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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CHILKAT INDIAN VILLAGE OF KLUKWAN *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BUREAU OF LAND MANAGEMENT *et al*.,	)	Case No. 3:17-cv-00253-TMB
	)	
Defendants,	)	
	)	
and	)	
	)	
CONSTANTINE NORTH, INC. *et al.*,	)	
	)	
Intervenor-Defendants.	)	
	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND DISTRICT OF ALASKA LOCAL RULE 16.3

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INTRODUCTION

The key question in this case is whether the Bureau of Land Management (BLM) can lawfully approve exploration that could ultimately restrict the government's discretion to protect the Chilkat River watershed from mining impacts, without first meeting the National Environmental Policy Act (NEPA) requirement to do *some* analysis of how mining could affect that watershed and the communities that depend upon it.

NEPA requires BLM to consider the potential impacts of mine development in connection with the Plan Approval and Road Extension (collectively, the "exploration project") because development is a connected action and its impacts would be cumulative to those of exploration. BLM and Constantine (collectively, "Defendants") argue that, as a rule, 1) NEPA only recognizes connected actions and cumulative impacts of actions that have already been proposed, and 2) mineral exploration has utility independent of mine development, so it is not connected. The authorities Defendants rely on establish no such rules, and the cases Defendants cite are premised on factual findings that cannot be made here. The record shows that the tests for cumulative impacts and connected action are in fact satisfied: the sole purpose of Constantine's exploration is to facilitate potential mine development, and mine development is reasonably foreseeable, given the advanced stage of the company's exploration.

NEPA requires BLM to consider development impacts now because it may be the last opportunity for BLM to act with full authority to preclude those impacts before Constantine makes a discovery, the point at which property rights attach. Contrary to Defendants' claim, BLM has authority to recommend withdrawal if needed to protect the region and to defer a decision on Constantine's plan during that review. BLM's argument that approving the exploration project does not diminish the Secretary of Interior's withdrawal authority ignores the

import of property rights which are likely to be established during exploration. And the Ninth Circuit has already rejected the premise for Defendants' additional argument that the agency's authority to prevent unnecessary and undue degradation is an adequate substitute for its ability to protect the region by withdrawal.

Finally, Defendants assert that it would be too difficult to consider potential impacts of mine development because it would require BLM to create an entire mine plan that does not yet exist. But there is no need for that. Review of a specific mine plan will occur if such a plan is someday presented. What is required at this stage is an assessment of potential impacts of mine development sufficient to inform the exploration decisions based on information currently available, much of which is already in this record. Here, BLM unlawfully refused to consider the impacts of mine development at all.

The long-term health of the Chilkat River watershed that encompasses the Palmer Project is of vital importance. *See* Pls.' Br., Doc. 54-1 at 13-14, 23-24. For the Chilkat Indian Village of Klukwan, the area is ancestral, and its abundant resources are part of Klukwan's cultural identity. *See, e.g.*, Doc. 43-34, ¶ 14 ("This is a food bowl that has been sustaining the Chilkat Tlingit for millennia."). The watershed also supports salmon that are harvested commercially and that feed a globally unique annual gathering of thousands of eagles in the Alaska Chilkat Bald Eagle Preserve. Doc. 43-11 at 101-06; Doc. 43-29 at 8-9. All of these resources also attract visitors whose presence contributes to the local economy. Doc. 43-17 at 2; Doc. 43-15 at 2.

Adequate protection for these important environmental and cultural values in the Chilkat River watershed can only be assured if BLM assesses the environmental risks of its actions in a timely way. The "approve now and ask questions later" approach BLM has taken "is precisely the type of environmentally blind decision-making NEPA was designed to avoid." *Conner v.*

Burford, 848 F.2d 1441, 1450-51 (9th Cir. 1988). In sum, BLM's NEPA obligation is to do more than nothing to inform itself and the public about the potential impacts of mine development before approving actions that could limit its discretion to protect the region by precluding a mine. The agency violated the statute by shirking this obligation. As Defendants have not identified any unusual circumstances that would justify departing from the normal remedy, Plaintiffs request that the Court vacate the unlawful Plan Approval and Road Extension decisions.

ARGUMENT

I. NEPA REQUIRES BLM TO CONSIDER THE POTENTIAL IMPACTS OF FUTURE MINE DEVELOPMENT ON THE CHILKAT RIVER WATERSHED NOW.

A. NEPA requires BLM to consider the impacts of potential mine development because of its relationship to the exploration activities BLM has approved.

1. Constantine's exploration project is "connected" to potential mine development because it has no utility independent of such development.

When preparing an environmental assessment, NEPA requires an agency to consider the effects of "connected actions." 40 C.F.R. § 1508.25(a)(1)(ii). The Ninth Circuit considers an action "connected" to another for purposes of NEPA review if it has no independent utility. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 720 (9th Cir. 1988). The only purpose for Constantine's exploration project that is evident from the record is to facilitate potential future mine development. *See* Doc. 43-11 at 36 ("Constantine is exploring . . . with the goal of identifying a mineral resource that is economically feasible to develop."). The project has no utility independent of that goal. Therefore, the exploration project and future mine development are connected actions.

Defendants *do not identify* any other purpose for Constantine's exploration project in their opposition briefs. Instead, BLM argues for the existence of a general rule that mineral

exploration always has utility independent of mine development, citing *Greater Yellowstone Coal. v. Reese*, 392 F. Supp. 2d 1234 (D. Idaho 2005), and *Concerned Citizens & Retired Miners Coal. v. United States Forest Service*, 279 F. Supp. 3d 898 (D. Ariz. 2017). *See* Defs.' Br., Doc. 58 at 15-16. These cases announce no such general rule, and they do not assist Defendants because their holdings are based on factual findings not possible here.

In *Greater Yellowstone*, while a large mine proposal was undergoing environmental review, the same company proposed exploration in a much smaller, additional area that might ultimately be added to the larger mine. 392 F. Supp. 2d at 1237-38. In rejecting plaintiffs' connected actions argument, the court found no evidence that the large mine depended on the addition (in fact, only one alternative in the analysis had included it) and determined that the exploration had "a stand-alone purpose—gathering information to allow mining in" the smaller area where that exploration would occur. *Id.* at 1239-40. The facts here are different. Plaintiffs argue not that Constantine's exploration depends on some nearby mine for its justification, but on the potential for a mine where exploration is occurring. Any such mine would, by necessity, depend on Constantine's exploration project.

Similarly, in *Concerned Citizens*, a mine proponent applied to conduct baseline hydrological and geotechnical research in the location proposed for the mine's tailings storage facility. 279 F. Supp. 3d at 908. Again, the court found that the mine could proceed without this smaller project. *Id.* at 911-12. The court also found that the information gathered had independent value because it could "be used to inform separate proposals," including three nearby exploration projects and an operating mine. *Id.* at 912. Both findings of fact were key to the court's conclusion that there was no connected action, and neither has an analogue in the context of Constantine's exploration project. Constantine will not be able to develop a mine

without conducting this exploration, and the exploration could not plausibly be used for any separate proposals.

Citing 40 C.F.R. § 1502.4(a), BLM argues that mine development cannot be a connected action unless and until there is a "proposal" to mine. Defs.' Br., Doc. 58 at 13-14. The agency is incorrect. Section 1502.4(a) provides that to determine the appropriate subject of an environmental impact statement, an agency must use the criteria in 40 C.F.R. § 1508.25, which describes the scope of environmental impact statements and also defines "connected actions." Section 1502.4(a) concludes, "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." From this, BLM infers that the connected action test in 40 C.F.R. § 1508.25 only pertains to "proposals." However, the last sentence of section 1502.4(a) does not purport to modify section 1508.25 or establish a new "connected action" test. It does not even refer to connected actions. The function of the sentence is to describe yet another situation that calls for inclusion in a single statement: proposals related "closely enough to be, in effect, a single course of action."

If there were any doubt that connected actions need not already be proposed, the question is settled by *Thomas v. Peterson*. In *Thomas*, the district court accepted the Forest Service's argument that timber sales were not connected actions in the environmental analysis of a road that would facilitate them, because only the road had so far been "proposed." *See* 589 F. Supp. 1139, 1146-47 (D. Idaho 1984), *rev'd in part*, 753 F.2d 754 (9th Cir. 1985). The Ninth Circuit reversed, finding that the sales were connected because the road had no other purpose sufficient to justify its construction and was essential to the sales. *Thomas*, 753 F.2d at 758-59. The agency protested that the sales were too uncertain and remote in time to be analyzed. *Id.* at 760.

"[I]f the sales are sufficiently certain to justify construction of the road," the court explained, "then they are sufficiently certain for their environmental impacts to be analyzed along with those of the road." *Id.* The same is true here, where mine development is sufficiently certain to have justified Constantine's $40 million, ten-year exploration campaign. *See* Second Green Decl., Doc. 57-3, ¶ 7.

BLM also argues that, generally speaking, it is appropriate to defer detailed NEPA analysis of the later stages of a project until those stages are presented for approval. Defs.' Br., Doc. 58 at 16-17, 27-28. That general principle has no application here, where BLM conducted no analysis of mine development at any level of detail, and where the agency's actions could ultimately limit its discretion to prohibit the next phase. BLM quotes *California v. Block*, which actually supports Plaintiffs' position on this issue. 690 F.2d 753, 763 (9th Cir. 1982) (explaining "the promise of site-specific [environmental impact statements] in the future is meaningless if later analyses cannot consider . . . preservation as an alternative to development."). The remaining cases BLM cites for the proposition that agencies can defer analyses of later project phases are easily distinguishable. Unlike here, the initial phases at issue in those cases had substantial value independent of the later phases. *See Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000) (the first action would create a freshwater marsh, which had "value in and of itself"); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 n.13 (9th Cir. 1974) (the first phase had "the immediate benefits of flood control, irrigation, and hydroelectric power"). In addition, the later phases in *Wetlands Action Network* were deemed beyond the agency's jurisdictional reach, 222 F.3d at 1117, and in *Trout Unlimited*, "Congress clearly intended that the First Phase of this project would be constructed without regard to whether" the second phase also proceeded, 509 F.2d at 1285. Finally, and most

importantly, there was no risk in either of these cases that the agency's discretion to prohibit later phases would narrow in the interim, as there is here.

BLM argues that the purpose of the connected action requirement is to ensure that NEPA analyses are not improperly segmented, and that there is no risk of improper segmentation here because BLM will eventually have to analyze any mine development plan that may be proposed, accounting for the cumulative impacts of exploration in that analysis. Defs.' Br., Doc. 58 at 18-19. To the contrary, BLM has improperly segmented consideration of the significant potential impacts of mine development and postponed that analysis to a later date at which the agency may have less discretion to prohibit them. The segmentation question here is not whether BLM will eventually consider all the impacts, but whether it has done so in a timely way.

Defendants maintain that because mineral exploration does not always lead to mine development, exploration has independent utility. Def.-Ints.' Br., Doc. 57 at 36-39; Defs,' Br., Doc. 58 at 16-17.[1] This argument has nothing to do with the independent utility test, which is instead about whether the two stages are interdependent. *See Thomas,* 753 F.2d at 759-60; 40 C.F.R. § 1508.25(a)(1). Although mine development does not always follow mineral exploration, the potential for development is what justifies Constantine's exploration. Conversely, development of a mine at the Palmer Project cannot proceed without this prior exploration. Thus, the two stages are interdependent.

Constantine erroneously states that BLM made an independent utility determination in either the 2017 environmental assessment for the Road Extension or the 2016 Plan Approval

[1] Constantine also cites decisions from the Interior Board of Land Appeals. Def.-Ints.' Br., Doc. 57 at 36-37. Perhaps not surprisingly, these cases track BLM's position that exploration is not connected to mine development. In this regard, they are inconsistent with the case law on connected actions in the Ninth Circuit discussed in this section.

Decision Record, and that the Court should defer to that determination. Def.-Ints.' Br., Doc. 57 at 28-29 (making this assertion in the section heading). In fact, BLM never mentioned the independent utility test in either document, and neither document describes any independent purpose for the exploration. Under these circumstances, there is nothing for the Court to defer to.

2. Impacts from mine development are "cumulative" to those of Constantine's exploration project because mine development is reasonably foreseeable and its impacts would affect the same resources.

BLM was also required to analyze the impacts of mine development because it is reasonably foreseeable and because those impacts will be cumulative to the impacts of the exploration project. 40 C.F.R. § 1508.8; *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075-76 (9th Cir. 2002).

As they did with connected actions, Defendants assert that for mine development to be reasonably foreseeable, a project must be "proposed." Defs.' Br., Doc. 58 at 19; Def.-Ints.' Br., Doc. 57 at 39-40. Not so. In *Lands Council v. Powell*, where the plaintiffs had already abandoned their cumulative impacts claims related to future projects, the Ninth Circuit noted in dictum that its precedent to date suggested only "proposed" projects had been considered reasonably foreseeable. 395 F.3d 1019, 1023 (9th Cir. 2005). However, the Ninth Circuit later clarified the cumulative impacts standard in *Northern Plains Research Council, Inc. v. Surface Transportation Board*, holding that "reasonably foreseeable future actions need to be considered even if they are not specific proposals." 668 F.3d 1067, 1079 (9th Cir. 2011) (quoting EPA, Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents, Office of Federal Activities, 12-13 (May 1999)). "Each project is different, and the agency is required to rationally explain its decision in the context of project-specific effects." *Id.* at 1078. In *Northern*

Plains, like here, the agency already had enough information about the likely nature of future development to permit a meaningful discussion of cumulative impacts, and therefore it was "not appropriate to defer consideration of cumulative impacts to a future date." *Id.* (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)).

The remaining authorities Defendants cite do not change the rule established in *Northern Plains*.[2] *Northern Alaska Environmental Center v. Kempthorne* does not purport to limit cumulative effects analyses to proposed actions; the decision only notes that proposed actions are counted in the cumulative effects analysis. 457 F.3d 969, 980 (9th Cir. 2006). *Kleppe v. Sierra Club* considered whether an agency had to prepare a programmatic environmental impact statement analyzing the impacts of coal leasing activities across an entire region and where there was no region-specific plan guiding those activities, not an environmental review document for a single project analyzing foreseeable impacts in the same geographic area, which is the question here. 427 U.S. 390, 403 (1976). In *League of Wilderness Defenders v. Connaughton*, an agency did not have to consider the cumulative impacts of a project that it had "disclaimed any intention to move forward on . . . in any particular time frame." 752 F.3d. 755, 762 (9th Cir. 2014). Constantine rather than BLM is the proponent here, and the company has made clear both its intention to move toward mine development and the approximate timeframe in which it expects to do so. *See* Doc. 43-2 at 68 ("After Year 5, assuming continued positive results, it is anticipated that emphasis will shift from exploration to engineering & development . . . .").

Jones v. National Marine Fisheries Service also does not hold that only proposed mining

[2] BLM also cites *Environmental Protection Information Center*, 451 F.3d 1005. However, that case does not purport to limit cumulative impacts analysis to only proposals, and its holding was based on the fact that inadequate information was available about the projects at issue to support a discussion of their environmental impacts—a situation that is not presented here. *See infra* pp. 15-18.

projects are reasonably foreseeable. 741 F.3d 989 (9th Cir. 2013). *Jones* does state that "[a]n agency need only consider the cumulative effects of projects that the applicant is already proposing." *Id.* at 1000. However, the decision is consistent with the specific, controlling holding in *Northern Plains* that a proposal is not required because in *Jones* there were compelling facts undermining the foreseeability of the allegedly cumulative projects. The mining company had already rejected three mine sites in favor of its current proposal. *Id.* at 995. The court affirmed the agency's decision that these were not reasonably foreseeable as mine sites, given that each faced significant logistical hurdles and had already been rejected once. *Id.* at 1001. Otherwise, the company had only announced vague plans for expanded mining over a 50-mile coastline, with no information about the number of projects or locations. *Id.* at 1000-01. These plans, the court concluded, were too vague to be reasonably foreseeable. Unlike the company in *Jones*, Constantine has not rejected the Palmer Project in favor of pursuing development elsewhere, nor has the company identified any insurmountable logistical hurdles. To the contrary, exploration proceeds.

BLM also suggests that the potential impacts of mine development would not be cumulative to the impacts of exploration because some of the exploration project's effects on water are anticipated to be "minor and temporary" and its effects on wildlife habitat are not expected to have an appreciable negative impact on wildlife. Defs.' Br., Doc 58 at 24-25. This argument incorrectly assumes that only individually significant environmental effects must be considered in a cumulative impacts analysis. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. The reason BLM's analysis for the Plan Approval decision found no potential for cumulative impacts is that it inappropriately omitted any consideration of mine development.

Constantine's exploration project affects surface waters and wildlife habitat in the area, and these resources would also be affected by mine development. *See* Pls.' Br., Doc. 54-1 at 31-32. Therefore, the effects would be cumulative.

The record shows that mine development at the Palmer Project is reasonably foreseeable. Constantine has invested $40 million in exploration at the project over a period of ten years. Second Green Decl., Doc. 57-3, ¶ 7. Constantine's exploration is not meandering over a vast area in a blind search for minerals; it focuses on a defined set of claims in a confined location. *See* Doc. 43-11 at 50 (showing BLM claims affected by proposed drilling); *id.* at 34 (showing previous drillholes); Doc. 43-24 at 13-16 (describing Constantine's work in the area and results up to 2014). Constantine's exploration has yielded positive results; far from being dissuaded after putting in so much time and money, the company now anticipates that in the next two or three years "assuming continued positive results . . . emphasis will shift from exploration to engineering & development." Doc. 43-2 at 68. Defendants could not, and do not, argue that Constantine's exploration is in its infancy. They cite no facts in the record which support their argument that mine development at the Palmer Project is not foreseeable. Although it is still possible that a mine will not be developed, Constantine's continued investment in the project would be irrational at this point if development were not at least reasonably foreseeable. *See* Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations, 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981) ("[I]n the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences.").

Constantine argues that the Court should defer to BLM's determination, in the 2016 Plan Approval decision record, that mine development was not reasonably foreseeable. Def.-Ints.' Br., Doc. 57 at 28-29, 40. At the time, however, BLM articulated no basis for its conclusion that

the Court could defer to. BLM's "determination" that mine development was not reasonably foreseeable amounts to a bald conclusion with no factual support or analysis. Doc. 43-13 at 5 ("The proponent is still in the exploration stage; therefore, it is not a reasonable future action to consider mining in this analysis."). As context for this assertion, the agency only stated that exploration occurs before mine development, and that approving exploration is consistent with the General Mining Law of 1872 and Federal regulations. *See* Doc. 43-13 at 5. Those points have no bearing on the question of reasonable foreseeability, and BLM did not provide any explanation of their relevance. BLM's conclusion is arbitrary because it is contradicted by the facts in the record. It does not deserve deference.

B. Analysis of mine development impacts cannot wait, because the exploration activities BLM approved may limit the agency's discretion to prohibit development later.

None of the cases that Defendants cite to support delaying analysis of connected actions and cumulative impacts dealt with a situation where the delay could hamper the government's ability to prevent the unanalyzed effects. Here, BLM cannot defer an analysis of the impacts of mine development because its discretion to prevent those impacts may narrow between the current decision point and the next. *See, e.g.*, *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 782 (9th Cir. 2006); *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988); *Conner,* 848 F.2d at 1446, 1448.

Defendants deny that BLM's discretion will change when discovery occurs. First, they deny that BLM has the requisite discretion to begin with. Constantine denies that BLM has any role in the withdrawal process. Def.-Ints.' Br., Doc. 57 at 19-21. BLM takes a different approach, arguing that even if BLM decided a withdrawal was appropriate, the agency would have no discretion to reject Constantine's exploration plan of operations on that basis. Defs.'

Br., Doc. 58 at 30. Both are wrong.

Prior to discovery, BLM has full authority to act on any determination that mineral development is too risky in the Chilkat River watershed, including in the context of Constantine's application for a plan of operations, by initiating a withdrawal. If an appropriately-scaled NEPA review revealed to BLM that withdrawal from the mining laws was necessary, the agency could file a withdrawal petition with the Assistant Secretary for Land and Minerals Management. *See* Dep't of the Interior, 603 Dep't Manual 1, 2 (2005); 43 U.S.C. § 1714(c)(1), (d) (a department or agency head can request a withdrawal). If the Assistant Secretary approved a withdrawal petition from BLM, he would propose a withdrawal. *See, e.g.*, 81 Fed. Reg. 95,738, 95,738 (Dec. 28, 2016) (proposing a withdrawal on the basis of BLM's petition). Proposing a withdrawal triggers segregation of the land from the public land laws, including the mining laws, for two years while the withdrawal is being considered. 43 C.F.R. § 2310.2; *see also* 81 Fed. Reg. 95,738. BLM could then disapprove Constantine's plan of operations on the basis of the segregation. 43 C.F.R. §§ 3809.100, 3809.411(d)(3)(ii). The applicable regulations would allow BLM to delay decision on a plan of operations as long as necessary to complete this process. *See id.* § 3809.411(a)(3)(ii) (permitting delay while BLM fulfills its NEPA obligations); *id.* § 3809.411(a)(3)(iv) (permitting delay while BLM or the Department of Interior fulfill other Federal obligations, such as the obligation to protect public values on the lands BLM manages).

Second, Defendants argue that, whatever authority the agency has, it will not be diminished in the future. BLM argues that approving the exploration project does not limit the Secretary of Interior's withdrawal authority under the Federal Land Policy and Management Act (FLPMA). Defs.' Br., Doc. 58 at 30. But BLM's assertion avoids the key issue. FLPMA

withdrawal is subject to valid existing rights, *see* 43 U.S.C. § 1701, Note (h), including the property rights that prospectors can obtain under the General Mining Law of 1872 by making a valuable discovery. Pls.' Br., Doc. 43 at 35-36. Therefore, once Constantine's exploration advances far enough that the company has made a discovery, a later withdrawal of lands will be ineffective at stopping a mine predicated on that prior discovery. Even assuming BLM or the Secretary has authority to void valid existing rights in order to protect the region, such an action would likely require the United States to make just compensation. Prior to discovery, BLM has the full authority to preclude a mine without this limitation, and the agency cannot relinquish that authority without considering the potential effects of mine development. *See Conner*, 848 F.2d at 1448-51.

Defendants insist that BLM's authority to prevent unnecessary and undue degradation is a viable substitute for withdrawal. Defs.' Br., Doc 58 at 28-29; Def.-Ints.' Br., Doc 57 at 27-28. Their arguments on this issue mirror those that the Ninth Circuit rejected in *Conner*, 848 F.2d 1441. There, the government argued that there was no environmentally significant difference between being able to preclude oil and gas drilling and being able to impose reasonable regulations on it. *Id.* at 1448-49. The court disagreed, explaining, "[w]e seriously question . . . whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance." *Id.* at 1450. Given this serious uncertainty, the court ruled that under NEPA, "unless [oil and gas] surface-disturbing activities may be absolutely precluded, the government must prepare an [environmental impact statement] before it makes an irretrievable commitment of resources" by relinquishing its right to prohibit the activity. *Id.* at 1451.

The same is true here. If anything, BLM's authority to prevent "unnecessary and undue degradation" is even less robust than the *Conner* agency's ability to impose "reasonable

conditions" on development, because implicit in the standard is that some amount of degradation is necessary and due because it is reasonably incident to mining operations. 43 C.F.R. § 3809.5 (defining unnecessary or undue degradation to exclude conditions, activities, and practices reasonably incident to mining). For example, hardrock mining often requires the construction of huge tailings storage facilities that obliterate the natural functions of the underlying land. *See* Doc. 43-21 at 3 (noting that "tailings facilities are probably the largest man-made structures on earth"). Mining is no less environmentally intrusive than the oil and gas drilling at issue in *Conner*.

C. It is reasonably possible to assess the potential impacts of future mineral development at the Palmer Project now.

BLM already has the means to conduct a reasonable analysis of potential environmental effects of future mine development on this record, notwithstanding that Constantine has yet to submit a mine development plan.

Defendants suggest that the analysis Plaintiffs seek is equivalent to a full-scale environmental impact statement for a mine development plan, and that BLM would be forced to speculate regarding the details of a mine that are not yet fleshed out. *See, e.g.*, Defs.' Br., Doc. 58 at 13; Def.-Ints.' Br., Doc. 57 at 42. However, what BLM has to consider here is not whether to permit a given mine plan, but the more general question of whether any mine development is consistent with protecting the other values in the area, such that BLM should allow Constantine's advanced exploration to proceed. There is no reason that analysis would need to approximate the type of analysis used for a proposed mine plan; the agency would have substantial discretion to define the appropriate level of detail. *See, e.g.*, *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1191-92 (9th Cir. 1988) (noting, in the context of the Outer Continental Shelf Lands Act, that the amount and specificity of the information NEPA requires varies at each stage leading up to

development). If Constantine ultimately submits a mine plan, it is at that time that BLM will conduct the kind of detailed NEPA review Defendants describe. *See Vill. of False Pass v. Clark*, 733 F.2d 605, 616 (9th Cir. 1984) (holding that, in a staged approval process in which certainty increases at each stage, NEPA can require repeat analyses at increasing levels of detail). Therefore, the repeated emphasis on the need to guess specific details about a mine now is misplaced.[3]

In other circumstances, there may be a point in time at which too little is known to conduct a meaningful analysis of a connected action's impacts. Requiring analysis at that time could run counter to NEPA's rule of reason. *See, e.g.*, 40 C.F.R. § 1502.22; *Trout Unlimited*, 509 F.2d at 1283. However, once it is reasonably possible to analyze environmental consequences, the agency cannot postpone the analysis. *Kern*, 284 F.3d at 1072.

It is reasonably possible to assess the potential environmental impacts of mine development in the Chilkat River watershed now. As Plaintiffs described in their opening brief, much of the information needed for such an assessment is in this record—BLM just refused to consider it or incorporate it into the environmental assessments for Constantine's exploration project. *See* Pls.' Br., Doc. 43 at 38-41; Doc. 43-13 at 5; Doc. 43-30. The record includes information about the environmental values of the Chilkat River watershed, *see* Doc. 43-16 at 10-11, the mineralization where Constantine is exploring, Doc. 43-24 at 17; Doc. 43-16 at 5-6, typical impacts of hardrock mining, Doc. 43-16 at 7-9; Doc. 43-26 at 4, 8-9, and conditions in

[3] Constantine also cites an Interior Board of Land Appeals decision which opines that analysis of mine development at the exploration stage is not specific enough to assist the agency. Def.-Ints.' Br., Doc. 57 at 38. This sweeping conclusion is at odds with Ninth Circuit case law, including cases approving staged NEPA analyses that increase in detail as the stages advance to site-specific proposals. *See Tribal Vill. of Akutan*, 869 F.2d at 1191-92. Here, BLM has never considered the potential effects of mine development at any level of detail, and a general discussion of those impacts would offer crucial guidance.

the area relevant to the likelihood and magnitude of those impacts should they occur. Doc. 43-11 at 149.

The fact that an analysis of mine development impacts would require some reasonable forecasting does not relieve the obligation. *See, e.g.*, *Conner*, 848 F.2d at 1450 ("The government's inability to fully ascertain the precise extent of the effects of mineral leasing in a national forest is not, however, a justification for failing to estimate what those effects might be before irrevocably committing to the activity."); *N. Plains Res. Council*, 668 F.3d at 1078 (holding that an agency was required to analyze the cumulative impacts of anticipated coal bed methane wells, even though their precise construction time and location was uncertain); *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 600 (9th Cir. 2010) (upholding BLM's assessment of the impacts of exploration activities in a project area, even though their specific location was yet to be determined). Far less forecasting would be necessary to analyze mine development at the Palmer Project than development of the oil and gas leases at issue in *Conner*, for example, which spanned over 1.3 million acres and two forests. 848 F.2d at 1443-44. The Palmer Project covers just 6,765 acres, and exploration drilling is taking place at a handful of identified prospects. Doc. 43-11 at 16, 50.

The ample available information that would support a general analysis of mine development impacts here distinguishes this case from *Environmental Protection Information Center*, which BLM cites. 451 F.3d at 1005. In that case, the court found it was not erroneous to exclude from a cumulative impacts analysis projects about which there was not yet enough information to permit meaningful consideration. *Id.* at 1014-15. Moreover, the court emphasized that as soon as more information was available, the agency did provide a general discussion of the projects' impacts. *Id.* at 1014-15. Finally, unlike here, there was no risk that

the agency's discretion with respect to the unanalyzed projects would narrow in the interim.

"NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." *Kern*, 284 F.3d at 1072. This assessment can already reasonably be done, given the information that is available and the discretion BLM would have to determine the appropriate depth of analysis.

II. THE PLAINTIFFS HAVE STANDING TO BRING THIS CASE.

Constantine argues that Plaintiffs lack prudential standing to bring this case, citing *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1254 (9th Cir. 2017). Def.-Ints.' Br., Doc. 57 at 21-22. *Havasupai* is inapposite. In that case, plaintiffs with environmental interests lacked prudential standing to claim that an agency action violated the General Mining Law, which only protects economic or property rights. *Havasupai*, 876 F.3d at 1254. By contrast, Plaintiffs here only claim that BLM's actions violated NEPA and the Administrative Procedure Act (APA). *See* Doc. 1 at 23-24. NEPA protects Plaintiffs' environmental and cultural interests. *Havasupai*, 876 F.3d at 1254. The fact that the decision is also governed by the General Mining Law does not deprive Plaintiffs of standing. *See id.* at 1253 (explaining that under the APA, a plaintiff's interests "must be arguably within the zone of interests to be protected or regulated by the statute that he says was violated").

Constantine erroneously asserts that, if successful, Plaintiffs' claims would force BLM to make a determination about—or, variously, an assumption as to—whether Constantine has made a discovery under the General Mining Law. Def.-Ints.' Br., Doc. 57 at 21-22, 24-26. The relief Plaintiffs request does not require BLM to make such an assumption or determination. Plaintiffs' argument is not that a discovery determination has to be made, but that, given the

advanced stage of Constantine's exploration and the potential that further exploration will result in discovery, BLM should have analyzed the potential impacts before approving more exploration. Constantine's confusion on this point also accounts for its misplaced reliance on *Northern Alaska Environmental Center v. Lujan*, 872 F.2d 901 (9th Cir. 1989), which is about unique obligations to make discovery determinations under the Alaska National Interest Lands Conservation Act, not about an agency's obligations under NEPA.

Constantine argues that Plaintiffs forfeited the right to pursue their claim because they did not present withdrawal as an alternative in the NEPA processes for the exploration project. Def.-Ints.' Br., Doc 57 at 22-23. This argument is addressed to a claim Plaintiffs have not made. Plaintiffs' actual claim is about BLM's failure to complete even an initial assessment of how mine development could affect the Chilkat River watershed, not the adequacy of the agency's alternatives analysis. Plaintiffs plainly believe BLM should consider the option of withdrawal once it has undertaken the required assessment, but that issue is not before the Court here.

Constantine is also wrong that Plaintiffs waived their claims in this case because their public comments to BLM did not specifically cite the potential narrowing of withdrawal authority as a reason to analyze the impacts of future mine development. Def.-Ints.' Br., Doc. 57 at 14. Public comments preserve claims even when framed "in non-legal terms rather than precise legal formulations," as long as the agency had "sufficient notice . . . to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 898-99 (9th Cir. 2002)). BLM's discussion in the environmental assessments demonstrates that the agency was on notice it should analyze mine development impacts, which is all the law requires. *See id.*; Doc. 43-32 at 12.

III. THE APPROPRIATE REMEDY IS VACATUR.

Vacatur is the ordinary and appropriate remedy for BLM's failure to comply with NEPA. 5 U.S.C. § 706(2)(A).

Defendants have not identified any "rare circumstances" that would justify eschewing vacatur here. *Humane Soc'y of U.S. v. Locke,* 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). In all of the cases Defendants cite where a court declined to vacate agency action that violated NEPA or another environmental law, vacatur itself would have caused serious environmental harm.[4] In *Kunaknana v. U.S. Army Corps of Eng'rs*, the court found that "halting construction . . . could result in more environmental harm than if the project [wa]s allowed to proceed." No. 3:13-CV-00044-SLG, 2014 WL 12813625, at *3 (D. Alaska July 22, 2014). In *Westlands Water District v. U.S. Department of Interior*, vacatur of a water allocation decision would have allowed the continuation of severe environmental harms that Congress had long before directed the agency to address. *See* 275 F. Supp. 2d 1157, 1231-34 (E.D. Cal. 2002), *rev'd in part on other grounds*, 376 F.3d 853 (9th Cir. 2004) ("The current dispute is unusual in that environmental concerns are on both sides of the balance of hardships."). In *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989 (9th Cir. 2012), vacatur based on violations of the Clean Air Act would have stopped the construction of a "much needed" power plant, resulting in regional blackouts that would necessitate the use of diesel generators, causing more air pollution. *Id.* at 993-94.

Defendants do not argue—and could not argue—that halting Constantine's exploration while BLM complies with NEPA would cause environmental harm, let alone serious

[4] In its brief, Constantine apparently confuses *National Wildlife Federation v. Espy*, 45 F.3d 1337 (9th Cir. 1995), and *Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853 (9th Cir. 2004). *See* Def.-Ints.' Br., Doc. 57 at 43. Between the two, only *Westlands Water* affirmed a district court's decision not to vacate agency action. 376 F.3d at 877.

environmental harm. Nor would it deprive the region of a necessary utility service, as in *California Communities Against Toxics*. The cases Defendants rely on do not support a conclusion that this is one of the rare circumstances in which vacatur is inappropriate.

Defendants' requests for further briefing on remedy should be rejected. With respect to vacatur, BLM asserts that it is not possible to discuss the seriousness of the NEPA violation at issue in this case until the Court decides whether it was in fact a violation. Defs.' Br., Doc. 58 at 31-32. There is no support for this assertion. BLM could easily have discussed its views about the seriousness of the NEPA violation Plaintiffs allege without a decision from the Court. Constantine, meanwhile, did not even provide a reason for its request for additional briefing on remedy. Def.-Ints.' Br., Doc. 57 at 43. No further briefing is necessary. Furthermore, granting Defendants' request would potentially delay a decision on remedy until after the start of the 2019 exploration season, increasing the risk that Constantine will make a discovery in the meantime and limiting the value of any relief ordered.

IV. IN THE ALTERNATIVE, AN INJUNCTION PENDING COMPLIANCE WITH NEPA IS WARRANTED.

In the alternative, Plaintiffs request that the Court enter an injunction prohibiting activities under the unlawful Plan Approval and Road Extension decisions, and remand them to BLM to remedy its NEPA violation.

A. Defendants' actions are causing irreparable harm to Plaintiffs.

Plaintiffs are experiencing ongoing irreparable harm because they are precluded from viewing, using, and experiencing the Palmer Project area in its undisturbed state. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018) (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)); Doc. 43-38, ¶ 11; Doc. 43-42, ¶¶ 6, 8, 15; Doc. 43-39, ¶¶ 21-22; Doc. 43-35, ¶ 8; Doc. 43-36, ¶ 11; Doc. 43-37, ¶ 12; Doc. 43-

41, ¶ 18. Constantine asserts that the record shows there has been mining in the Porcupine Mining District since the 1890s, suggesting that therefore Plaintiffs cannot complain there has been meaningful change. *See* Def.-Ints.' Br., Doc. 57 at 44. However, mining disturbance has not been continuous during that period, and there is no evidence it has occurred on a scale equivalent to Constantine's exploration project or in the same locations. *See, e.g.*, Doc. 36-1 at 31 ("After 1935, mining within the Porcupine district greatly diminished."). In fact, Constantine's exploration project disturbs approximately seven times as much land as BLM had previously authorized. Doc. 43-11 at 13, 19. This increase inflicts irreparable injury to the Plaintiffs' interests in the land subject to the expansion.

In another attempt to minimize the harm Constantine's exploration activities will cause Plaintiffs, the company focuses on the environmental harms from those activities, characterizing them as insignificant. Defs.' Br., Doc. 58 at 33-34; Def.-Ints.' Br., Doc. 57 at 45.[5] As BLM has acknowledged, however, the exploration activities do cause direct harm to the environment. *See* Doc. 43-13 at 2 ("the exploration operations in Glacier Creek will have adverse effects"); Doc. 43-30 at 2 ("the road extension would have adverse effects"). Moreover, these activities substantially harm Plaintiffs' use and enjoyment of the area. They displace wildlife, deter Plaintiffs with industrial sights and sounds, and block Plaintiffs' access. *See supra* pp. 21-22. Plaintiffs' years of lost opportunity to use and enjoy the area in its natural state for subsistence, recreation, and connection to ancestral experience are irreparable. Furthermore, Defendants fail to address the fact that as long as Constantine's exploration activities are allowed to continue,

[5] Defendants quote a public comment letter submitted to BLM by Plaintiff Rivers Without Borders in support of their argument that Plaintiffs will not be irreparably harmed. This comment merely drew a comparison between the exploration project's impacts and the much greater impacts of potential mine development. It did not purport to characterize how the exploration project would harm Rivers Without Borders, or any other Plaintiff.

they increase the likelihood that BLM's discretion will be narrowed so as to limit protections available to address the even greater irreparable injury that would flow from mine development.

B. Plaintiffs' remedies at law are inadequate.

Constantine suggests Plaintiffs' remedies at law are adequate to prevent future mine development because Plaintiffs could request that BLM deny any development proposal or withdraw the area from mining. Def.-Ints.' Br., Doc. 57 at 44. This is both wrong and beside the point. Constantine fails to appreciate that in this case, Plaintiffs seek to require BLM to comply with its NEPA obligations by analyzing the potential effects of mine development, not to deny a future mine. The company also ignores the fact that withdrawals are subject to valid existing rights, and that once Constantine obtains property rights at the Palmer Project, BLM's discretion to deny a lawful mine proposal will be constrained by those rights. *See supra* pp. 13-14.

C. The balance of harms favors an injunction.

The balance of harms tips in favor of an injunction. In its arguments to the contrary, Constantine inappropriately discounts ongoing irreparable harm to Plaintffs' use of the land, focusing on the environmental harms from exploration that the company characterizes as insignificant. *See supra* pp. 22-23. With respect to future harms to Plaintiffs, Constantine argues that there will be none unless the worst-case scenario occurs, and BLM unlawfully permits a mine that would cause unnecessary and undue degradation of the environment. Def.-Ints.' Br., Doc. 57 at 45. Constantine is wrong. The surface occupation and environmental degradation "reasonably incident" to mining the Palmer Project would irreparably harm Plaintiffs, even if BLM succeeded in preventing unnecessary or undue degradation. *See* 43 C.F.R. § 3809.5; *see also* Doc. 43-27 (comparing predicted and actual water quality at hardrock mines).

Constantine also argues that its own harm might be irreparable if an injunction issues. Def.-Ints.' Br., Doc. 57 at 45-46. However, the only harm Constantine describes is financial, which is generally not irreparable. *See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Constantine is also guilty of the kind of worst-case assumptions the company claims Plaintiffs have made, projecting that any analysis BLM conducts would take "considerable time," "would likely be followed by litigation," and "could potentially cause Constantine to lose its entire investment." Def.-Ints.' Br., Doc. 57 at 45-46. The need for environmental review is a predictable reality of mineral exploration and development on federally managed public lands. Constantine has no basis on which to predict what conclusion BLM may reach after conducting the appropriate analysis.

Plaintiffs' ongoing and future irreparable environmental harms outweigh any potential financial harms to Constantine. "[T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation," not merely harm "to a legalistic 'procedure,' nor, for that matter, merely to psychological well-being." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989).

Finally, Constantine argues that the Court should not issue an injunction because the company may already have made a discovery. Def.-Ints.' Br., Doc. 57 at 44-45. Significantly, Constantine does not argue that a discovery *has* already occurred, only that it might have occurred. Even if Constantine is correct, the possibility does not weigh against an injunction for two reasons. First, as discussed above, Plaintiffs are suffering irreparable harm from Constantine's exploration activities themselves. Second, as long as it remains unclear whether a discovery has occurred, NEPA's timeliness component means that it is imperative no further exploration occur which could narrow BLM's discretion before the agency has conducted the

required analysis. This is like arguing against an injunction stopping activities that would harm an endangered species because no one has proven the species is not already extinct. Plaintiffs do not bear the burden of proving discovery has not yet occurred.

D. An injunction would serve the public interest.

Granting an injunction is also in the public interest. There is a "public interest in careful consideration of environmental impacts before major federal projects go forward, and . . . that suspending such projects until that consideration occurs comports with the public interest." *All. for the Wild Rockies*, 632 F.3d at 1138 (internal quotation omitted). Defendants argue that an injunction would eliminate the jobs at the Palmer Project, and Constantine claims that Haines would lose the company's charitable contributions and spending. Defs.' Br., Doc 58 at 34; Def.-Ints.' Br., Doc. 57 at 46. Implicit in this argument is the unsupported assumption that an injunction pending analysis on remand would permanently end Constantine's exploration activities on BLM land. Any injunction issued in this case would be narrow, only halting activity during the time it takes BLM to conduct the required analysis.

CONCLUSION

BLM approved Constantine's exploration project in violation of NEPA. Plaintiffs request that the Court vacate the Plan Approval and Road Extension decisions, or, in the alternative, remand to BLM with the direction to comply with NEPA and enjoin all activities under the Plan Approval and Road Extension decisions pending BLM's completion of NEPA review.

Respectfully submitted this 28th day of September, 2018.

s/ Erin Whalen
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EARTHJUSTICE

Attorneys for Plaintiffs Chilkat Indian Village of Klukwan et al.

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, a copy of foregoing PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 AND DISTRICT OF ALASKA LOCAL RULE 16.3 was served electronically on Dean Dunsmore and James F. Clark.

s/ Erin Whalen
Erin Whalen