Nos. 15-15754, 15-15857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAVASUPAI TRIBE, GRAND CANYON TRUST, CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB,
Plaintiffs-Appellants,

v.

HEATHER C. PROVENCIO, KAIBAB NATIONAL FOREST SUPERVISOR, UNITED STATES FOREST SERVICE,
Federal Defendants-Appellees,
and

ENERGY FUELS RESOURCES (USA), INC., EFR ARIZONA STRIP LLC.,
Intervenors-Defendants-Appellees.

Appeal from the U.S. District Court
for the District of Arizona, No. 13-8045-DGC

INTERVENORS-DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

GALLAGHER & KENNEDY, P.A.
Michael K. Kennedy (Bar No. 004224)
mkk@gknet.com
Bradley J. Glass (Bar No. 022463)
brad.glass@gknet.com
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000

Counsel for Intervenors-Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

I. SUMMARY OF ARGUMENT

The Canyon Mine has been the subject of extensive litigation in the U.S. District Court for the District of Arizona and this Court. *See Havasupai Tribe v. United States*, 752 F.Supp. 1471 (D. Ariz. 1990), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, *Havasupai Tribe v. United States*, 503 U.S. 959, 112 S.Ct. 1559, 118 L.Ed.2d 207 (1992); *Grand Canyon Tr. v. Williams*, 98 F.Supp.3d 1044 (D. Ariz. 2015), *aff'd sub nom. Havasupai Tribe v. Provencio*, 876 F.3d 1242 (9th Cir. 2017). Throughout the litigation, the Trust has raised numerous claims under the National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") relating to its environmental, recreational, and conservation interests in the Mine. The Trust does not seek rehearing of its NEPA and NHPA claims here. Instead, the Trust requests rehearing on the Court's decision that the Trust lacks prudential standing under the Mining Law of 1872 ("Mining Law") to assert claim four, which alleges that the U.S. Forest Service ("USFS") violated several federal laws, including the Federal Land Policy and Management Act ("FLPMA") and the Mining Law, by failing to take various costs into account when it voluntarily prepared a Mineral Report dated April 18, 2012 ("Mineral Report"), that it was not required by law to prepare.

To decide claim four, the Court examined the substance of the Claim; reviewed the purposes of FLPMA and the Mining Law; determined that the central

issue was FLPMA's requirement that a withdrawal be "subject to valid existing rights" ("VER"), 43 U.S.C. § 1701 note (h); determined that FLPMA does not define or address VER; looked to the Mining Law to determine how VER are established and who may challenge them; examined the Trust's environmental, recreational, and conservation interests; concluded that those interests fall outside the Mining Law's zone of interests; and ultimately held that Appellants lacked prudential standing to challenge the Mineral Report under the Mining Law. The Court's decision is thorough and well-reasoned; consistent with Supreme Court and other appellate decisions; follows established precedent under the Mining Law and zone of interests test; and does not present a question of exceptional importance.

To avoid the Court's decision, the Trust seeks to use FLPMA in an unprecedented way to achieve what it could not through NEPA and NHPA – that is, to challenge operation of the Mine by collaterally attacking and invalidating Defendant-Intervenor-Appellees Energy Fuels Resources (USA) Inc.'s and EFR Arizona Strip LLC's (together, "EFR's") VER in the Mine. The Trust asserts that it has environmental, recreational, and conservation interests in those rights that USFS should have considered when the agency prepared the Mineral Report. The Court correctly determined the Trust does not have prudential standing to assert such interests or to attack EFR's rights under the Mining Law. The Court's

decision is supported by 140 years of Mining Law jurisprudence and administration; is entirely consistent with the Court's zone of interests test; and properly held that NEPA and NHPA – not the Mining Law – afford the Trust a statutory basis to protect its environmental, recreational, and conservation interests. Accordingly, the Court should deny the Petition.

II. BACKGROUND

EFR's Canyon Mine ("Mine") is a breccia pipe uranium mine located in a natural clearing on unpatented mining claims on USFS-managed lands in the Kaibab National Forest in northern Arizona, approximately 10 miles south of Grand Canyon Village and some 13 air miles south of the Grand Canyon itself. ER295-98[1]; SER0078; SER0157. EFR's mining claims were located in 1978. ER234. Valuable minerals were discovered in a "major deposit" of uranium following exploratory drilling from 1978 to 1983. ER232, 242, 250-51. From 1983 to 1985, EFR's predecessor "delineate[d] the uranium mineralization … to determine the placement of the mine shaft" and established VER. ER242. USFS then approved EFR's Plan of Operation ("Plan") in 1986. ER375-89. The Plan was upheld against administrative and judicial challenges, remains valid today, and authorizes EFR to operate the Mine. *Havasupai*, *supra*; 36 C.F.R. §§ 228.4, 228.5;

[1] The Excerpts of Record and Supplemental Excerpts of Record filed with the merits briefs in this appeal are cited as "ER__" and "SER__."

ER002, 184-85, 216.

EFR's predecessor placed the Mine on stand-by status when uranium prices fell in 1992 and maintained the Mine under the interim management portions of the Plan. *Grand Canyon Tr.*, 98 F.Supp.3d at 1049. In January 2012, the Department of Interior ("DOI") withdrew approximately 633,547 acres of public lands and 360,002 acres of National Forest System lands for 20 years from location and entry under the Mining Law ("Withdrawal"). 77 Fed. Reg. 2317-01 (Jan. 17, 2012); *Grand Canyon Tr.*, 98 F.Supp.3d at 1049. The Withdrawal included the location of the Mine, which was identified in the Withdrawal's final environmental impact statement ("EIS"). 74 Fed. Reg. 35,887-01 (July 21, 2009); *Grand Canyon Tr.*, 98 F.Supp.3d at 1050.

In August 2011, EFR notified USFS that it intended to resume operations under the Plan. *Id*. In response, USFS voluntarily completed the Mineral Report to confirm that EFR had VER.[2] The Mineral Report was completed on April 18, 2012, and confirmed that EFR had VER. *Id*. USFS also undertook a "Mine

[2] Both the District Court and this Court determined that the Mineral Report is not required by law, and the Trust has not challenged those determinations. *See Grand Canyon Tr.*, 98 F.Supp.3d at 1054 ("[T]he relevant regulations and guidance documents did not require a [Mineral Report]. Mining could have resumed without one."); *Havasupai Tribe*, 876 F.3d at 1251 ("the Mineral Report did not 'permit, license, or approv[e]' resumed operations at Canyon Mine; it simply acknowledged the continued vitality of the original approval of the [Plan of Operations].").

Review." *Id*. The Mine Review was conducted by a 13-person interdisciplinary team with expertise in minerals and geology, surface and groundwater, air quality, transportation, tribal consultation, heritage resources, vegetation, NEPA, and socioeconomic issues. *Id*. USFS's team evaluated the Plan; historical and religious issues related to local tribes; sensitive tribal sites; the effect of resumed operations on the quality of air, surface water, and groundwater; and the effect of resumed mine operations on wildlife and any threatened, endangered, or sensitive species. *Id*. The Mine Review was completed on June 25, 2012, and concluded that EFR could resume operations under the Plan without any modifications or amendments.

III. ARGUMENT

A. The Court's decision is correct, and en banc consideration is not necessary to secure or maintain uniformity of the Court's decision.

The Court held that the Trust was not within the zone of interests protected by the Mining Law, and thus, did not have prudential standing to challenge the Mineral Report. To avoid this holding, the Trust now asserts that FLPMA – not the Mining Law – forms the legal basis of the Trust's claim four; and that the Trust's environmental, recreational, and conservation interests fall within both FLPMA's and the Mining Law's zones of interests. For the reasons set forth by USFS in its Opposition, the Trust's arguments are without merit and should be

rejected. EFR provides the following to supplement USFS's arguments.

1. The Mining Law – not FLPMA – forms the legal basis for the Trust's challenge.

The Trust asserts that its challenge to the Mineral Report is based upon FLPMA's withdrawal authority and VER exemption – not the Mining Law. The Court correctly rejected this argument once, and it should do so again. FLPMA guides BLM's management of public lands. 43 U.S.C. §§ 1701(a)(1), 1712; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 877 (1990). The bulk of FLPMA focuses on BLM's administration of public lands, range management, grazing, rights-of-way, and designated management areas. 43 U.S.C. §§ 1731-87. As both the District Court and this Court found, the Trust does not, and cannot, point to any provision within FLPMA that requires the discovery of valuable minerals, creates a prudent person/marketability test, or otherwise grants the Trust a right to assert a claim under the Mining Law to challenge the Mineral Report. ER007-11, 019.

FLPMA's relationship with mining and the Mining Law is set forth in FLPMA § 302(b), 43 U.S.C. § 1732(b), which provides:

> Except as provided in section 314, section 603, and subsection (f) of section 601 of this Act and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.[3]

[3] The identified exceptions do not address or amend the Mining Law's core provisions. Instead: Section 314 addresses recordation requirements; Section 603 addresses BLM' s study and management of wilderness areas and mining claims

FLPMA could not be any clearer: it did not amend the Mining Law or impair the rights of those with VER. Neither does it incorporate by reference the Mining Law. Quite the contrary, it refers to the Mining Law as a stand-alone law that is not impacted by FLPMA. Despite this plain language, the Trust argues that FLPMA's withdrawal provisions and VER exemption protect the Trust's interest by closing public lands to mining through withdrawals. This argument is misguided. *The VER exemption is intended to protect the VER as determined under applicable mining or other law, not the proponents of the withdrawal*. The Trust's argument that FLPMA § 204 allows withdrawals is beside the point. Nothing in Section 204 addresses mining, let alone the discovery of valuable minerals requirement. 43 U.S.C. § 1714. The Trust's reliance on Section 701 also is misplaced. That provision applies to "[a]ll actions" by DOI, and also does not address mining. 43 U.S.C. § 1701 note (h). It requires that DOI's acts, not acts of miners or anyone else, are "subject to [VER]." *Id*. That means that all DOI's acts give way, and are subordinate to, others' VER under the Mining Law and any other applicable laws. This includes the Withdrawal. 77 Fed. Reg. 2563-01 (Jan. 18, 2012). Nothing in FLPMA provides any standard against which USFS's

---

therein; Section 601(f) addresses mining claims in the California Desert Conservation Area; and the last sentence of Section 302(b) requires BLM to manage public lands to prevent unnecessary or undue degradation. *Id*. §§ 1732(b), 1744, 1781(f), 1782. These exceptions are not relevant here.

Mineral Report could be measured. 37 ER019. For those same reasons, neither does the Withdrawal. Accordingly, based upon its plain language, FLPMA is not the relevant statute for purposes of the zone of interests test, and the Court properly looked to the Mining Law.

2. FLPMA's withdrawal provisions and VER exemption protect property rights established by the Mining Law, and the Court properly applied the Mining Law's zone of interests.

The Trust next argues that FLPMA's withdrawal provisions and VER exemption benefit non-mining users of public lands. It argues that its interests "in limiting the public lands that may be mined" and "'haphazard' mining" fall within FLPMA's and the Mining Law's zones of interests. Petition at 14. Both the District Court and this Court carefully considered and evaluated the Mining Law and the property interests that it protects. The District Court explained claim four and the various interests as follows:

> Claim four alleges that the [Mineral Report] is flawed – that it failed to consider and properly evaluate relevant information when it concluded that the Canyon Mine had valid existing mineral rights. In essence, claim four challenges Energy Fuel's rights in the uranium at the Canyon Mine. But Plaintiffs do not assert competing interests in the uranium; they have not engaged in the procedures established by the Mining Law for acquiring mineral interests; and they did not participate in the [Mineral Report]. Nor does the Mining Law protect the environmental and historical interests Plaintiffs assert in this case. Other statutes such as NEPA and NHPA protect such interests, but the Mining Law does not.
>
> Because Plaintiffs' interests are not "marginally related to . . . the purpose implicit" in the Mining Law, *see Ashley Creek*, 420 F.3d at

> 940, they lack prudential standing to bring claim four. To hold otherwise would give environmental groups and tribes the right to challenge every grant of private mineral rights under the Mining Law. Mineral claimants would be forced into the courts, the costs associated with validating rights would increase, and the "obvious purpose" of the Mining Law – to reward and encourage mineral discovery – would be undermined.
>
> The Ninth Circuit has often held that purely economic interests are inconsistent with the environmental interests protected by NEPA. (citations omitted). Thus, plaintiffs asserting economic injuries lack prudential standing under NEPA. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land Action*, 8 F.3d at 716. This case presents the same situation in reverse – the "obvious purpose" of the Mining Law is to protect economic interests in mineral deposits, not the environmental or historical interests held by Plaintiffs.

Grand Canyon Tr., 98 F.Supp.3d at 1059-60.

This Court agreed with Judge Campbell and held that the Mining Law protects those with competing economic interests in VER, just as NEPA protects environmental interests and NHPA protects cultural and religious interests. *Havasupai Tribe*, 876 F.3d at 1254. The Trust has provided no legal authority, additional argument, or reason to rehear these well-reasoned decisions that the Trust's environmental, recreational, and conservation interests are outside the Mining Law's zone of interests and, therefore, they lack prudential standing to claim violations of the Mining Law and challenge the Mineral Report.

3. Standing is limited to those with rights created by the Mining Law.

The Trust next argues that "the panel incorrectly limited the zone of interests

in the Mining Law's 'valuable mineral deposit' requirement." Petition at 12. The Trust asserts that this requirement protects the Trust's interests by restricting the public lands that may be mined. To make this argument, the Trust relies on the "competitor-standing" principle, which holds that a statutory limitation on the markets that a person serves arguably protects the financial interests of that person's competitors. The Trust's reliance on the "competitor-standing" principle is misplaced for several reasons.

First, the Trust does not assert competing interests in the uranium at the Mine; it has not engaged in the procedures established by the Mining Law to acquire mineral interests; it did not bring a claims contest; and it did not participate in the Mineral Report. Consequently, the Trust is not covered by the "competitor-standing" principle. Second, there is nothing in the text or history of the Mining Law that bestows recreational or conservation interests upon non-miners, such as the Trust, that are equal to and opposing the mining rights explicitly provided to miners, such as EFR. The Mining Law promotes and regulates mining interests, but contains no such similar provisions or regulations for non-mining uses. Finally, the cases on which the Trust relies to apply the principle are distinguishable. Each of those cases discusses their respective statute's express requirements, thus providing standing to the injured plaintiffs for the respective agency's failure to comply with the requirements. *See Bennett v. Spear*, 520 U.S.

154, 175-77 (1997) (Endangered Species Act's requirement to consider "commercial data" encompassed plaintiffs' economic interests); *Pit River v. BLM*, 793 F.3d 1147, 1155-58 (9th Cir. 2015) (Statute required BLM to conduct a review under NEPA and NHPA considering the cultural, historical, and environmental effects of its leasing decision before making a lease-extension determination); *Nat'l Wildlife Fed. v. Burford,* 871 F.2d 849, 852–53 (9th Cir. 1989) (Mineral Leasing Act expressly requires consideration of economic and environmental impact of coal mining). In each case, the plaintiff had a statutorily-defined competing interest that authorized the right to bring suit. The Mining Law, upon which the Trust seeks prudential standing, contains no such language and does not require consideration of the Trust's environmental interests when determining VER. For these reasons, the "competitor-standing" principle does not give the Trust prudential standing to challenge the Mineral Report.

B. <u>This appeal does not involve a question of exceptional importance.</u>

The Trust contends that the Court's decision involves a question of exceptional importance. Although there is no set rule for making such determinations, the Supreme Court has set a high bar for convening en banc courts, finding they "are the exception, not the rule" and should be convened "only when extraordinary circumstances exist." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). This case does not involve a question of exceptional

importance for several reasons.

1. The Court's determination that the Trust does not have standing to challenge the Mineral Report is not a question of exceptional importance.

The Trust's inability to challenge the Mineral Report under the Mining Law does not present a question of exceptional importance.[4] As noted above, EFR's predecessor established VER in the Mine and Plan by 1986. USFS voluntarily conducted a mineral exam to confirm that EFR's VER remained valid prior to EFR resuming operations at the Mine. A mineral report documents the conclusions and recommendations of a BLM or USFS mineral examiner following a mineral exam (*i.e.*, an investigation of whether a mining claim is valid under the Mining Law). SER0528, 0593, 0597-98. As BLM has explained:

> A mineral report serves two functions. One is to give a professionally prepared and technically reviewed report on the merits of the mining claim. . . . Secondly, the mineral report can be a powerful tool when submitted into evidence at a contest hearing. . . . A well-prepared report will assure quality control over the mineral examination process, and will help to ensure that the Government has a sound prima facie case to stand upon before issuing a contest complaint.

SER0457. A mineral report may support a recommendation to BLM to initiate a claim contest to invalidate a claim. It is an internal, investigatory

[4] The Mineral Report is not required by law. The District Court acknowledged that if it invalidated the Mineral Report, USFS's position was that a new Mineral Report would not be required and mining could resume. *Grand Canyon Tr.*, 98 F.Supp.3d at 1062.

document that reflects a mineral examiner's opinion on whether a discovery has been made under the prudent person/marketability test, which is used to inform later agency decision-making. It is not a formal determination and has no legal effect. ER007-11, 120-23; *see* ER742-44 (mineral reports are "statements of belief and not formal determinations" that are used as a "basis for a decision on whether or not to contest the claim.").

To complete the Mineral Report, USFS's mineral examiners visited the Mine, reviewed records, evaluated ore deposits, toured facilities, and conducted an economic evaluation of the Mine. *Grand Canyon Tr.*, 98 F.Supp.3d at 1052. The Mineral Report ultimately confirmed that EFR had VER to the Mine. However, because the Mineral Report was not a formal determination and had no legal effect, and even if a new mineral report would be required if invalidated by the Court, it is not the kind of document that raises a question of exceptional importance. This is especially true in light of well-established precedent that third parties may not bring challenges under the Mining Law.[5] Consequently, the Court's decision that

[5] The Trust relies on a single case, *Wilderness Soc'y v. Dombeck*, 168 F.3d 367 (9th Cir. 1999), to argue that non-miners have prudential standing to challenge a VER determination under the Mining Law. *Dombeck* does not support the Trust's argument for two reasons. First, the Court did not address prudential standing in *Dombeck*, and therefore, it has limited application here. Second, the decision is factual distinguishable. *Dombeck* involved a protest to a mineral patent. The Mining Law expressly grants standing for anyone to challenge whether a patent application complies with the Mining Law, including whether a VER determination was done properly. Because the Mining Law granted standing to the

the Trust lacked prudential standing to challenge the Mineral Report under the Mining Law does not present a question of exceptional importance.

2. The unique facts surrounding the Mine and Withdrawal do not present a question of exceptional importance.

The unique facts surrounding the Mine and Withdrawal limit the potential impact of the Court's decision. EFR had VER in the Mine and an approved Plan by 1986. Consequently, EFR had VER when DOI issued the Withdrawal and withdrew nearly 1,000,000 acres of land for 20 years from location and entry under the Mining Law. 77 Fed. Reg. 2317-01 (Jan. 17, 2012); *Grand Canyon Tr.*, 98 F.Supp.3d at 1052. As noted above, because USFS was not required to prepare the Mineral Report and it had no legal effect, it is unlikely that such a scenario will arise again.

The Withdrawal is also unique. The Withdrawal's EIS acknowledged that there were four mines, including the Mine, with approved plans of operations, and the potential for another seven mines in the withdrawn area. A.R. 10314-15; *Grand Canyon Tr.*, 98 F.Supp.3d at 1053). The fact that there are only 11 potential

---

Dombeck plaintiffs, they were allowed to bring their claim and prudential standing was not an issue. The Trust's claim four does not involve a patent protest; rather, it involves a challenge to a voluntarily prepared mineral report for a mine with VER and a valid plan of operations. As discussed above, the Mining Law does not grant third parties a right to challenge a mineral exam under this scenario. As a result, the types of challenges involved in *Dombeck* and here are completely different and distinguishable, and *Dombeck* does not support the Trust's argument.

mines located within approximately 1,000,000 acres covered by the Withdrawal demonstrates that this case does not present a question of exceptional importance.

3. Because NEPA and NHPA protect its interests, the Trust's inability to bring claims under the Mining Law does not present a question of exceptional importance.

The Trust opens its Petition with the allegation that "[t]he panel's decision is the first ever to hold that plaintiffs with Article III standing based on an undisputed interest in protecting federal public lands do not have 'prudential standing' to challenge an industrial use of those public lands." Petition at 1. This allegation ignores the fact that the Trust has standing under NEPA and NHPA to protect its environmental, recreational, and conservation interests and to challenge the use of public lands that impact those interests. Indeed, it exercised its standing in this case. Specifically, utilizing NEPA and NHPA, the Trust argued that the Mine's EIS: (1) failed to consider the "no-action alternative; (2) failed to give adequate consideration to tribal religious and cultural interests; (3) was based on incomplete hydrogeological information; (4) failed to adequately consider the environmental impact of disposal of radioactive waste; and (5) failed to adequately consider the environmental cumulative impacts of mining in the region. *Havasupai Tribe*, 752 F.Supp. at 1490. While it did not succeed on its claims, the Trust was given an opportunity to raise all of its interests and concerns regarding the Mine. Because NEPA and NHPA protect its environmental, recreational, and conservation

interests, the Trust's inability to bring a Mining Law claim does not present a question of exceptional importance.

4. The merits' evidence demonstrates that there is no question of exceptional importance.

EFR demonstrated that the Trust's claim four was without merit. While the Court did not reach the merits, this evidence demonstrates that the Trust's claim four does not present a question of exceptional importance. The Trust argues that the Mineral Report is faulty because USFS did not consider certain environmental monitoring costs and conservation measures required by the Plan. Not so. EFR, an experienced miner, submitted comprehensive cost estimates for the development and operation of the Mine in accordance with the Plan and all applicable laws. SER1120. Monitoring costs were included in mining site and general and administrative costs (budgeted at $9,298,136.94 (costs of operating under the Plan at $110.42/ton)), and conservation costs were covered as surface facility costs (budgeted at $508,000). A $1.7 million contingency also was included. *Id*.; ER244-47; SER1186-87 Consistent with BLM's mineral exam guidance (SER0653), USFS verified those costs, compared them to costs from EFR's similar, nearby mines, and performed an economic evaluation of the costs to develop the Mine, as compared with the value of mineral resources based on commodity prices. ER244-50. USFS concluded that the Mine could be developed with a profit of $29,350,736, and thus, that the claims were valid. ER250.

Even if the Trust's asserted costs were not included (they were), the 1986 EIS calculated those activities would cost $131,060. SER0144. At triple that amount ($393,180), overly accounting for inflation, those costs are well within the Mine's $1.7 million contingency, and not enough to off-set the Mine's projected profit of nearly $30 million. Even if USFS erred as the Trust asserts, it would be a harmless error. It would not change the conclusion that the claims were valid. And as discussed above, if the Mineral Report were invalidated, a new mineral report would not be required. These facts demonstrate that the Trust's claim four does not present a valid claim – much less a claim of exceptional importance.

IV. CONCLUSION

For the foregoing reasons, the Petition should be denied.

RESPECTFULLY SUBMITTED this 20th day of April, 2018.

GALLAGHER & KENNEDY, P.A.

By: */s/ Bradley J. Glass*

Michael K. Kennedy
Bradley J. Glass
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Intervenors-Defendants-Appellees Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC

STATEMENT OF RELATED CASES

Intervenors-Defendants-Appellees Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC state that they are unaware of any related cases before this Court, other than the consolidated appeal, Docket Number 15-15857.

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULES 35-4 AND 40-1

I hereby certify, pursuant to Circuit Rule 35-4 and 40-1, that the foregoing opposition to the petition for rehearing en banc is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 4,200 words.

/s/ Bradley J. Glass
Attorney for Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, I electronically filed Intervenors-Defendants-Appellees' Opposition to Plaintiff-Appellant Havasupai Tribe's Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bradley J. Glass
Attorney for Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC

6556201v1/21569-0005