UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 15-15857 (Consolidated with No. 15-15754)

GRAND CANYON TRUST, *et al.*,
Plaintiffs-Appellants

v.

HEATHER PROVENCIO and UNITED STATES FOREST SERVICE,
Defendants-Appellees, and

ENERGY FUELS RESOURCES (USA), INC., *et al.*,
Intervenor-Defendants-Appellees.

On appeal from the United States District Court
for the District of Arizona
Case No: 13-8045-DGC

ENVIRONMENTAL AND NATURAL RESOURCE LAW PROFESSORS' AMICUS BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae Environmental and Natural Resources Law Professors have no corporate status and therefore no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

AUTHORSHIP AND FUNDING STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), Amicus state that no counsel for a party authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

IDENTITY AND INTERESTS OF AMICI CURIAE

This brief is filed on behalf of a group of legal scholars ("Environmental and Natural Resources Law Professors") who study and write about natural resources and public lands legal issues. The group includes authors of the leading casebooks, treatises, and articles in the field. Several members of this group are law professors who live and work in the Ninth Circuit. The interest of the Environmental and Natural Resources Law Professors is in ensuring the coherent development of the

field. The brief is intended to provide specialized expertise and perspectives that may be of assistance to the Court in considering this case.

Amici obtained the consent of all parties to file this brief via electronic mail dated January 30-31, 2018. A motion for leave to file is therefore not required. Circuit Rule 29-2(a).

ARGUMENT

I. THE COURT SHOULD GRANT EN BANC REVIEW TO ENSURE CONSISTENCY WITH SUPREME COURT ZONE-OF-INTEREST ANALYSIS.

The panel's decision held that plaintiffs who sued to enforce rights under a public lands statute lacked prudential standing.[1] The opinion conflicts with Supreme Court and Ninth Circuit precedent and creates unwarranted confusion in prudential standing doctrine. The opinion imposes new and significant barriers to public land law claims, and would have far-reaching effects on administrative law cases generally. The panel's mistakes are two-fold. First, the court failed to analyze the "zone-of-interest" test under the correct statute. Second, the court applied an unprecedentedly narrow approach to the question of which interests satisfy the zone-of-interest test, in direct conflict with recent Ninth Circuit precedent. En banc review is therefore required to (1) "secure or maintain uniformity of the court's decisions," and (2) resolve "a question of exceptional importance" involving public land law claims and claims seeking review of agency action generally. Fed. R. App. P. 35(a).

[1] The panel framed its analysis as prudential standing. *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1253 n. 5 (9th Cir. 2017). The parties argued that the Supreme Court rejected that approach in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). Regardless of the framing, the panel's zone-of-interest analysis was flawed and amici therefore take no position on whether prudential standing analysis survived *Lexmark*.

The zone-of-interest test was initially developed for Administrative Procedure Act (APA) claims. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). Pursuant to the test, courts assess whether the parties' interests in the litigation align with what Congress sought to protect or regulate under the relevant statute. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The Supreme Court has repeatedly emphasized that the zone-of-interest test is not intended to be particularly demanding. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). A party has satisfied the test if its interest is "arguably" one Congress intended to protect or regulate. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S 479, 488 (1998); *Pit River Tribe v. BLM*, 793 F.3d 1147, 1155-56 (9th Cir. 2015). Any doubt regarding whether the claim falls within the zone-of-interest is resolved in favor of the plaintiff. *Patchak*, 567 U.S. at 225. Further, the test should be applied consistent with Congress's intent "to make agency action presumptively reviewable" under the APA. *Id.*, (quoting *Clarke*, 479 U.S. at 399). The interests analyzed depend on the particular statutory provision under which the parties seek relief, *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997), but courts may also consider the larger context of the relevant statute, *see Clarke*, 479 U.S. at 403.

The panel opinion failed to heed the Supreme Court's cautionary and narrow approach to rejecting claims based on the zone-of-interest test. First, the opinion transmutes the appellants' claims from the ones they sought to enforce under the Federal Land Policy and Management Act (FLPMA) to claims brought under another statute. Second, the opinion construes the interests encompassed by the zone-of-interest test far too narrowly.

II. THE PANEL ANALYZED THE ZONE-OF-INTEREST UNDER THE WRONG STATUTE.

Petitioners challenged the Forest Service's determination of a uranium mine's valid existing rights on lands withdrawn by the Secretary of the Interior. Petitioners sued under the APA to require the agency to fulfill its obligations under FLPMA. The panel opinion's first mistake was to analyze the zone-of-interest test under the Mining Law of 1872, rather than FLPMA. *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1253-54 (9th Cir. 2017). Under the Mining Law, all lands held by the U.S. Government are open for "locating" a mining claim to explore for a "valuable mineral deposit". 30 U.S.C. §§ 22 *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 575 (1987). Locating a claim involves marking "the boundaries of the claim" and fulfilling certain administrative requirements. *Cole v. Ralph*, 252 U.S. 286, 296 (1920); *United States v. Shumway*, 199 F.3d 1093, 1099 (9th Cir. 1999).

FLPMA, passed in 1976, states Congress's intention to have public lands "managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. §1701(a)(8). To achieve this purpose, FLPMA authorizes the Secretary of the Interior to "withdraw" public lands from the operation of the Mining Law. 43 U.S.C. § 1714(a); §1702(j). The withdrawal authority allows the agency to "maintain other public values in the area…". 43 U.S.C. § 1702(j). Under FLPMA, all of the Secretary's actions, including the withdrawal power, are subject to "valid existing rights". 43 U.S.C. § 1701; Pub. Law 94-579, §701 note (h).

In this case, the Secretary exercised FLPMA authority to withdraw public lands surrounding Grand Canyon National Park from disposition under the Mining Law. The Secretary's authority to do so was upheld in *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845 (9th Cir. 2017), which recognized that concerns regarding the impact of uranium mining were a significant factor in the Secretary's decision, *id*. at 857, 866. Petitioner's claim in this case is that the Forest Service violated FLPMA when it limited the scope of the Secretary's withdrawal by improperly performing a valid existing rights determination for a uranium mining claim. The panel, without any explanation or analysis, transmuted petitioner's claims to ones arising under the Mining Law. The panel's analysis directly conflicts with Supreme Court and Ninth Circuit precedent.

A. Petitioner's cause of action arises under FLPMA.

The Mining Law does not define a single requirement for when an agency must conduct a formal process to determine if a miner has a valid claim. *See* 30 U.S.C. §§22 *et. seq.* But under FLPMA, the Secretary's decision to withdraw public lands terminates the ability of miners to enter and locate minerals on public lands. 43 U.S.C. §1714(a); § 1702(j); *see Lara v. Sec'y of Interior of U.S.*, 820 F.2d 1535, 1542 (9th Cir. 1987)("[T]he right to prospect for minerals ceases on the date of withdrawal…."); *see also Swanson v. Babbitt*, 3 F.3d 1348, 1352 (9th Cir. 1993). Therefore, at the moment of withdrawal, the miner must have discovered a "valuable" mineral deposit in order to conduct mining operations on withdrawn lands. *See Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 375 (9th Cir. 1999) (holding a valuable mineral must have been discovered "at the time of withdrawal" to create a valid existing right under the Wilderness Act). The discovery of a valuable mineral deposit creates a valid existing right that FLPMA preserves by limiting the authority of the Secretary to withdraw lands. *See id.*

Although the Forest Service approved Energy Fuels' proposed plan of operations prior to the withdrawal of the land by the Secretary, it did not make and has never made a finding that Energy Fuels made a "discovery" of a valuable mineral deposit prior to the withdrawal. Grand Canyon Trust Reply Br. 7. That finding was necessary to give Energy Fuels a valid existing right to withstand the

withdrawal. *See Wilderness Soc'y*, 168 F.3d at 375; Grand Canyon Trust Reply Br. 26-28. Due to the withdrawal, the Forest Service does not have the authority to allow a miner to continue operations, including mining, *see Lara*, 820 F.2d at 1542, unless the right to mine is valid and pre-dates the withdrawal, *see Wilderness Soc'y*, 168 F.3d at 375. Petitioners are suing to ensure the Forest Service has not exceeded its authority under FLPMA by allowing mining to continue in the absence of a valid existing right – the only limit on the Secretary's withdrawal of land from operation of the Mining Law. *See* 43 U.S.C. § 1701; Pub. Law 94-579, §701 note (h); § 1702(j). Petitioners claim therefore arises under FLPMA.

To properly decide if the zone-of-interest test is satisfied, the court must consider the interests that Congress chose to protect or regulate under FLPMA, not the Mining Law. Yet the panel's opinion did the opposite. The Mining Law does not displace FLPMA as the basis for the petitioner's cause of action simply because the court may look to it to guide its understanding of valid existing rights.

B. The cause of action does not change if the statute incorporates terms from another statute.

Statutes commonly incorporate terms or portions of another act by reference. This does not transform the cause of action to one brought under the referenced statute. When analyzing a statute that incorporates another by reference, the court treats the second statute as if it were a part of the first. *See Hassett v. Welch*, 303

U.S. 303, 314 (1938); *United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998). *Ammari v. City of Los Angeles*, 988 F. Supp. 2d 1139, 1146 (C.D. Cal. 2013)(if a statute refers to another and incorporates the second statute's language, the effect is the same as if the language were "set forth in the first."), *aff'd sub nom. Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192 (9th Cir. 2016).

In *Iverson*, a defendant violated the Clean Water Act (CWA), the Washington Administrative Code (WAC), and Olympia's Municipal Code (Olympia code) by discharging wastewater into municipal sewers. 162 F.3d at 1021. The Olympia code defined the term "pollutant" and incorporated by reference any standards in the WAC that were more stringent. *Id.* at 1020. The WAC in turn incorporated by reference standards defined in section 307 of the Federal Water Pollution Control Act (amended by the CWA). *Id*. By the definitions contained solely in either the Olympia code or the WAC, a discharge into a publicly owned treatment plant was permissible unless it affected water quality. *Id*. However, the court found that through incorporation by reference of standards set forth in the CWA, both the WAC and the Olympia code prohibited a discharge into a publicly owned treatment plant, regardless of its actual effect on water quality. *Id.* at 1020-21. *Iverson* illustrates a central theme in statutory interpretation – it is common to incorporate terms from other statutes, and doing so

does not convert a claim under one statute to a claim under the referenced act. *Iverson*, 162 F.3d 1015.

In this case, as the panel observed, FLPMA does not expressly define the term valid existing rights. *See* Laitos, "*The Nature and Consequence of 'Valid Existing Rights' Status in Public Land Law.*" 5 JOURNAL OF MINERAL LAW & POLICY 399, 399-400 (1990). The valid existing rights phrase is a term of art that incorporates by reference an unknown variety of rights, privileges, or interests that Congress recognized in FLPMA. *Id*. A private party may have obtained a variety of rights and interests in public lands through a long history of land disposal and resource allocation statutes, such as: the Homestead Act of 1862, 43 U.S.C. § 161, the Mining Law of 1872, 30 U.S.C. § 22, the Timber Culture Act of 1873, ch. 277, 17 Stat. 605 (1873), the Desert Land Act of 1877, 43 U.S.C. § 321, and the Federal Coal Leasing Act Amendments of 1975, 30 U.S.C. § 201.

FLPMA's approach of preserving rights and interests created in other statutes does not result in FLPMA's displacement by those statutes. Similar to the issue in *Iverson*, the effect of FLPMA's incorporation by reference is to pull another statute's definition into its terms, not to transform FLPMA into the secondary statute. *See Iverson*, 162 F.3d at 1020-21; *see also Ammari*, 988 F. Supp. 2d at 1146. The panel decision incorrectly concluded the petitioner's claims

arose under the Mining Law, not FLPMA, and as a result, the court failed to evaluate the interests in the relevant statute, FLPMA.

Even if it is implicated, the Mining Law, both as enacted and as modified over the years, contemplates that its activities will be regulated to promote other objectives, including environmental protection, which arguably brings plaintiffs within its zone of interest. As enacted, the Mining Law made activities under it subject to "regulations prescribed by law", 30 U.S.C. § 22, which could encompass state as well as federal law. *See Cal. Coastal Comm'n*, 480 U.S. 572, 583, 586-87 (1987); *People v. Rinehart*, 377 P.3d 818 (Cal. 2016), *cert. denied*, 2018 WL 311309. And Congress has several times modified it to expressly recognize various forms of regulation. One such example was in the so-called Surface Resources Act of 1955. *See* 30 U.S.C. § 612; *United States v. Curtis-Nevada Mines*, 611 F.2d 1277, 1280 (9th Cir. 1980). Another example is found in a portion of FLPMA, which obligates the Interior Secretary to "take any action necessary to prevent unnecessary or undue degradation of the lands," 43 U.S.C. § 1732(b), which expressly applies to activities under the Mining Law. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 20, 42 (D.D.C. 2003).

III. THE PANEL MISAPPLIED THE SCOPE OF THE ZONE-OF-INTEREST TEST.

The panel decision's second, and more problematic, mistake was to apply an unprecedentedly restrictive approach to determining whether parties' interests are protected under the relevant statute. The zone-of-interest test does not require a party to be an intended beneficiary of the statute. *Patchak*, 567 U.S. at 225 (citing *Clarke*, 479 U.S. 399-400.). The Supreme Court has repeatedly held the zone-of-interest test is satisfied by parties with interests that compete with those of a regulated party. *Nat'l Credit Union*, 522 U.S. at 488–91; *see Data Processing*, 397 U.S. at 157 (finding that those with interests affected by a "broad or narrow interpretation" of an act fall within the zone-of-interest). Noneconomic concerns such as religious, aesthetic, and recreational interests can establish standing under the zone-of-interest test. *Data Processing*, 397 U.S. at 154. ("We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here."). In the land use context in particular, the Supreme Court and Ninth Circuit have held that noneconomic interests meet the zone-of-interest test and recognized standing for parties with environmental interest that compete with private, economic interests. *See Patchak*, 567 U.S. at 226-28; *Pit River Tribe*, 793 F.3d at 1149.

A. The zone-of-interest test is satisfied if a party's interests compete or conflict with the interests of parties regulated by the statute.

The Supreme Court has consistently held that parties with interests that compete with financial institutions can challenge an agency's decision regarding limitations on the institutions' lines of business. *E.g. Nat'l Credit Union*, 522 U.S. at 488-91. Most recently, in *Nat'l Credit Union*, the Supreme Court determined that commercial banks were not the intended beneficiaries of limitations on the markets served by federal credit unions. *Id.* at 492-93. Nonetheless, Congress's regulation of credit unions directly affected the market available to commercial banks. *Id*. at 493. Congress and the commercial banks had the same interest in limiting the markets served by credit unions, whether Congress intended to benefit the banks or not. *Id*. at 493-94. The commercial banks met the zone-of-interest test and had standing to ensure the limitations on credit unions were properly enforced. *Id.* at 493.

The holding was bolstered by four previous Supreme Court cases, each of which involved businesses with statutory interests that depended on limitations on financial institutions' ability to branch into new lines of business. Each opinion affirmed the institution's competitors' standing under the zone-of-interest test. *Id.* at 489-92 (citing *Data Processing*, 397 U.S. 150; *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curium); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Clarke*, 479 U.S. 388 (1987)).

Similarly, the petitioner here has interests in limitations on the right to mine. *See Nat'l Credit Union*, 522 U.S. at 493. Just as competitors of financial institutions have interests in legal limitations imposed on those institutions, the petitioner has protectable interests in enforcing mandated limits on public lands mining. Competition over mining and natural resources is similar to competition between commercial banks and federal credit unions for market-share. Legislation that regulates one group inevitably implicates the other group's access to a limited resource. *See Data Processing*, 397 U.S. at 157; *Pit River Tribe*, 793 F.3d at 1149. Congress's interests and those of the parties challenging agency interpretations are therefore the same. *See Nat'l Credit Union*, 522 U.S. at 493.

It does not matter whether Congress specifically intended to benefit the petitioners by limiting mining on public lands. What matters is that petitioner's interests depend upon the broad or narrow interpretation of the miner's right to mine. *See id.*; *Data Processing*, 397 U.S. at 157. In this case, the panel recognized that some competing interests would meet the zone-of-interest test. But the panel erred by differentiating between competing economic or property interests, and all other interests that compete in the land-use context.

B. Petitioners do not need to have an economic or property interest to meet the zone-of-interest test.

This Circuit recently affirmed that non-economic interests suffice to meet prudential standing requirements in the natural resources law context. In *Pit River Tribe*, the Ninth Circuit determined that the Geothermal Steam Act's purpose was to "promote the development of geothermal leases on federal lands." 793 F.3d at 1149. The court acknowledged that the plaintiff land users' interests were "environmental, recreational, aesthetic, and scientific in nature" and incompatible with the development of geothermal resources. *Id*. The court nonetheless concluded that the land users were within the zone-of-interest of the Geothermal Steam Act provision granting the Bureau of Land Management (BLM) authority to make lease extension decisions. *Id*.

Pit River Tribe is in line with the Supreme Court's reasoning in *Patchak*, a case involving a land owner's challenge to the Secretary's authority to acquire land under the Indian Reorganization Act (IRA). *Patchak*, 567 U.S. at 211. The landowner was not claiming a property interest in the land, but instead asserted "economic, environmental, and aesthetic harm" that would result from the Secretary's intention to put the land into trust status in order to allow an Indian tribe to build a casino. *Id.* at 211-13. The IRA was intended to benefit tribes economically through its authorization to the Secretary of the Interior to restore protected status to tribal property. *Id.* at 226. The land-use purpose of the statute,

casino development, was inextricable from the land-acquisition authority it granted to the Secretary. *Id.* at 225-26. The Court found the land owner's conflicting land use interests met the zone-of-interest test under the IRA's acquisition provision. Specifically, the Court held that all the plaintiff's "interests, whether economic, environmental, or aesthetic" were within the statute's zone-of-interest and did not limit its holding to the land owner's economic interests. *Id*. at 227-28.

Here, the panel held the Mining Law had an economic purpose and recognized that those with "competing claims" would arguably be within the zone-of-interest. *Havasupai Tribe*, 876 F.3d at 1254. The decision, however, ignored precedent treating many different interests as meeting the zone-of-interest test in the land use context, even when the primary purpose of the statute at issue was economic. Instead, the panel differentiated between property interests and other types of interests in land use. *Id.* This is an inappropriately narrow treatment of competing interests under the zone-of-interest analysis. In *Patchak*, despite the economic nature of the statute, the Supreme Court specifically held that it was *not* a property interest providing the land owner standing. 567 U.S. at 213. It was *all* other competing land-use interests including environmental and aesthetic interests that met the zone-of-interest test. *Id*. at 227-28. In the current case, petitioner's environmental, recreational, and aesthetic interests compete with miners' economic

land use interests, just as the *Patchak* land owner's interests competed with the tribe's economic land-use interests.

The Ninth Circuit has applied the logic in *Patchak*, and held that land users with competing environmental, recreational, aesthetic and scientific interests in land use were within the zone-of-interest of the Geothermal Leasing Act, a statute intended to promote economic development of public land. *Pit River Tribe*, 793 F.3d at 1149. Just as commercial banks' interests are incompatible with those of other financial institutions and depend on their proper limitation, the petitioners' interests are incompatible with those of miners and depend upon the appropriate limitation of mining under FLPMA.

The panel in this case chose to differentiate between competing land use interests by finding that only property interests would satisfy the zone-of-interest test. The panel's approach conflicts with multiple Supreme Court opinions as well as a recent decision by this court on similar facts, and should therefore be reconsidered.

IV. THE PANEL'S DECISION HAS WIDESPREAD IMPLICATIONS.

The panel's approach to prudential standing is unprecedented and could affect a wide range of public lands cases. The analytic mistakes also have implications for zone-of-interest analysis more generally.

In the public lands context, there are dozens of statutes and executive orders that use the term "valid existing rights" – the Wilderness Act of 1964, 16 U.S.C. §1131, Alaska National Interests Lands Conservation Act, 43 U.S.C. § 160, Federal Coal Leasing Amendment Act, Pub. L. No. 94-377, 90 Stat. 1083 (1976) (codified as amended at 30 U.S.C. § 201), to name a few. Laitos, at 403-05. Rights and interests that may constitute valid existing rights cross the legal spectrum, and include surface rights, mineral rights, possession rights, and various other forms of property rights. *See id*. The area covered by the Grand Canyon withdrawal alone contains over 10,000 located mining claims, and this represents just a single category of valid existing rights. Grand Canyon Trust En Banc Pet. at 17. In short, an untold number of public and private interests on every manner of public lands will be impacted by the panel's decision on prudential standing.

More generally, the panel's restrictive approach to zone-of-interest analysis could affect cases brought under financial regulation statutes, *Nat'l Credit Union*, 522 U.S. 479 (citing to four Supreme Court cases), and virtually any challenges to agency action under the APA. *Patchak*, 567 U.S. at 225 (citing *Clarke*, 479 U.S. 399-400.).

CONCLUSION

For the reasons stated above, Amici Environmental and Natural Resources Law professors respectfully support the Petitioners' Request for Rehearing En Banc.

CERTIFICATION OF COMPLIANCE UNDER CIRCUIT RULE 32-1

I certify that: Pursuant to Circuit Rule 32-1(e), this Petition is proportionately spaced, has a typeface of 14 points or more, and contains less than 4,200 words.

/s/ Eric Biber, February 5, 2018
Date

CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on February 5, 2018, I electronically filed the foregoing petition 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 certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Eric Biber

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