to prevent 'lifestyle loss' when the lifestyle in question is damaging to the environment"). Yount cannot reasonably characterize his alleged injury otherwise to avoid the zone-of-interests requirement. *Cf. W. Radio Servs.*, 79 F.3d at 903.

III. THE NFMA CHALLENGES WERE CORRECTLY REJECTED

A. NFMA Does Not Prohibit the Service from Consenting to the Withdrawal.

AEMA argues that the Service's consent to the withdrawal violates the National Forest Management Act. AEMA Br. 47-55. That

[38] Although the district court discussed the issue in terms of "prudential standing," *Yount*, 2013 WL 93372, at *27, the zone-of-interests requirement is better understood as a matter of statutory interpretation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

argument lacks merit. NFMA concerns the management of "renewable resources," not minerals. *See, e.g.*, 16 U.S.C. 1600 (congressional findings). Accordingly, NFMA requires the Service to develop forest plans that provide for "multiple use and sustained yield" of renewable forest products and services as those terms are defined in the Multiple-Use Act—a requirement that excludes nonrenewable resources like minerals. 16 U.S.C. 1604(e), (g); *see* 16 U.S.C. 528.

The omission of mineral resources from the planning requirements of NFMA is consistent with the limitations, with respect to mining, that Congress placed upon the Service's otherwise broad authority to make rules for the national forests. Although the reservation of the national forests withdrew them from entry under the Mining Law, Congress subsequently reopened those lands to the Mining Law, subject to statutory and regulatory constraints. 16 U.S.C. 482; *see Wilderness Society v. Dombeck*, 168 F.3d 367, 374 (9th Cir. 1999).

Although the Service may reasonably regulate mining activities to protect the renewable resources of the national forests, it may not "prohibit any person from entering upon [the] national forests for . . . prospecting, locating, and developing the mineral resources thereof." 16

U.S.C. 478; *see United States v. Shumway*, 199 F.3d 1093, 1106-07 (9th Cir. 1999). That authority is vested in the Secretary. For when Congress directed the Service to execute "all laws affecting public lands" that were reserved as national forests, it "except[ed] such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands," including the Mining Law. 16 U.S.C. 472. Accordingly, the withdrawal decision correctly stated that withdrawals of lands from the mining laws are "outside the authority of National Forest Planning" and therefore need not conform to existing forest plans. AEMA-ER:176.[39]

AEMA's reliance (Br. 54-56) on 16 U.S.C. 1604(i) for the proposition that the withdrawal was required to conform to the existing forest plan is misplaced. Under that provision, "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of

[39] AEMA cites (Br. 51) the Service's regulations governing the "use of the surface" of national forests in connection with mining authorized under the general mining law, but the purpose of those regulations "is not . . . to provide for the management of mineral resources," a task left to Interior. 36 C.F.R. 228.1.

National Forest System lands" must be consistent with the applicable forest plan. 16 U.S.C. 1604(i). National forests, however, are open to "use and occupancy" for mineral exploration by operation of law, 16 U.S.C. 482, not because of any "instruments" issued by an agency. Neither the withdrawal nor the consent letter are "instruments for" using or occupying national forests—they do not "define[any] rights, duties, entitlements, or liabilities. BLACK'S LAW DICTIONARY 918 (10th ed. 2014) (defining "instrument"). Nor are they "for" use and occupancy because a withdrawal decision "limit[s] activities," 43 U.S.C. 1702(j), rather than authorizes them. Regardless, if NFMA's consistency requirement applies to withdrawals, AEMA's claim is moot and, in any event, it fails on the merits.

B. Challenges to the Withdrawal's Consistency with the Forest Plan Are Moot.

Article III of the Constitution limits federal courts' jurisdiction to "Cases" and "Controversies," meaning that "an actual controversy must exist" throughout "all stages of the litigation." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of a lawsuit" or otherwise extinguishes the live character of the dispute "at any point

during the litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013); *see Murphy v. Hunt*, 455 U.S. 478, 481 (1982).

While this lawsuit was pending, the Service revised the forest plan at issue. *See* Land & Resource Management Plan for the Kaibab National Forest 82 (2014).[40] As AEMA concedes (Br. 51 n.21), the revised plan reflects the fact of the withdrawal. AEMA's claim that the withdrawal had to conform to the now-superseded version of the forest plan is therefore moot. *See Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv.*, 357 F.3d 1130, 1133-34 (10th Cir. 2004) (claim asserting inconsistency with forest plan was rendered moot by revised plan); *cf. Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250, 1254 (9th Cir. 1979) (challenge to interim management plan was moot where a new draft plan had been published and it was "anticipated that a final plan will be forthcoming in a matter of weeks").

[40] *Available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3791580.pdf. The Court may take judicial notice of intervening facts—like the forest plan revision—concerning whether the Court lacks jurisdiction. *See Cole v. Rustgard*, 68 F.2d 316 (9th Cir. 1933).

AEMA (Br. 55-59) argues that the Service may not amend forest plans to conform to prior forest management decisions. But even assuming that the withdrawal or the Service's consent letter were subject to Section 1604(i), the Service undertook a plan *revision* under 16 U.S.C. 1604(f)(5), not an amendment under 16 U.S.C. 1604(f)(4). "When," as here, "land management plans are revised," site-specific instruments, "when necessary, shall be revised as soon as practicable," subject to valid existing rights. 16 U.S.C. 1604(i).

A remand, therefore, would serve no purpose for two reasons. First, the Service would have discretion under 16 U.S.C. 1604(i) to rewrite its consent letter, subject to valid existing rights, to reflect the updated plan. Second, any newly issued consent letter would have to comply with the forest plan in place at the time of the new decision. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 n. 8 (9th Cir. 2006). There can be no reasonable dispute that the withdrawal complies with the plan, as revised. Thus, the dispute is moot, but even if it were not, the Court could decline to grant relief as an equitable matter. *See Morgan Stanley Capital Group Inc. v. PUD No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 545 (2008) (remand not

required as "an idle and useless formality"); *United States v. W.T. Grant Co.*, 345 U.S. 629, 635-36 (1953) (in the absence of mootness, finding "no abuse of discretion" in court's decision to withhold equitable relief).

C. The Service's Consent Was Neither Arbitrary nor Capricious.

AEMA asserts (Br. 60) that the Service failed to articulate sufficient reasons for consenting to the withdrawal. That argument is contradicted by the record. The Service's letter explained that it was a cooperating agency in preparing the EIS and had been engaged in the withdrawal process since it began. The Service explained, referring to the EIS, that "impacts are possible from uranium mining in the area, including impacts to water resources," and that "[i]important cultural and other resource values would also be protected by the withdrawal." AEMA-ER340. Those reasons are consistent with the consideration of the relevant factors in the voluminous EIS and are supported by substantial evidence for the reasons discussed *supra*. Though succinct, the Service's explanation nevertheless may reasonably be discerned. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

IV. THE WITHDRAWAL SATISFIES THE ESTABLISHMENT CLAUSE.

Yount argues (Br. 7-23) that the withdrawal violates the Establishment Clause because the Secretary's decision would protect lands that are considered sacred by American Indian tribes. To comply with the Establishment Clause, a government action must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The last two factors essentially ask "whether the challenged governmental practice has the effect of endorsing religion." *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007). As we explain, the withdrawal does not violate the Establishment Clause.

A. The Withdrawal's Purposes Are Secular.

Government action will be upheld against an Establishment-Clause challenge if it is motivated "at least in part by [a] secular purpose." *Cholla Ready Mix v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004). The government's "stated reasons will generally get deference" as long as they are "genuine, not a sham, and not merely secondary to a religious objective." *McCreary County v. ACLU*, 545 U.S. 844, 864

(2005). A court may invalidate a government action "on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the . . . activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

Here, as already discussed, the withdrawal was supported by four main purposes, all of which are secular. Metamin-ER:91-94. The only purpose Yount challenges as religious is the protection of cultural and tribal resources. But Interior's analysis focused upon the disruption that mining could cause to the values that tribes attach to the landscape for a variety of cultural reasons. *See, e.g.*, Metamin-ER:167-73, 275-79. And the fact that tribes may attach spiritual importance to otherwise culturally-important places does not make the purpose impermissibly religious. *See Access Fund*, 499 F.3d at 1044; *Cholla Ready Mix*, 382 F.3d at 975-76.

Even if the protection of tribal resources were considered religious, which it is not, the remaining three purposes—precautionary protection of water resources, study of impacts to wildlife, and the ability of local communities to continue realizing economic benefits from mining—would still satisfy the Establishment Clause because the

withdrawal was motivated "at least in part by [a] secular purpose," *Cholla Ready Mix*, 382 F.3d at 975, and not "wholly by religious considerations." *Lynch*, 465 U.S. at 680; *see Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 758 (D.C. Cir. 2007) (upholding withdrawal with "several secular purposes," including "protection of aquifers and the environment").

Contrary to Yount's contentions (Br. 12), whether the indisputably secular purposes withstand challenges under the APA is a separate question. As discussed *supra*, those purposes are rational and supported by the record, because in Establishment Clause challenges courts review articulated governmental purposes with "reluctance to attribute unconstitutional motives" to the government, "particularly when a plausible secular purpose" for the action "may be discerned" from the face of its decision. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). No reasonable, informed observer could conclude that the withdrawal's other purposes were not plausible, but a "sham" or "merely secondary to a religious objective." *Cf. McCreary County*, 545 U.S. at 864.[41]

[41] Yount incorrectly states (Br. 14) that the Secretary "ignor[ed] the last 150 years" of cultural use of the land for "cattle grazing, mining, timber harvest, [and] tourism." Interior's study of cultural impacts

B. The Withdrawal Does Not Effectively Endorse Religion.

The withdrawal also does not effectively advance or endorse religion. The fact that new mining claims are not being located and non-mineral resources are being protected in no way implies that the government is endorsing tribal religion. The withdrawal area is not exclusively devoted to tribal religious practice—uranium mining operations are still occurring after the withdrawal, even though they are anathema to many tribes' beliefs. Metamin-ER:93, 277; *see Ctr. for Biological Diversity*, 706 F.3d at 1088 (affirming continued uranium mining operations in the withdrawal area). The lands also remain open to statutes governing the disposal of minerals through leases and sales. 77 Fed. Reg. at 2,563. That the withdrawal does not prohibit all mining development negates any suggestion that the government is endorsing religion. *See Access Fund*, 499 F.3d at 1045.

Yount (Br. 8-11, 36) cites cases addressing whether the government's approval of various uses of federally managed lands has either violated the Free Exercise Clause or the Religious Freedom

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contains a detailed discussion of the historical use of the area by both Native and European Americans. SER:460-80.

Restoration Act ("RFRA"), which requires the federal government to follow rules derived from early Free-Exercise-Clause case law concerning burdens on the exercise of religion. 42 U.S.C. 2000bb; *see Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-42 (1988); *Navajo Nation*, 535 F.3d at 1067-68. Yount's argument, however, incorrectly assumes that the minimum the government *must* do to avoid unlawfully burdening the exercise of religion also represents the outer limits on what the government *may* do without violating the Establishment Clause. Neither RFRA nor the Free Exercise Clause, however, supports that assumption. "Nothing in [RFRA] shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion." 42 U.S.C. 2000bb-4. Likewise, the government may accommodate religion beyond Free-Exercise-Clause requirements without violating the Establishment Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987).[42]

[42] Yount's assertion (Br. 8-9) that the Supreme Court in *Lyng* recognized that a successful challenge under the Free Exercise Clause in that case would compel the government to violate the Establishment

Yount argues (Br. 12-13, 19) that the size of the withdrawal and the fact that it is not limited to discrete sites important to the tribes create an improper appearance of endorsement. But while various statutes may provide for protection and consideration of particular sites that are culturally important to tribes, nothing in the Establishment Clause imposes such a limitation on the Secretary's exercise of withdrawal discretion. Here, landscapes, landforms, and entire plateaus are culturally important to the tribes. *See* AEMA-ER:268-72. The Establishment Clause does not require hostility to that view. *See, e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995); *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

***

In sum, the Secretary acted within FLPMA's authority when making the withdrawal, and plaintiffs have not demonstrated that the withdrawal or the Service's consent was arbitrary and capricious in violation of any statute or constitutional right.

Clause, is incorrect. The pertinent language is from the appellate opinion that was reversed, and it is not the basis of any holding by the Supreme Court in the case. *See Lyng*, 485 U.S. at 445 (quoting *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 694 (1986).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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90-1-4-13562

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STATEMENT OF RELATED CASES

These four consolidated appeals (9th Cir. Nos. 14-17350, 14-17351, 14-17352, 13-17374) are related to one another, as they arise from the same district court judgment. The undersigned is not aware of any other related cases within the meaning of Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE

1. This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is 22,400 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

On August 19, 2015, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the electronic case filing system, which will serve electronic notice of the filing on all registered users of that system. A copy was also served on the following by U.S. mail, first-class postage prepaid:

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STATUTORY ADDENDUM

Title 43, United States Code
Chapter 35—Federal Land Policy and Management

§ 1714. Withdrawals of lands

(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.

(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.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no

later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees—

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases,

evaluation of future mineral potential, present and potential market demands.

(d) Withdrawals aggregating less than five thousand acres; procedure applicable

A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head—

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

(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.

(f) Review of existing withdrawals and extensions; procedure applicable to extensions; duration

All withdrawals and extensions thereof, whether made prior to or after October 21, 1976, having a specific period shall be reviewed by the Secretary toward the end of the withdrawal period and may be extended or further extended only upon compliance with the provisions

of subsection (c)(1) or (d) of this section, whichever is applicable, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period. The Secretary shall report on such review and extensions to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.

(g) Processing and adjudication of existing applications

All applications for withdrawal pending on October 21, 1976 shall be processed and adjudicated to conclusion within fifteen years of October 21, 1976, in accordance with the provisions of this section. The segregative effect of any application not so processed shall terminate on that date.

(h) Public hearing required for new withdrawals

All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) shall be promulgated after an opportunity for a public hearing.

(i) Consent for withdrawal of lands under administration of department or agency other than Department of the Interior

In the case of lands under the administration of any department or agency other than the Department of the Interior, the Secretary shall make, modify, and revoke withdrawals only with the consent of the head of the department or agency concerned, except when the provisions of subsection (e) of this section apply.

(j) Applicability of other Federal laws withdrawing lands as limiting authority

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under chapter 3203 of Title 54; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)).

* * *

Title 16, United States Code
Chapter 36—Forest and Rangeland Renewable Resources Planning

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

* * *

(f) Required provisions

Plans developed in accordance with this section shall--

* * *

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

* * *

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be

revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

(j) Effective date of land management plans and revisions

Land management plans and revisions shall become effective thirty days after completion of public participation and publication of notification by the Secretary as required under subsection (d) of this section.

* * *

Title 42, United States Code
Chapter 55—National Environmental Policy

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of appropriate Federal,

State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *