No. 19-35424

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHILKAT INDIAN VILLAGE OF KLUKWAN; SOUTHEAST ALASKA CONSERVATION COUNCIL; LYNN CANAL CONSERVATION; and RIVERS WITHOUT BORDERS, a project of TIDES CENTER,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT; WILLIAM PERRY PENDLEY, exercising the authority of the Director of the Bureau of Land Management; CHAD PADGETT, in his official capacity as Alaska State Director of the Bureau of Land Management; and MARNIE GRAHAM, in her official capacity as Field Manager of the Bureau of Land Management Glennallen Field Office,

Defendants-Appellees,

and

ALYU MINING CO. INC.; HAINES MINING & EXPLORATION, INC.; and CONSTANTINE NORTH, LLC,

Intervenor-Defendant-Appellees.

On Appeal from the United States District Court
for the District of Alaska

APPELLANTS' OPENING BRIEF

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September 16, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Chilkat Indian Village of Klukwan, Southeast Alaska Conservation Council, Lynn Canal Conservation, and Rivers Without Borders, a project of Tides Center, hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

The Chilkat River watershed where Constantine Metal Resources ("Constantine Metals") explores for minerals at its Palmer Exploration Project ("Palmer Project") is dramatically beautiful and ecologically rich, supporting all five species of Pacific salmon, Dolly Varden, trout, eulachon, and numerous mammal and bird species that live off these fish. The continuing health of this river ecosystem is vital to the people of the Chilkat Indian Village of Klukwan ("Klukwan") who have called it their home for thousands of years; to the world's largest gathering of bald eagles that congregates there each fall; and to Southeast Alaska residents who depend on it for commercial and recreational fishing and other purposes.

Mining at the Palmer Project could severely harm salmon and other environmental values in the watershed. The type of deposit the company is exploring is among the most likely to produce acid mine drainage and other environmental problems when mined. However, when the Bureau of Land Management (BLM) approved what the company described as its final exploration plan—an action which may enable the company to acquire a right to develop a mine—BLM completely refused to consider the environmental impacts of such a mine.

BLM's refusal violated the National Environmental Policy Act (NEPA) for three reasons. First, NEPA requires an agency to look before it leaps by considering development impacts before taking action that could facilitate development without preserving the agency's authority to preclude development absolutely. BLM's decisions to approve exploration at the Palmer Project do not preserve its authority to preclude development. Instead, by providing the company an opportunity to acquire a right to extract minerals through its approved exploration activities, those decisions take the kind of blind leap that NEPA prohibits.

Second, NEPA requires agencies to consider in their NEPA documents all cumulative impacts, *i.e.*, the incremental impacts of the proposed action in combination with those of reasonably foreseeable future actions. Mine development at the Palmer Project is now reasonably foreseeable and its impacts will be cumulative to those of exploration, given Constantine Metals' two decades of prior exploration in the area and the fact that the company believes this is the last stage of exploration needed before it will decide whether to develop a mine.

Third, NEPA requires agencies to consider in the same NEPA document all connected actions, including any later actions that provide the sole justification or utility for a preliminary action the agency is considering. Here, Constantine Metals' proposed mineral exploration and potential mine development at the

Palmer Project are connected actions because the exploration has no utility independent of potential mine development.

BLM's justification for refusing to consider mine development impacts focuses on a formalistic approach that treats the entire mineral exploration process as being so preliminary that it does not trigger the need to look forward to potential mine development. This arbitrary line-drawing does not take into account that confidence in the mineral resource increases during exploration until the last exploration stage, which immediately precedes a decision about whether to pursue development. Indeed, in this case, Constantine Metals expects to shift to mine engineering and development immediately following the current exploration, and there is already substantial information available about the potential impacts of mine development at the Palmer Project. Under these circumstances, BLM's formulaic separation of exploration and development does not satisfy the agency's obligation under NEPA to justify its decisions based on the relevant facts.

It is imperative for BLM to consider the potential environmental impacts of mining at the Palmer Project now, before allowing Constantine Metals to advance any further in this final stage of mineral exploration. The decisions Appellants challenged here may represent BLM's last chance to decide whether the Chilkat River watershed is an acceptable place to build an industrial-scale hardrock mine,

or whether fuller protection is necessary to maintain the watershed's outstanding ecosystem values.

Appellants ask the Court to declare BLM's decisions approving the exploration unlawful and vacate them or, in the alternative, enjoin all activity authorized by those decisions and remand them to BLM to satisfy NEPA's obligations.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because the action arises under federal statutes. This Court has jurisdiction based on 28 U.S.C. § 1291 because this is an appeal from a final decision of a district court. The district court issued an opinion disposing of all parties' claims on March 15, 2019, I-ER-3-55, and entered final judgment on May 7, 2019, I-ER-1-2. Appellants filed the notice of appeal on May 13, 2019, II-ER-56-60, which is within the 60 days allowed for appeals when an agency of the United States is a party. Fed. R. App. P. 4(a)(1)(B)(ii).

ISSUES PRESENTED

Whether BLM violated NEPA and acted arbitrarily by approving Constantine Metals' final mineral exploration plan and plan modification without any analysis of the environmental impacts of potential mine development at the Palmer Project because:

(I) The decisions to approve such exploration may allow Constantine Metals' exploration to advance to the point at which precluding mine development is no longer an option available to BLM; or

(II) Mine development is reasonably foreseeable and its potential environmental impacts will be cumulative to exploration impacts; and/or

(III) Mine development is a connected action the possibility of which provides the sole justification for mineral exploration.

STATEMENT OF STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory, regulatory, and other authorities appear in the addendum to this brief.

STATEMENT OF THE CASE

I. Procedural history

Appellants Chilkat Indian Village of Klukwan, Southeast Alaska Conservation Council, Lynn Canal Conservation, and Rivers Without Borders, a project of the Tides Center, filed their complaint challenging BLM's approval of Constantine Metals' exploration plan and subsequent plan modification on December 4, 2017. IV-ER-823-47.

The Chilkat Indian Village of Klukwan is a federally recognized Indian tribe whose traditional territory includes the entirety of the Palmer Project area. II-ER-82, 85-86, ¶¶1, 2, 6-8. The Tribal Government of the Chilkat Indian Village

represents Klukwan's interests and cares for the community under the authority of its federally recognized Constitution. II-ER-84, ¶4. Klukwan practices traditional subsistence fishing, hunting, mushroom-, and berry-gathering in the Chilkat watershed, including in the Palmer Project area, the lands surrounding it, and the waters immediately downstream. II-ER-86, ¶8. These practices are important to Klukwan and its members not only economically, but also for the maintenance and enrichment of the Klukwan's traditional values and cultural life. II-ER-86-87, ¶9. Tourism in the Chilkat River region is also economically important to Klukwan. II-ER-85-86, ¶7. The Chilkat watershed and its environmental values are culturally and economically crucial to the Village's way of life.

The Southeast Alaska Conservation Council, Lynn Canal Conservation, and Rivers Without Borders are conservation organizations whose members and supporters use and enjoy the Palmer Project area and Chilkat River watershed in a variety of ways, including harvesting salmon and other natural resources for customary and traditional uses (subsistence), recreational and commercial purposes, and aesthetic enjoyment. II-ER-92-112.

The district court granted Constantine Metals' motion to intervene on May 24, 2018. CR 40.

On March 15, 2019, the district court upheld BLM's decision, denying Appellants' motion for summary judgment. I-ER-3-55. The district court entered judgment for Defendant BLM on May 7, 2019. I-ER-1-3.

Appellants appealed the district court's decision on May 13, 2019. II-ER-56-57.

II. The Chilkat River watershed sustains the people of Klukwan, all five species of Pacific salmon and the fisheries they support, and the world's largest known gathering of bald eagles.

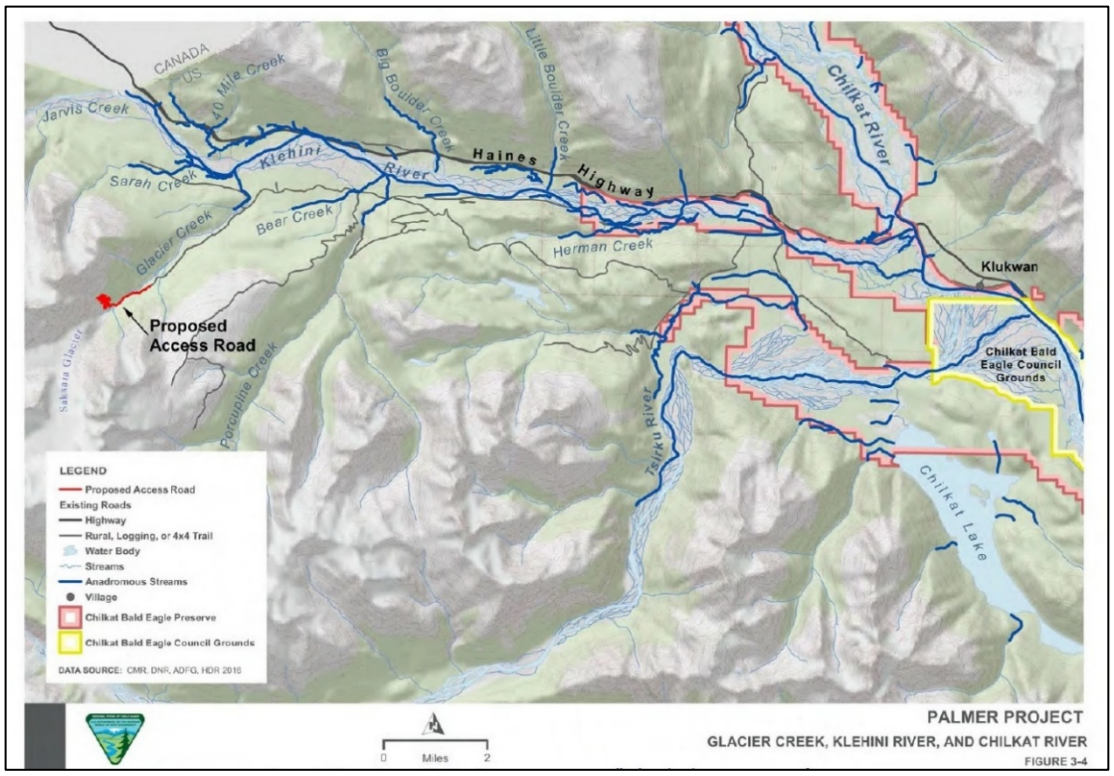
The exploration at issue here is part of Constantine Metals' Palmer Project, which has been in progress since 1998 and is aimed at discovering mineral deposits sufficient to justify building a mine to extract them. *See* III-ER-371; II-ER-62, ¶¶5, 7; II-ER-293. The primary minerals of interest at the site are zinc, copper, gold, silver, and barite. II-ER-240. The Palmer Project lies within a steep glacial valley near the headwaters of four creeks that flow into the Klehini River, which in turn flows into the Chilkat River, the Chilkat Inlet, and ultimately the ocean. III-ER-427. The Palmer Project is within the traditional territory of the Chilkat Tlingit people. III-ER-491.

Downstream of the Palmer Project on the bank of the Chilkat River sits village of Klukwan, just past where the Chilkat and Klehini Rivers merge. III-ER-450, Fig. 3-4. Klukwan is a traditional Tlingit subsistence community that

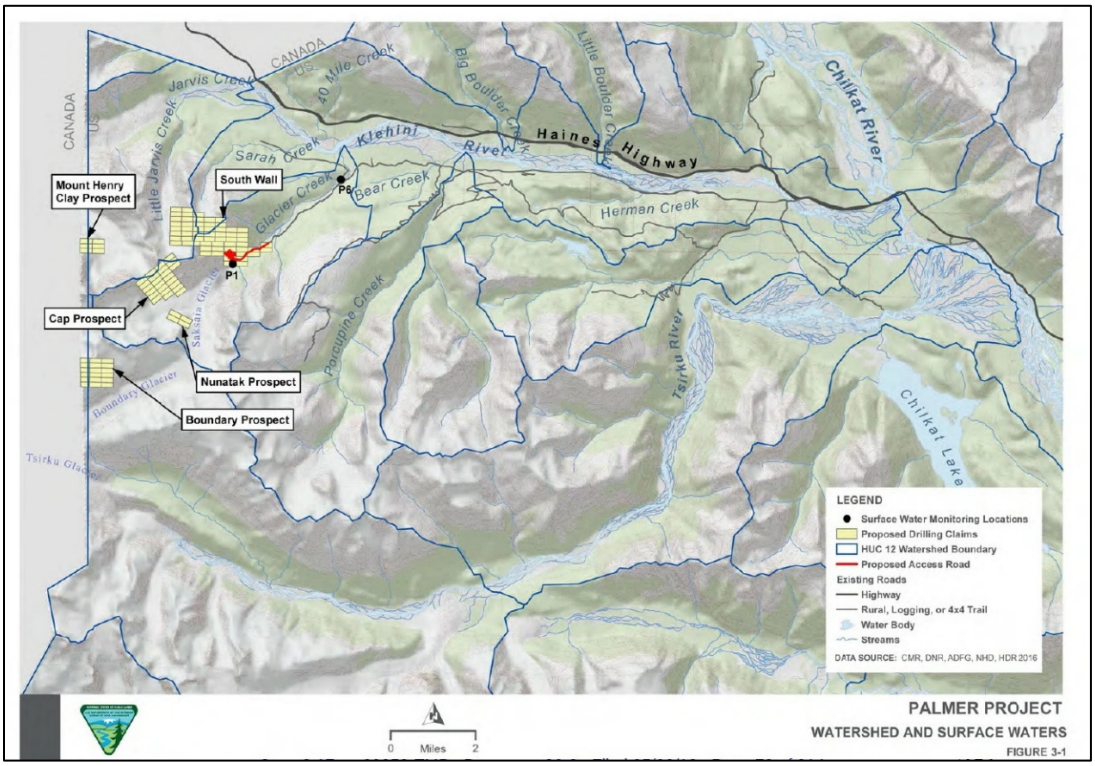
is home to, and serves as the cultural center of, the Chilkat Indian Village, a federally recognized Indian tribe. III-ER-509, 510.

Just downstream of Klukwan on the Chilkat River lies the Alaska Chilkat Bald Eagle Preserve ("Eagle Preserve"). III-ER-450, Fig. 3-4. The State of Alaska created the Eagle Preserve to "protect and perpetuate the Chilkat bald eagles and their essential habitats . . . in recognition of their statewide, nationally, and internationally significant values in perpetuity." AS 41.21.610(a); III-ER-490.

The following BLM maps show the location of the Palmer Project area relative to Klukwan, the Eagle Preserve, and surface waters, including anadromous fish streams.



III-ER-450, Fig. 3-4 (indicating the locations of Klukwan, the Eagle reserve,[1] and anadromous fish streams).



III-ER-428, Fig. 3-1 (indicating the location of the Palmer Project area).

The Palmer Project area and the surrounding Chilkat River watershed are of significant socioeconomic and cultural importance to the people of Klukwan, as is evident from the very names given to the land and water. The name "Klukwan" comes from *Tlakw Aan*, which means "Eternal Village" or "Village That Has Always Been" in the Tlingit language. II-ER-83, ¶2. Oral history holds that it was settled for its rich natural environment, so rich that the entire valley serves as a

[1] BLM sometimes refers more specifically to the bald eagle gathering site within the Eagle Preserve known as the "Council Grounds." *See* III-ER-456.

food bowl. II-ER-83, 90 ¶¶2, 14. The name "Chilkat River" itself comes from *Jilkaat Heeni*, Tlingit for "Storage Container for Salmon." II-ER-85-86 ¶7.

Historically, the people of Klukwan thrived on the Chilkat River watershed's abundant salmon, berries, and animals. III-ER-581-82; II-ER-83, 85, 90, ¶¶2, 6, 14. Today, subsistence harvests, particularly of salmon from the Chilkat and Klehini Rivers, are still the lifeblood of Klukwan. III-ER-581-82; II-ER-86, 90, ¶¶8,14. Villagers rely on all five species of Pacific salmon, steelhead trout, and Dolly Varden. III-ER-582. Compared to other rivers in Southeast Alaska, the Chilkat is the most consistently fished river for eulachon, a species harvested for food and for traditional and cultural uses. III-ER-591. The watershed is also important for cultural reasons: Klukwan is a traditional Tlingit subsistence community for which maintaining traditional cultural practices, including subsistence harvest, is central. II-ER-83, 85, 86, 90 ¶¶2, 6, 9, 14; III-ER-510; III-ER-581-82. Impacts to subsistence food sources in the watershed are impacts to the livelihoods and culture of the people of Klukwan. II-ER-85-86, 90, ¶¶7, 9, 14; III-ER-581-82; III-ER-361.

The Eagle Preserve sits at the confluence of the Klehini, Tsirku, and Chilkat Rivers. III-ER-455-56, 490. The State designated this area as critical habitat for bald eagles. III-ER-456, 490. Coho and chum salmon run in these waters exceptionally late in the year, bringing thousands of bald eagles in late October and

November for a last salmon feeding before the onset of winter. IV-ER-731-32; III-ER-456, 490. Eagles arrive from the U.S. Pacific Northwest, Canada, and Interior Alaska, drawing together the largest bald eagle concentration in the world. IV-ER-731-32; III-ER-456. Visitors to the Eagle Preserve support the local economy, allowing Klukwan and the nearby community of Haines to extend the visitor season into early winter and thus generate additional revenue. III-ER-582.

The Chilkat River watershed is also important to regional commercial and sport fisheries. The salmon returning to spawn in this drainage are harvested in the commercial fisheries of Southeast Alaska. III-ER-456-57, 459, 460. Sport anglers in Southeast Alaska and farther afield enjoy the watershed and the fish that return to it. III-ER-457. For example, over 1,600 sport anglers used the Chilkat River drainage for over 5,300 angler days in 2015 alone. III-ER-603b.

III. If mine development takes place at the Palmer Project, it may cause serious pollution in the Chilkat River watershed.

Constantine Metals' ongoing exploration activities preclude other uses of the project area and its vicinity by occupying physical spaces with infrastructure and equipment, generating disturbances that may displace users and wildlife, and creating safety concerns related to the use of heavy machinery, materials, and vehicles. III-ER-343-44; III-ER-419-20; III-ER-486, Fig. 3-8; III-ER-491-92; *see*

infra pp. 52-53. Potential harms arising at the mine development stage would be even greater in intensity, scope, and duration.[2]

Development involves "the actual mining, milling, and processing of the metal [or] ore" and the construction necessary to facilitate those steps. II-ER-68; *see also* IV-ER-760-61, Fig. 1.5.1. Development produces waste byproducts, including waste rock and finely crushed rock called "tailings." *See* II-ER-181 (describing factors that can influence the environmental impacts of these byproducts and therefore of the associated mine). Hardrock mine development can cause dramatic and lasting changes on the physical landscape. IV-ER-716 (finding that the average surface disturbance of a major mine is 1,901 acres). Hardrock mine development also threatens the downstream environment, particularly via pollution from mining wastes. *See*, *e.g.*, IV-ER-718; IV-ER-734; IV-ER-699 ("[S]evere world-wide ecological consequences, especially for aquatic resources, have resulted from mining ore deposits with acid-forming minerals.").

Constantine Metals has indicated that the Palmer Project area contains a volcanic-associated massive sulfide deposit. IV-ER-655. Such deposits "are among the most likely of all deposit types to have associated environmental

[2] For simplicity Appellants use the term "development" throughout the brief to refer to mineral extraction, processing, and the construction activities undertaken to facilitate mineral extraction and processing. At places in the record, mineral extraction and/or processing are referred to as distinct steps following development. *See* IV-ER-761-62; II-ER-68.

problems, particularly acid mine drainage." II-ER-178. Acid mine drainage is a form of pollution generated when sulfide rock is exposed to air and water; oxidation of the rock turns waters acidic, and these acidic waters dissolve heavy metals from the rock into the water. IV-ER-682-85. The result is a toxic cocktail of acidic water loaded with heavy metals. *Id.* Mining activities are especially prone to generate this form of pollution, because extraction and ore milling (the process of grinding ore into fine particles to draw out metals) vastly increase the surface area of rock, which accelerates oxidation and expedites the rates at which acidity and dissolved metals are released. IV-ER-684-85.

If the Palmer Project area is developed, acid and heavy metals could be transferred to waters exposed to mining wastes, known as contact waters. Acidity of contact waters can be strong. In fact, the highest levels of acidity ever measured in the environment—more acidic than battery acid—were in contact waters from a copper-zinc mine in the United States. II-ER-185. A mining operation can attempt to capture contact waters and treat them before the contact waters are released into the environment. IV-ER-717. However, these methods frequently do not operate as predicted. IV-ER-706. The likelihood of failure is significant, not least because mining wastes can persist and generate acid mine drainage for decades or more. IV-ER-685.

In addition to the problem of contaminated contact waters, a mine would need to dispose of the granular waste rock, known as tailings, that results from ore processing. Each disposal method has its own risks and drawbacks. Dry stacking, *i.e.*, dewatering and compacting tailings, and then storing them in piles, can increase the amount of water that must be treated or stored, IV-ER-676, introducing more opportunities for water management to fail. *See* IV-ER-706. On the other hand, wet tailings storage using an impoundment or tailings dam creates, in addition to water treatment challenges, risks that the dam itself may fail. IV-ER-640-44.

Many hardrock mines employ tailings dams. IV-ER-640 ("There are 3,500 tailings dams located around the world."). Tailings dams must be designed to store the material they contain in perpetuity. IV-ER-641. However, tailings dam failures occur regularly, at an average rate of around once every eight months globally. IV-ER-632. Serious and very serious tailings dam failures, in which at least 100,000 cubic meters of tailings and contact water were released into the environment or a human life was lost, are increasing as a proportion of total failures. IV-ER-624-25 & n.3.

The risk of a tailings dam failure is exacerbated by the possibility of seismic activity, which can compromise tailings dams. IV-ER-636. The Palmer Project area lies within the Fairweather-Queen Charlotte fault region, and is close to the

Denali, Chilkat River, and Chugach-St. Elias faults. III-ER-154. The region experiences frequent and at times strong seismic activity. *Id.* According to BLM, the probability of destructive earthquakes is unknown in the Palmer Project area because regional tectonics have not been studied in detail. *Id.* However, the agency conceded that a nearby earthquake "could cause extensive damage" at the project site. III-ER-505.

Pollution from a mine upstream of Klukwan, the Eagle Preserve, and the fish-inhabited tributaries of the Chilkat River watershed could harm the area's ecological values. The Palmer Project area experiences considerable precipitation. III-ER-434; III-ER-505. Waters from the Palmer Project area drain into Glacier Creek at the valley's trough, then flow into waterbodies that sustain Klukwan's subsistence harvests, the commercial fisheries of Southeast Alaska, and the bald eagles of the Eagle Preserve. III-ER-600-02. Pollution of downstream waters by acidic, metals-loaded contact waters and/or tailings could harm aquatic organisms. III-ER-598-600; IV-ER-682, 686-87. Numerous studies have found that acid mine drainage is highly toxic and even lethal to fish species, including salmon. III-ER-598-600 & nn.36-37 (describing scientific literature and citing studies); *see also, e.g.*, II-ER-187-202 (describing toxic effects of dissolved copper from acid mine drainage on salmon); IV-ER-604-14 (documenting toxic effects of acid mine drainage on salmon downstream of a sulfide mine in British Columbia); IV-ER-

733-42 (describing acid mine drainage risks to salmon from development of sulfide deposits). Adverse effects on both the natural values of the area and its people could follow.

In Klukwan, adverse effects on the Chilkat River watershed's salmon, Dolly Varden, trout, and eulachon could harm villagers' traditional way of life and potentially compromise the economic viability of the village. III-ER-581-82; III-ER-601-02. The bald eagles returning to the Eagle Preserve could struggle if late-season salmon runs were adversely affected. III-ER-598-601; III-ER-587-90. Other wildlife reliant on salmon, trout, and eulachon—birds and mammals—could experience indirect harms. *See* III-ER-497; III-ER-600-01; III-ER-589-90. In turn, people in this corner of Southeast Alaska and others who visit the watershed from the around the globe might no longer be able to enjoy its fish and wildlife. III-ER-601-02; III-ER-590-91.

IV. BLM approved what Constantine Metals projected was its last phase of exploration before a shift to mine engineering and development, without any analysis of how potential mine development would affect the Chilkat River watershed.

Mineral exploration[3] occurs in progressive stages that precede mine development in the life cycle of a mine. Exploration is the process of seeking a

[3] Some sources refer to "prospecting" as the process of finding minerals and "exploration" as the process of defining the size and value of the mineral deposits found during prospecting. *See* II-ER-214. This brief uses the term "exploration" to encompass both of these stages.

mineral deposit and then evaluating whether it can be mined profitably. *See* IV-ER-760-61. Exploration begins with preliminary searches to find ore (mineral-bearing rock) and can proceed to advanced stages, during which subsurface sampling provides a more detailed assessment of the size, grade, value, and distribution of a deposit. *Id.*; II-ER-214-15; II-ER-210-11. Although many projects that enter the preliminary or "grassroots" stages of exploration may not ultimately become mines, "[a]s an exploration project advances the confidence of the geological resources progresses." IV-ER-761-62.

Constantine Metals has been conducting exploration activities on the Palmer Project lands since 1998 when, under the name Rubicon Metals USA Inc., it leased 340 unpatented federal claims from Alyu Mining Company and Haines Mining Exploration. II-ER-62, ¶¶4, 5. Since 2006, the company has been exploring under its current name. *Id.*, ¶6. The company's exploration activities have intensified over its years in the area. Prior to 2015, Constantine Metals conducted helicopter-supported drilling with timber-frame drill pads, constructed a stretch of road with pullouts, cleared more than half an acre for equipment laydown, and built a weather station. II-ER-239, Tbl. 1-1 (column "Completed under Notice"). These activities took place under a mere notice to BLM. II-ER-237; III-ER-377. In 2015, operations advanced and expanded to the point at which the total associated

surface disturbance required BLM approval subject to NEPA review. II-ER-224-25; III-ER-377.

On May 22, 2015, Constantine Metals submitted a Plan of Operations to BLM, proposing expanded exploration activities. *Id.*; II-ER-226. This exploration plan proposed additional infrastructure, including construction of additional drill pads, an equipment laydown area, and a longer road starting in the Glacier Creek valley, crossing Glacier Creek, and climbing the south wall of the valley with switchbacks. II-ER-239, Tbl. 1-1; II-ER-260; II-ER-271 & Fig. 2-11. The plan would facilitate road access to drill sites on the face of the south wall, provide a staging area for intensified helicopter- and ground-supported exploration activities, and facilitate transport of personnel, equipment, fuel, and supplies. II-ER-237.

Constantine Metals projected that the expanded exploration activities in the plan would take about five years to complete, II-ER-302; II-ER-293, Tbl. 2-8, and would be the final exploration stage prior to mine engineering and development. II-ER-293 ("After Year 5, assuming continued positive results, it is anticipated that emphasis will shift from exploration to engineering & development . . . ."). Given the level of contemplated surface disturbance, pursuant to BLM's regulations, Constantine Metals sought the agency's approval of the exploration plan. II-ER-224-25; III-ER-377.

On November 30, 2015, BLM's Glennallen Field Office announced preparation of an environmental assessment for the exploration plan pursuant to NEPA's requirements. III-ER-337-39; IV-ER-842, ¶69; IV-ER-802, ¶69; IV-ER-817, ¶69. The agency gave notice of a review period regarding the scope of the environmental assessment and stated that it would accept public comment. III-ER-337-39.

Members of the public, including Appellants, submitted comments on the scope of BLM's review, urging that it should encompass not only direct effects of the proposed exploration activities, but also associated impacts beyond the exploration plan's immediate horizon, including potential development impacts. II-ER-69-70, 73; III-ER-341; II-ER-77; III-ER-350, Tbl. 1 (Letter No. 122); III-ER-349, Tbl. 1 (Letter No. 72); III-ER-349, Tbl. 1 & III-ER-351, Tbl. 2 (Letter No. 76); III-ER-351-52, Tbl. 2 & III-ER-354, Tbl. 7 (Letter Nos. 123, 125, & 127); III-ER-353 (Letter No. 78).

On April 25, 2016, BLM released a draft environmental assessment in connection with the exploration plan. II-ER-160. In this assessment, BLM restricted its review to the impacts of exploration activities; BLM refused to consider the effects of later stages in the mining process. Looking only at exploration activities, BLM found no potentially significant impacts to water quality, wildlife, or fish habitat from Constantine Metals' proposed exploration

plan. II-ER-166; II-ER-171; II-ER-173. Considering only exploration activities, the agency characterized potential effects on the community of Klukwan and its culture as "minimal." II-ER-175-76.

BLM opened a 30-day public review and comment period on the draft environmental assessment. III-ER-385. Members of the public, including Appellants, submitted comments on the draft, again addressing the scope of review and pointing out that the agency should have considered impacts beyond the immediate horizon of the exploration plan, including the effects of development. III-ER-355; III-ER-356-57, 360-61; II-ER-220-22.

On August 18, 2016, BLM issued a Decision Record approving the exploration plan, together with a final environmental assessment and a finding of no significant impact. III-ER-569-75; III-ER-362-564; III-ER-565-684. In reaching its approval decision, BLM again refused to consider potential impacts of mine development. BLM stated that "[e]xploration must be conducted . . . before the prospect can lead to an economical discovery." III-ER-573. It also stated that "[t]he proponent is still in exploration phase; therefore it is not a reasonable [sic] foreseeable future action to consider mining in this analysis." *Id.* BLM asserted that it lacked the ability to "prevent the claimant, or their operators, from exploring or developing their mineral resources." III-ER-572. According to the agency,

"[d]evelopment of mineral resources within an active unpatented mining claim is a non-discretionary action on behalf of BLM's decision process." *Id.*

Following BLM's approval decision, Constantine Metals began road construction and drilling operations under the exploration plan. IV-ER-844, ¶79; IV-ER-804-05, ¶79; IV-ER-818, ¶79.

V. BLM approved Constantine Metals' road extension proposal, facilitating further expanded exploration, without considering development impacts.

In January 2017, Constantine Metals requested BLM's approval to modify the exploration plan by adding an 800-foot extension to the road design. IV-ER-844, ¶80; IV-ER-805, ¶80; IV-ER-818, ¶80; III-ER-576-77. The extension's purpose was to allow further expansion of the company's exploration activities, including by providing access to immediately adjoining state Mental Health Trust lands that the company has leased. III-ER-576; IV-ER-753. BLM accepted public comment on the proposed road extension and associated environmental analysis. IV-ER-745.

Appellants commented once again that environmental analysis of the proposed road extension should assess the environmental risks of future mine development, including from potential acid mine drainage and tailings dam failure. III-ER-592-603; III-ER-581-91. Appellants described and included numerous sources documenting the scientific consensus that acid mine drainage is a likely

consequence of hardrock mining at a deposit like that which is present at the Palmer Project; that tailings dam failure could follow from development, a possibility heightened by potential seismic activity; and that pollution from the project could be harmful to fish populations, wildlife, and Klukwan itself. III-ER-596-601; III-ER-585-89.

On September 21, 2017, BLM issued a Decision Record approving the road extension, along with an associated environmental assessment and a finding of no significant impact. IV-ER-743-46; IV-ER-751-81; IV-ER-747-50. Again, BLM entirely refused to consider development impacts. In the environmental assessment, BLM asserted that "[v]ery few exploration projects actually make it to the point that a mine can be developed," and that the Palmer Project "has a greater chance of not becoming a mine than that it does at becoming a mine." IV-ER-762. The agency stated that it would not consider development impacts until after the project had reached the "feasibility study phase," after the company had produced a thorough valuation of the deposit's resources. IV-ER-763.

VI. BLM had access to information about potential future mine development impacts at the Palmer Project, but did not consider that information.

Between submissions from Appellants and Constantine Metals and the agency's own analysis, BLM had access to information about potential future mine development at the Palmer Project, including information about its location and

timing, II-ER-239, Fig. 1-2 (showing the areas where exploration is focused); II-ER-293; the scale and geology of the underlying deposit, IV-ER-652-667; the natural resources in the watershed where the mine would be located, III-ER-426-500; III-ER-600-01; the kinds of environmental impacts typical of hardrock mining, IV-ER-604-16, 624-44, 668-723, 733-42; and conditions in the Palmer Project area relevant to the likelihood and magnitude of those impacts should they occur. III-ER-504-05. The agency refused to consider this information before approving Constantine Metals' exploration plan and modification. III-ER-573; IV-ER-762-63.

STATUTORY FRAMEWORK

I. The 1872 Mining Act and the Mining and Minerals Policy Act

BLM approved Constantine Metals' proposed exploration under the authority of the General Mining Act of 1872 ("1872 Mining Act"), 17 Stat. 91, *as amended*, 30 U.S.C. § 22 *et seq*. The 1872 Mining Act provides that, by default, most public lands will be open to mineral exploration by the public. *See* 30 U.S.C. § 22. Under the Federal Land Policy and Management Act (FLPMA), however, BLM can petition the Assistant Secretary for Land and Minerals Management to withdraw land from the 1872 Mining Act in order to maintain other public values or reserve the area for other public purposes. 43 U.S.C. § 1714(c)(1) (describing the procedure for withdrawing more than five thousand acres of land); 43 U.S.C. §

1714(d) (explaining that for withdrawals of less than five thousand acres, a department or agency head can request a withdrawal); 43 U.S.C. § 1702(j) (defining "withdrawal"); 43 U.S.C. § 1712(e)(3) (making clear that withdrawal under section 1714 includes withdrawal from the 1872 Mining Act); Dep't of the Interior, 603 Dep't Manual 1, 1-2, Sec. 1.1(E), 1.2(A), (B) (2005).

BLM regulations promulgated to implement the 1872 Mining Act set out a management regime for exploration activities, the initial step in the mining process. *See* 43 C.F.R. Part 3800; 43 C.F.R. § 3809.1. The agency's level of involvement varies depending on the degree of surface disturbance the exploration will cause. For "[n]otice-level operations" involving less than five acres of surface disturbance on public lands, companies must submit only a notice to the agency. 43 C.F.R. § 3809.10(b); 43 C.F.R. § 3809.21(a). For "[p]lan-level operations" disturbing more than five acres of land or meeting certain other requirements, companies must submit a plan of operations and obtain BLM's approval. 43 C.F.R. § 3809.10(c); 43 C.F.R. § 3809.11.

Initially, companies exploring for minerals on public lands pursuant to the 1872 Mining Act regulations have the status of tenants at will or licensees, with no valid existing rights in their prospects as against the government. *See Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964). Such exploration is subject to the risk

that a FLPMA withdrawal action might occur and preclude any further mineral activity by the company on the public lands. *See* 43 U.S.C. § 1714.

However, if a company 1) discovers minerals of sufficient quantity and character to constitute a "valuable mineral deposit" such that a "person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine"; and 2) satisfies the statute's marking and recordation requirements, the 1872 Mining Act grants a right to extract the minerals from the claim. *United States v. Coleman*, 390 U.S. 599, 602 (1968); *Eno v. Jewell*, 798 F.3d 1245, 1251 (9th Cir. 2015), *opinion amended on denial of reh'g*, 805 F.3d 1154 (9th Cir. 2015). After that, BLM can no longer preclude absolutely mine development activities with a FLPMA withdrawal because FLPMA withdrawals are subject to valid existing rights. *See* 43 U.S.C. § 1701, Note (h); 43 C.F.R. § 3809.100 (explaining the procedure for approving mineral plans of operation after withdrawal occurs).

In 1970, Congress adopted the Mining and Minerals Policy Act as a preface to the 1872 Mining Act, to clarify that it "did not, and does not, intend mining to be pursued at all costs." *Bohmker v. Oregon*, 903 F.3d 1029, 1036 (9th Cir. 2018) (quoting *People v. Rinehart*, 377 P.3d 818, 825 (Cal. 2016)); *see* 30 U.S.C. § 21a. Instead, mining on public lands should occur subject to "environmental needs." 30 U.S.C. § 21a; *Bohmker*, 903 F.3d at 1036.

II. NEPA

Also in 1970, Congress passed NEPA, which announced "a national policy of environmental protection" and a goal of assuring that government agencies consider the environmental impacts of their actions in decisionmaking. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976). Congress directed agencies to apply this policy "to the fullest extent possible" when acting under other federal statutes. 42 U.S.C. § 4332.

"Proper timing is one of NEPA's central themes." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988). Agencies must consider the potentially significant environmental impacts of an action before making any irreversible commitment to that action. *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (citing *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988)). This includes considering the impacts of potential future resource development before an agency takes an action to facilitate such development that does not preserve the agency's authority to preclude it absolutely. *See Conner*, 848 F.2d at 1448-51.

If, based on a preliminary environmental assessment, the agency finds that an action has no potential significant impact, it must explain that in a finding of no significant impact. 40 C.F.R. § 1508.9. If, however, the agency determines that there may be a significant impact, it must prepare an environmental impact statement, including a full and fair discussion of significant environmental impacts

and reasonable alternatives that would avoid or minimize adverse effects. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1.

APPELLANTS HAVE STANDING

Appellants Chilkat Indian Village of Klukwan, Southeast Alaska Conservation Council, Lynn Canal Conservation, and Rivers Without Borders have standing. Their members have standing in their own right, the interests at stake are germane to Appellants' organizational purposes, and the lawsuit does not require the participation of individual members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000). Appellants' members use the areas at and near the Palmer Project area for various purposes, including hunting, fishing, subsistence practices, and recreation. *See* II-ER-94, ¶4; II-ER-103-04, ¶10; II-ER-108, ¶5; II-ER-114-17, ¶¶5, 6, 7, 9, 10; II-ER-112-24, ¶¶8-18; II-ER-131, ¶12; II-ER-142-45, ¶¶8-17; II-ER-154-56, ¶¶6-9. The exploration activities BLM authorized in the challenged decisions have harmed, currently harm, and will harm Appellants' members' abilities to engage in these activities. II-ER-87, ¶10; II-ER-96, ¶8; II-ER-104-05, ¶¶11-12; II-ER-111-12, ¶¶12-13; II-ER-117, ¶11; II-ER-125-26, ¶¶20-24; II-ER-133-35, ¶¶21-24; II-ER-146-47, ¶18-19; II-ER-154-58, ¶¶6, 8-9, 14-16. BLM's unlawful circumvention of its procedural NEPA obligations have also harmed Appellants' abilities to pursue their educational and informational missions. II-ER-96, ¶9; II-ER-104, ¶11; II-ER-111, ¶13. The harm

and threat of harm to their members' aesthetic, economic, cultural, recreational, subsistence, and other interests in and around the Palmer Project area, as well as to Appellants' educational and informational interests in a lawful public administrative process, represent a concrete injury in fact, fairly traceable to the actions challenged in this litigation and redressable by the relief they seek. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000).

SUMMARY OF THE ARGUMENT

BLM's decision to approve the proposed exploration without considering the impacts of potential mine development at all violated NEPA for three reasons. First, this Court explained in *Conner v. Burford* that NEPA requires an agency to consider development impacts before taking action that could facilitate development, if the agency does not in doing so preserve its authority to preclude development absolutely. BLM's decisions to approve exploration at the Palmer Project do not preserve its authority to preclude development. Instead, they give Constantine Metals an opportunity to acquire a right to extract minerals. If acquired, that right will prevent BLM from precluding a mine through FLPMA withdrawal. Thus, as in *Conner*, BLM should have considered development impacts before approving this final stage of exploration during which rights may attach. The agency's plan to postpone that analysis until Constantine Metals

submits a mine development plan—by which time it will have discovered a valuable deposit and rights will already presumably have attached—does not satisfy the NEPA obligation announced in *Conner*. Nor is that delay necessary, because the agency already has access to substantial information about potential development impacts.

Second, NEPA requires agencies to consider all cumulative impacts: the incremental impacts of the proposed action in combination with those of reasonably foreseeable future actions. Mine development at the Palmer Project is reasonably foreseeable and its impacts will be cumulative to those of the exploration BLM approved here. Constantine Metals has been exploring this same area for two decades, and believes the exploration BLM approved is the last exploration necessary before deciding whether to develop a mine. Contrary to BLM's arguments below, the fact that Constantine Metals has not yet formally proposed mine development to BLM is irrelevant, because agencies must consider the impacts of reasonably foreseeable future projects even if they are not yet proposed. Nor was BLM entitled to depend on the generic and unsupported assertion that mine development is never reasonably foreseeable during exploration. The agency was required to assess reasonable foreseeability and explain its decision based on the facts specific to this case. Had BLM done so, it

would have been compelled to conclude that mine development is reasonably foreseeable here.

Third, NEPA requires agencies to consider in the same NEPA document all connected actions, including any later actions that provide the sole justification or utility for a preliminary action the agency is considering. Constantine Metals' proposed mineral exploration and potential mine development at the Palmer Project are connected actions because the exploration has no utility independent of potential mine development. Unlike in other cases, the exploration here is not aimed at producing generally useful information but is limited to evaluating the potential for a mine.

Appellants ask the Court to declare BLM's decisions approving the exploration unlawful and either vacate them or, in the alternative, enjoin all activity authorized by those decisions and remand them to BLM to satisfy NEPA's obligations.

ARGUMENT

I. Standard of review

This Court reviews a district court's summary judgment decision de novo. *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002). In an administrative review case, that means "view[ing] the case from the

same position as the district court." *Id.* (quoting *Sierra Club v. Babbit*, 65 F.3d 1502, 1507 (9th Cir. 1995)).

Review of an agency's compliance with NEPA is governed by the Administrative Procedure Act, which requires courts to set aside agency actions, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004). But because the scope of NEPA analysis is predominantly a legal question, the agency's determination is subject to a reasonableness standard more exacting than the deferential review courts may accord agency decisions on factual or technical matters. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1028 (9th Cir. 2006) (quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995)).

II. NEPA requires BLM to consider mine development before approving advanced exploration that may extinguish the agency's authority to preclude mine development at the Palmer Project.

BLM's categorical refusal to consider the environmental impacts of potential mine development before approving advanced mineral exploration at the Palmer Project violates NEPA. As this Court explained in *Conner v. Burford*, NEPA requires that before the government relinquishes its right to preclude absolutely potential development on public lands, it must consider the environmental impacts

of such potential development. On the facts here, BLM's decision to approve the proposed exploration was a crucial point of commitment beyond which the agency could lose its authority to absolutely preclude a mine. Therefore, as in *Conner*, BLM should have considered mine development impacts before making that decision. Postponing the necessary analysis until the company submits a mine development plan is not a viable solution; by that point, BLM's preclusion authority will already be gone. Nor is a mine plan necessary to determine, in general terms, whether mining should be precluded in the Chilkat River watershed. To the contrary, the agency already has access to information about the deposit Constantine Metals is exploring, known risks of hardrock mining, and so on that could inform the requisite analysis. The NEPA requirement to consider future development impacts at an earlier stage defined in *Conner* applies here with equal force, because that requirement poses no conflict with the 1872 Mining Act.

In *Conner v. Burford*, this Court held that NEPA prohibits an agency from relinquishing its authority to preclude absolutely resource development without first considering the environmental impacts of that development, even if the agency retains other broad regulatory authority short of preclusion. 848 F.2d 1441, 1450-51 (9th Cir. 1988). In *Conner*, plaintiffs challenged BLM's decision to sell oil and gas leases without considering the environmental impacts of development that might occur on the leases. *Id.* at 1444. Even though any future activity on the

leases would be subject to further NEPA analysis and regulation, and even though the occurrence, location and scope of any future development was uncertain, the Court held NEPA requires BLM to estimate and consider development impacts before selling leases that do not "reserve to the government the absolute right to prevent all surface-disturbing activity." *Id.* at 1449-51. Mere regulation, the panel explained, is not likely to reduce development impacts to insignificance. *Id.* at 1450. Thus, a decision that relinquishes the agency's authority to preclude development absolutely represents a crucial point of commitment under NEPA. *Id.* at 1451. *Before* taking a step past that point of commitment, an agency must estimate development impacts in a NEPA document. *Id.* at 1450. Since *Conner*, the court has applied this holding in similar circumstances where an agency's discretion to prevent later impacts narrows before the agency's next potential decision point. *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).

Here, as in *Conner*, the BLM's decision to approve Constantine Metals' advanced exploration plan could extinguish the agency's authority to preclude mining in the area. The company is exploring the Palmer Project area subject to the possibility that the Secretary of the Interior will withdraw the area under FLPMA, which would segregate it from entry under the 1872 Mining Act and from further mineral exploration and mine development. *See supra* pp. 24-25.

However, once the exploration yields sufficient data to establish a valuable mineral deposit, Constantine Metals will secure rights to extract those minerals. *See supra* p. 25. At that point, BLM could still file a petition to withdraw the lands and the Secretary could still withdraw them to preclude new mineral entry and activity under the 1872 Mining Act. *See id.* Any such subsequent withdrawal, however, would be subject to the Constantine Metals' extraction right, 43 U.S.C. § 1701, Note (h), and therefore ineffective at precluding Constantine Metals from developing a mine.

It is undisputed that Constantine Metals' discoveries may advance to the point where they constitute a valuable deposit over the course of the five-year exploration plan, granting the company a right to extract minerals. BLM was aware of this when the agency approved the company's advanced exploration. At the time, Constantine Metals had already been exploring the area for almost two decades, and had projected to BLM that, assuming continued positive results, exploration under the five-year plan would produce enough data to enable a shift to mine development. *Supra* p. 18. In other words, BLM approved a plan that may allow Constantine Metals to establish a valuable deposit and deprive BLM of the right to preclude mining. Doing so marked a crucial point of commitment prior to which BLM must consider development impacts. *See Conner*, 848 F.2d at 1451.

In *Conner*, BLM issued leases that transferred rights directly to prospective developers. In this case, any vesting of rights in Constantine Metals under the 1872 Mining Act would occur by operation of law without further action by BLM as a result of the exploration BLM authorized. *See United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999). However, the result is the same in both cases: the agency stands to lose its authority to preclude absolutely development later by virtue of the decision it is making now, at an earlier stage in the process. In *Conner*, once BLM issued the relevant leases, the agency could regulate potential future development but could not absolutely preclude it. *Conner*, 848 F.2d at 1450. Here, if Constantine Metals acquires a right to extract the minerals on its federal claims during the course of this exploration, BLM will be able to regulate the company's mining activities but will no longer be able to preclude those activities. *See supra* pp. 24-25. Any action to withdraw the land from operation of the 1872 Mining Act under FLPMA would be subject to such a valid existing right. *See supra* p. 25. Therefore, just like in *Conner*, if BLM fails to consider now whether hardrock mine development is incompatible with other public purposes in the Chilkat River watershed, there may never be—and likely will never be, *see supra* p. 34—another opportunity for the agency to act on that knowledge. In both circumstances, proceeding without an analysis of potential development impacts is "precisely the type of environmentally blind decision-making NEPA was designed

to avoid." *Conner*, 848 F.2d at 1451. This was the determinative factor in *Conner*, and it must also determine the outcome in the context of the 1872 Mining Act. NEPA does not permit BLM to take this potentially irreversible step in willful ignorance of development impacts.

BLM argued below that any analysis of development impacts must wait until Constantine Metals submits a fully fleshed-out mine development plan containing more reliable information about proposed mining operations—*i.e.*, after the company has discovered a valuable mineral deposit. CR 58 at 23-27. Appellants acknowledge such development plan-specific analysis will occur if Constantine Metals submits such a plan, CR 59 at 15-16; the same was true in *Conner*. *See Conner*, 848 F.2d at 1449 ("Standard stipulations provide that any surface-disturbing activity on the leases is conditional on compliance with additional NEPA analysis, including an [environmental impact statement] if appropriate."). But, as in *Conner*, that analysis will come too late to serve NEPA's purpose; it will not apprise BLM of the disruptive environmental effects that may flow from its decision at a time when the agency still retains "a maximum range of options." *Id.* at 1446 (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983)). Thus, as in *Conner*, the promise of future analysis regarding the effects of a specific development proposal does not excuse BLM from estimating development impacts and describing them in a NEPA document now, before making a decision

that effectively determines whether development impacts can occur. *Id.* at 1450-51.

In its Decision Record approving the road extension, BLM stated, slightly differently, that it would not consider development impacts until after the project had reached the "feasibility study phase," *i.e.*, after Constantine Metals had produced a thorough valuation of the deposit's resources, which will happen before formulation of a specific development plan. IV-ER-763. However, this is no different from the argument BLM made in its brief below, because there is no separate decision for BLM to make in connection with a feasibility study. The agency's next decision point would be the submission of a mine development plan, which is too late for the reasons just explained.

BLM's reliance on the later mine development plan-specific analysis also misunderstands what is required now. There is no need for a mine plan because the relevant question at this stage is not whether to approve a specific mine plan, but more generally whether to allow hardrock mining in this area at all. As a result, the analysis at this stage could be more general, and the agency would have some discretion as to how detailed and specific that analysis should be. *See Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1187 (9th Cir. 1988) (holding, in the context of analogously staged oil and gas exploration and development, "the amount and specificity of information necessary to meet NEPA requirements

varies at each . . . stage[].”). At a minimum it must surpass what BLM did here, which is to categorically refuse to consider development impacts at all. *Conner*, 848 F.2d at 1450-51.

Indeed, *Conner* rejected the agency’s argument that analysis must wait for a specific development plan even where information about development impacts was severely limited because only two percent of the leases sold could be expected to result in development. *Id.* 1450 & n.21. Here, by contrast, BLM already had access to substantial information about potential mine development impacts in the Chilkat River watershed. When BLM made the challenged decisions, it had information about the approximate location and timing of potential development, the scale and geology of the underlying deposits, the natural resources in the watershed where the mine would be located, characteristic environmental impacts of hardrock mining in general, and conditions in the area relevant to the likelihood and magnitude of those impacts should they occur at the Palmer Project. *See supra* pp. 22-23. Nothing prevented BLM from analyzing the potential impacts of development here, and the agency was required to do so before yielding its authority. *Conner*, 848 at 1540.

Conner held that NEPA’s fundamental obligation to ‘look before you leap’ applies to BLM’s decisions under the Mineral Leasing Act of 1920. *See id.* at 1452. This case seeks to enforce the same obligation in the context of the 1872

Mining Act. NEPA is intended to facilitate environmentally informed government decisionmaking, 42 U.S.C. § 4332, whereas the 1872 Mining Act exists to facilitate mining on public lands. *See United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981). Congress has instructed, however, that all public laws of the United States be interpreted and administered in accordance with NEPA "to the fullest extent possible," 42 U.S.C. § 4332, and that federal mining policy must be sensitive to "environmental needs." *Bohmker*, 903 F.3d at 1036; 30 U.S.C. § 21a. This Court gives NEPA "the broadest possible interpretation," holding that its obligations yield only when there is an irreconcilable conflict with another statute. *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 460 (9th Cir. 1994). Thus, agency action implementing the 1872 Mining Act is subject to NEPA requirements unless complying with NEPA would unavoidably conflict with the 1872 Mining Act. No such conflict is present here.

Nothing in the 1872 Mining Act prohibits BLM from considering the environmental impacts of mine development at this stage. As BLM recognized, its exploration plan decisions were subject to NEPA review. *See supra* pp. 19-22. The only issue is whether NEPA required the scope of BLM's review to include some consideration of development impacts. *See Westlands Water Dist.*, 43 F.3d at 460. *Conner* dictates the answer to that question. BLM's decision to take a

potentially irreversible step down the path to mine development in total ignorance of mine development impacts is unreasonable and violates NEPA.

III. NEPA requires BLM to consider the impacts of mine development because of its close relationship to advanced mineral exploration.

The fact that advanced mineral exploration could limit BLM's ability to preclude mine development is enough under *Conner* to require the agency to analyze such development before approving the exploration. However, there are two other reasons NEPA requires BLM to analyze the impacts of mine development now: the environmental impacts of mine development will be cumulative to those of exploration, and exploration and mine development are connected actions.

A. Mine development impacts are cumulative to mineral exploration impacts.

NEPA also requires agencies to consider cumulative impacts associated with their proposed actions. 40 C.F.R. § 1508.8(b); *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002). Cumulative impacts are those that result "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. By definition, "reasonably foreseeable" future actions are not certain, and NEPA requires agencies to engage in reasonable forecasting. The impacts of future actions may be reasonably foreseeable even if those actions and/or their potential impacts are

uncertain. 40 C.F.R. § 1502.22(b)(4); *City of Davis v. Coleman*, 521 F.2d 661, 675-76 (9th Cir. 1975); *Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1091-93 (D. Mont. 2017). Likewise, a future action may be reasonably foreseeable even if it is not yet reduced to a specific proposal as long as sufficient information is available to permit meaningful consideration. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011).

Agencies may not rely on formalistic, one-size-fits-all rules to determine the scope of cumulative impact analyses because "[e]ach project is different." *Id.* at 1078. "[T]he agency is required to rationally explain its decision [about the scope of a cumulative impact analysis] in the context of project-specific effects." *Id*.

Here, BLM should have considered the impacts of potential mine development at the Palmer Project as cumulative impacts with Constantine Metals' proposed final stage of exploration. The facts before BLM demonstrated that mine development was a reasonably foreseeable future action. As of September 2018, Constantine Metals had invested $40 million in exploring its Palmer Project claims. II-ER-65, ¶7. The company's exploration has progressed beyond mere grassroots stages, and now focuses on delineating the mineral deposits at specific claims that have yielded positive results. *See* III-ER-407, Fig. 2-9 (showing BLM claims affected by proposed drilling); III-ER-391, Fig. 2-1 (showing previous drillholes); IV-ER-649-651 (describing Constantine Metals' work in the area and

results up to 2014). The company now anticipates that in the next few years, "assuming continued positive results, . . . emphasis will shift from exploration to engineering & development." II-ER-293. Any future development impacts would affect the same environmental resources in the Chilkat River watershed as exploration, and as such would be cumulative to exploration impacts.

Although it is still possible that a mine will not be developed, Constantine Metals' continued investment in the project would be irrational at this point if development were not at least reasonably foreseeable. *See* 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."); *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985), *abrogated in part on other grounds as stated in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015) ("[I]f the sales are sufficiently certain to justify construction of the road, then they are sufficiently certain for the environmental impacts to be analyzed along with those of the road.").

BLM also had sufficient information to meaningfully analyze development impacts at this stage. *See N. Plains*, 668 F.3d at 1078. Based on what Appellants and Constantine Metals submitted during the exploration plan decision process, and based on its own environmental assessments, BLM already had access to

information about the location, timing, and potential impacts of mine development. *See supra* pp. 22-23.

BLM did not discuss these facts when it refused to consider mine development impacts at the Palmer Project. Instead, BLM's justification focused on a formalistic, bright-line assertion that mine development is never reasonably foreseeable during any phase of mineral exploration. *See* III-ER-573 ("The proponent is still in exploration stage; therefore it is not a reasonable [sic] foreseeable future action to consider mining in this analysis."). That assertion contradicts the Ninth Circuit's admonishment that "[e]ach project is different, and the agency is required to rationally explain its decision in the context of project-specific effects," *N. Plains*, 668 F.3d at 1078, and is arbitrary. Had BLM adequately considered the facts here, the agency would have been compelled to conclude that mine development at the Palmer Project is reasonably foreseeable and that it was not appropriate to proceed in complete ignorance of mine development impacts.

In holding that BLM need not consider development impacts because a mine plan is not yet "proposed," the district court adopted BLM's citation to deleted portions of *Lands Council v. Powell*, 395 F.3d 1019, 1023 (9th Cir. 2005). I-ER-44; CR 58 at 17-18. The Ninth Circuit had, in fact, amended its opinion, explaining:

The final two paragraphs in section III.B.2 state:

> . . . The agency is required to consider the cumulative effects of projects that it is already proposing. For any project that is not yet proposed, and is more remote in time, however, a cumulative effects analysis would be both speculative and premature . . . .

The final two paragraphs in section III.B.2 and footnote 8 are deleted in their entirety and replaced with the following language:

> We need not address these issues . . . .

Lands Council, 395 F.3d at 1022-23. Had this language not been deleted, the *Lands Council* decision would have conflicted with *Thomas v. Peterson*. *Thomas*, 753 F.2d at 758; *see also City of Davis*, 521 F.2d at 674-77 (holding that it was arbitrary for an agency not to estimate the environmental impacts of potential future developments that had not yet been proposed but were the highway project's "raison d' etre").

In *Thomas*, the district court accepted the Forest Service's argument that timber sales were not cumulative actions in an environmental analysis of a road that would facilitate them, because only the road had so far been "proposed." *See Thomas v. Peterson*, 589 F. Supp. 1139, 1146-47 (D. Idaho 1984). This Court reversed, finding that the agency should have considered the cumulative impacts of the sales along with the impacts of the road. *Thomas*, 753 F.2d at 758-59. "[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.* In 2011, this Court again rejected the proposal-based test for reasonable foreseeability. *N. Plains*, 668 F.3d at 1079.[4]

In sum, Ninth Circuit case law establishes that the existence of a formal proposal is not what renders future action reasonably foreseeable. Instead, agencies must base an assessment of what is reasonably foreseeable on the facts and context specific to the relevant project. *See N. Plains*, 668 F.3d at 1078.

In this case, mine development impacts are cumulative impacts that BLM should have considered in its environmental assessment, because at this point mine development is reasonably foreseeable. After exploring the area for nearly 20 years with positive results, Constantine Metals informed BLM that the company's decision on mine development will immediately follow completion of the activities included in the current exploration plan. *See supra* pp. 17-18. BLM's environmental assessments and decision records arbitrarily dismiss mine development impacts as not reasonably foreseeable without grappling with these

[4] This Court also erroneously quoted the deleted *Lands Council* language in *Jones v. Nat'l Marine Fisheries Service*, 741 F.3d 989, 1000 (9th Cir. 2013). But the *Jones* Court recognized this language was in tension with *Northern Plains* and did not rest its decision there, relying on facts that established any future expansion was in fact speculative. *Id.* at 1001 (noting there was only vague potential for expanded mining over a 50-mile coastline, and the company had already rejected the specific expansion possibilities the plaintiffs argued BLM should consider). No analogous facts are present here.

essential facts, and in doing so they fall short of NEPA's requirement to assess cumulative impacts. 40 C.F.R. § 1508.7.

B. Mine development and mineral exploration are connected actions.

In addition to evaluating the direct and indirect effects of an agency action under consideration, NEPA requires an agency to evaluate the effects of "connected actions." 40 C.F.R. § 1508.25(a)(1); *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 998 (noting this requirement applies to both environmental impact statements and environmental assessments). An action is "connected" to another for purposes of NEPA review if one cannot proceed unless the other is undertaken, or if the two "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(ii), (iii). This Circuit has characterized the test as being whether each action has "independent utility" such that a person might reasonably consider taking one without the potential for the other to take place. *See Thomas*, 753 F.2d at 759. Applying this test, mine development and the advanced exploration BLM approved for the Palmer Project are connected actions.

This Circuit's decision in *Thomas v. Peterson* is instructive. There, the court considered the relationship between the proposed authorization of a logging road and subsequent timber sales. *Thomas*, 753 F.2d at 757. The Court observed that the "cost-benefit analysis of the road considered the timber to be the benefit of the

road;" in other words, without subsequent timber sales, construction of the road would not be justified. *Id.* at 758-59. The Court held that the proposed road lacked utility independent of the timber sales, and, accordingly, that the actions were connected. *Id.* at 759. Therefore, the agency was required to consider the impacts of the subsequent timber sales when analyzing the road's impacts. *Id.* at 759-60.

Here, as in *Thomas*, the advanced mineral exploration BLM approved lacks any justification independent of the possibility of future mine development. That possibility is the only thing that accounts for the positive value in exploration's cost-benefit analysis, because exploration itself does not generate revenue. It is only when a mine commences operation that "companies start to see a return on their investment" and "make some money." II-ER-68. The company's exploration plan thus anticipates a progression from exploration to development. II-ER-293. This is also how the agency understands the situation: as BLM states in the environmental assessment accompanying the plan approval, "Constantine is exploring the Palmer base and precious metals deposit . . . with the goal of identifying a mineral resource that is economically feasible to develop." III-ER-393. Without the possibility of development, exploration would be an irrational waste of time and resources.

Concerned Citizens & Retired Miners Coalition v. U.S. Forest Service, 279 F. Supp. 3d 898 (D. Ariz. 2017) and *Greater Yellowstone Coalition v. Reese*, 392 F. Supp. 2d 1234 (D. Idaho 2005) are not to the contrary. In *Concerned Citizens*, mineral exploration itself was not at issue. The question was whether a mining company's project to gather baseline groundwater and geotechnical data had utility independent of its concurrent mine development proposal, where the data was not essential to that development and could be used to inform other projects. 279 F. Supp. 3d at 908-12. The court found that it did. *Id.* at 912. However, such groundwater and geotechnical data by its very nature is of broader interest and application than the highly specialized, proprietary data that Constantine Metals is collecting concerning mineral deposit location and content. That proprietary data serves only to facilitate mine development.

In *Greater Yellowstone*, the issue was not whether, in general, mineral exploration has utility independent of mine development, but whether the exploration of a specific tract had utility independent of a larger adjacent mine development proposal. 392 F. Supp. 2d at 1237-40. The court found that the adjacent proposal could move ahead with or without development of the smaller tract, and that the independent utility of exploring the small tract was to facilitate mining *on that separate tract*. *Id.* at 1240 ("While the information from the exploratory project may be used in [the larger] proposal, the exploratory project

has a stand-alone purpose—gathering information to allow mining in [the exploratory project] area."). Thus, to the extent *Greater Yellowstone* addresses the utility of exploration, it describes no other utility than to facilitate mining. The development impacts BLM was required to consider here will not occur at some other location, but at the same Palmer Project area that Constantine Metals is exploring.

In sum, because Constantine Metals' mineral exploration has no utility other than to facilitate potential future mine development at the Palmer Project, and because mine development cannot occur without such exploration, mine development is a connected action that BLM could not refuse entirely to consider in approving Constantine Metals' advanced exploration plan.

IV. Vacatur or an injunction is appropriate.

BLM approved Constantine Metals' exploration plan and plan modification relying on unlawfully constrained NEPA analyses that failed entirely to examine potential impacts of mine development. Accordingly, Appellants request that the Court declare BLM's actions unlawful and vacate the decisions. Alternatively, Appellants request that the Court remand the decisions to BLM with direction to comply with NEPA, and in the meantime enjoin further activities under both agency decisions.

A. Appellants request that the court vacate BLM's decisions approving the exploration plan and modification.

Vacatur is the normal remedy where agency actions are unlawful. Section 706 of the Administrative Procedure Act provides that the reviewing court "shall . . . set aside" agency action that is arbitrary or not in accordance with law. 5 U.S.C. § 706(2)(A). Departure from the ordinary remedy of vacatur may be warranted in rare circumstances where the remedy would thwart the objective of the statute at issue or trigger disastrous large-scale consequences. *See, e.g.*, *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (denying vacatur where remedy would trigger economically disastrous blackouts across California's south coast basin); *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (stating that remand without vacatur is granted only "in rare circumstances"); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (denying vacatur where the remedy would frustrate the aims of the Clean Air Act, under which plaintiffs sued).

Vacatur is the appropriate remedy here. As described above, BLM approved Constantine Metals' exploration plan and plan modification in violation of NEPA and the Administrative Procedure Act. In environmental analyses evaluating the impacts of decisions to approve these activities, BLM entirely refused to consider mine development impacts. The agency's decisions should have been informed by such consideration and by the associated public process. By vacating the unlawful

actions, the Court would provide BLM the opportunity to comply with NEPA by considering the full scope of impacts associated with its actions, while preventing irreparable harm to Appellants, their members, and the environment until such compliance occurs. Vacatur would serve the purposes of NEPA, and, therefore, this case does not present extraordinary circumstances to warrant departure from the default remedy of vacatur.

Accordingly, Appellants request that the Court grant the ordinary remedy of vacatur.

B. Alternatively, Appellants request the Court remand to BLM the agency's decisions approving exploration, and enjoin activities under these decisions pending BLM's compliance with its NEPA obligations.

In the alternative, in addition to declaring BLM's decisions unlawful, Appellants request that the Court enter an injunction prohibiting the activities BLM unlawfully approved, including Constantine Metals' use of the approved road extensions to explore its federal mining claims from state Mental Health Trust lands, and remand to BLM to remedy its violations of NEPA before reaching a new decision. A plaintiff seeking a permanent injunction must demonstrate: (1) that it is likely to suffer an irreparable injury in the absence of an injunction; (2) that remedies available at law are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be

disserved by a permanent injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018). Appellants demonstrate all four elements in this case.

1. Absent an injunction, Appellants would suffer irreparable injury from the exploration activities BLM approved.

Plaintiffs seeking injunctive relief "must show that they are likely to suffer irreparable harm in the absence of [an injunction]." *Nat'l Wildlife Fed'n*, 886 F.3d at 822 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "Environmental injury, by its nature . . . is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Where conduct would harm Appellants' members' ability to view, experience, and utilize an area in its undisturbed state, this Court has held this constitutes irreparable harm. *Nat'l Wildlife Fed'n*, 886 F.3d at 822 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

The exploration activities BLM approved impose ongoing irreparable harms on Appellants and their members, with further, more severe harms likely. These activities preclude Appellants' members' uses of the Palmer Project area and surrounding areas. Exploration activities occupy physical spaces with infrastructure and equipment, and generate disturbances in the area, as well as safety concerns related to the use of heavy machinery, materials, and vehicles. *See*

supra pp. 11-12. Disturbances have displaced and will continue to displace wildlife, precluding Appellants' members' use of the area for hunting and wildlife viewing. II-ER-117, ¶11. Noise disturbance and safety concerns have reduced accessibility for or precluded Appellants' members' subsistence, cultural, aesthetic, and recreational uses of the area. II-ER-125, ¶¶21-22; II-ER-96, ¶8; II-ER-104, ¶11; II-ER-111, ¶12; II-ER-146-47, ¶18; II-ER-154, ¶6. Likewise, increased traffic volumes associated with the exploration activities BLM approved have precluded and are precluding use and enjoyment of the area and surrounding lands by Appellants' members. II-ER-158, ¶15; II-ER-146-47, ¶18; II-ER-111, ¶12. Additionally, in the absence of an injunction, it is likely that Constantine Metals will obtain a right to extract minerals at the Palmer Project before BLM is able to assess the potential impacts of mine development. *See supra* p. 34. This would harm Appellants' and their members' interests in and around the Palmer Project area.

2. Remedies available at law are inadequate to compensate for Appellants' injury.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages." *Amoco Prod. Co.*, 480 U.S. at 545.

Here, the harms to Appellants' and their members' interests entail environmental injuries that cannot be compensated adequately by remedies at law. Most immediately, the exploration activities BLM approved preclude or limit

Appellants' members' use of the Palmer Project area and surrounding lands for subsistence, cultural, spiritual, aesthetic, recreational, and other uses. *See supra* pp. 27, 53. As described above, these activities also potentially compromise Appellants' and their members' interests in the protection of the Chilkat River watershed as they increase the likelihood that Constantine Metals will obtain a right to extract minerals from its claims. Remedies at law are inadequate to compensate Appellants' members for harms to their uses of areas in and around the Palmer Project.

3. The balance of hardships supports issuance of an injunction.

In considering equitable relief, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co.*, 480 U.S. at 542). Where irreparable injury is "sufficiently likely," "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545.

Here, the balance of hardships favors an injunction halting the exploration activities BLM approved. An injunction would impose no hardships on BLM. Constantine Metals may experience some limited harm associated with a pause in its activities while BLM completes an adequate NEPA review. However, such potential monetary harm is not normally considered irreparable. *L.A. Mem'l*

Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980) ("It is well established . . . [that] monetary injury is not normally considered irreparable."). In the absence of an injunction, substantial harms to the environment and to Appellants' and their members' interests in the Chilkat River watershed are ongoing and sufficiently likely, as described above. *See supra* pp. 52-53; *see also All. for the Wild Rockies*, 632 F.3d at 1135 (finding that project's prevention of plaintiffs' use and enjoyment of the project area "is hardly a de minimis injury"). The balance of hardships favors enjoining the activities BLM unlawfully approved, pending the agency's compliance with NEPA on remand.

4. An injunction serves the public interest.

This Court "recognize[s] the 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). Here, the public interest is served by an injunction halting exploration activities while BLM carefully considers the proper scope of potential impacts from those activities.

CONCLUSION

BLM acted unlawfully when it approved Constantine Metals' final mineral exploration plan and plan modification without any consideration whatsoever of the environmental impacts of mine development on the Chilkat River watershed. Appellants request that the Court declare BLM's NEPA analyses invalid and vacate the decisions premised upon them. Alternatively, Appellants request that the Court declare these decisions unlawful, remand them to BLM with instructions to comply with NEPA and the Administrative Procedure Act, and enjoin further activities under the decisions pending BLM's compliance.

Respectfully submitted this 16th day of September, 2019.

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STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6 AND FORM 17

9th Cir. Case Number: 19-35424

The undersigned attorney states the following:

[x] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: *s/ Erin Whalen* **Date:** September 16, 2019

CERTIFICATE OF COMPLIANCE FOR BRIEFS
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)
AND FORM 8

9th Cir. Case Number: 19-35424

I am the attorney or self-represented party.

This brief contains 11,956 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Erin Whalen* **Date:** September 16, 2019

ADDENDUM

FEDERAL REGISTER NOTICES

OTHER AUTHORITIES

5 U.S.C.A. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

. . . .

30 U.S.C.A. § 21a

§ 21a. National mining and minerals policy; "minerals" defined; execution of policy under other authorized programs

Effective: October 19, 1996

The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.

It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.

30 U.S.C.A. § 22

§ 22. Lands open to purchase by citizens

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

42 U.S.C.A. § 4332

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

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

. . .

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

. . . .

43 U.S.C.A. § 1701

§ 1701. Congressional declaration of policy

. . .

HISTORICAL AND STATUTORY NOTES

. . .

Savings Provisions

Pub.L. 94-579, Title VII, § 701, Oct. 21, 1976, 90 Stat. 2786, provided that:

. . .

"**(h)** All actions by the Secretary concerned under this Act shall be subject to valid existing rights.["]

43 U.S.C.A. § 1702

§ 1702. Definitions

Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by, this Act, as used in this Act--

. . .

(j) The term "withdrawal" means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than "property" governed by the Federal Property and Administrative Services Act, as amended from one department, bureau or agency to another department, bureau or agency.

. . . .

43 U.S.C.A. § 1712

§ 1712. Land use plans

Effective: December 19, 2014

. . .

(e) Management decisions for implementation of developed or revised plans

The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:

. . .

(3) Withdrawals made pursuant to section 1714 of this title may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318-2352; 30 U.S.C. 21 et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law: *Provided*, That nothing in this section shall prevent a wholly owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

. . . .

3 U.S.C.A. § 1714

§ 1714. Withdrawals of lands

Effective: December 19, 2014

. . .

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

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been

discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

. . .

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

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

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

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

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

40 C.F.R. § 1502.1

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.22

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

. . .

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

. . .

(4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

. . .

40 C.F.R. § 1508.7

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.8

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.25

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

. . . .

43 C.F.R. § 3809.1

§ 3809.1 What are the purposes of this subpart?

The purposes of this subpart are to:

(a) Prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws. Anyone intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas. This subpart establishes procedures and standards to ensure that operators and mining claimants meet this responsibility; and

(b) Provide for maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands.

43 C.F.R. § 3809.10

§ 3809.10 How does BLM classify operations?

BLM classifies operations as—

(a) Casual use, for which an operator need not notify BLM. (You must reclaim any casual-use disturbance that you create. If your operations do not qualify as casual use, you must submit a notice or plan of operations, whichever is applicable. See §§ 3809.11 and 3809.21.);

(b) Notice-level operations, for which an operator must submit a notice (except for certain suction-dredging operations covered by § 3809.31(b)); and

(c) Plan-level operations, for which an operator must submit a plan of operations and obtain BLM's approval.

43 C.F.R. § 3809.11

§ 3809.11 When do I have to submit a plan of operations?

(a) You must submit a plan of operations and obtain BLM's approval before beginning operations greater than casual use, except as described in § 3809.21. Also see §§ 3809.31 and 3809.400 through 3809.434.

(b) You must submit a plan of operations for any bulk sampling in which you will remove 1,000 tons or more of presumed ore for testing.

(c) You must submit a plan of operations for any operations causing surface disturbance greater than casual use in the following special status areas where § 3809.21 does not apply:

(1) Lands in the California Desert Conservation Area (CDCA) designated by the CDCA plan as "controlled" or "limited" use areas;

(2) Areas in the National Wild and Scenic Rivers System, and areas designated for potential addition to the system;

(3) Designated Areas of Critical Environmental Concern;

(4) Areas designated as part of the National Wilderness Preservation System and administered by BLM;

(5) Areas designated as "closed" to off-road vehicle use, as defined in § 8340.0–5 of this title;

(6) Any lands or waters known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat, unless

BLM allows for other action under a formal land-use plan or threatened or endangered species recovery plan; and

(7) National Monuments and National Conservation Areas administered by BLM.

43 C.F.R. § 3809.21

§ 3809.21 When do I have to submit a notice?

(a) You must submit a complete notice of your operations 15 calendar days before you commence exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. See § 3809.301 for information on what you must include in your notice.

. . . .

3 C.F.R. § 3809.100

§ 3809.100 What special provisions apply to operations on segregated or withdrawn lands?

(a) Mineral examination report. After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid. BLM may require preparation of a mineral examination report before approving a plan of operations or allowing notice-level operations to proceed on segregated lands. If the report concludes that the mining claim is invalid, BLM will not approve operations or allow notice-level operations on the mining claim. BLM will also promptly initiate contest proceedings.

(b) Allowable operations. If BLM has not completed the mineral examination report under paragraph (a) of this section, if the mineral examination report for proposed operations concludes that a mining claim is invalid, or if there is a pending contest proceeding for the mining claim,

(1) BLM may—

(i) Approve a plan of operations for the disputed mining claim proposing operations that are limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier; and

(ii) Approve a plan of operations for the operator to perform the minimum necessary annual assessment work under § 3851.1 of this title; or

(2) A person may only conduct exploration under a notice that is limited to taking samples to confirm or corroborate mineral exposures that are physically disclosed and existing on the mining claim before the segregation or withdrawal date, whichever is earlier.

(c) Time limits. While BLM prepares a mineral examination report under paragraph (a) of this section, it may suspend the time limit for responding to a notice or acting on a plan of operations. See §§ 3809.311 and 3809.411, respectively.

(d) Final decision. If a final departmental decision declares a mining claim to be null and void, the operator must cease all operations, except required reclamation.

46 FR 18026-01, 1981 WL 149008
RULES and REGULATIONS
COUNCIL ON ENVIRONMENTAL QUALITY
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations

Monday, March 23, 1981

***18026 March 17, 1981.**
AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information Only: Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations.

SUMMARY: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, held meetings in the ten Federal regions with Federal, State, and local officials to discuss administration of the implementing regulations. The forty most asked questions were compiled in a memorandum to agencies for the information of relevant officials. In order efficiently to respond to public inquiries this memorandum is reprinted in this issue of the Federal Register.

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March 16, 1981.

Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process

Subject: Questions and Answers About the NEPA Regulations

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A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

Department of the Interior

Departmental Manual

Effective Date: 8/1/05

Series: Public Lands

Part 603: Land Withdrawal Program

Chapter 1: Policy and Responsibility

Originating Office: Bureau of Land Management

603 DM 1

1.1 **Policy.** In general, the Secretary of the Interior is vested by statute and under limited circumstances by Executive order, with the administrative responsibility for the withdrawal of lands owned or controlled by the United States for public purposes and for the modification, extension or revocation of withdrawals. The term withdrawal, as employed in this Chapter, includes not only withdrawals of public lands from the general land laws but, also, reservations, power site classifications and transfers of administrative jurisdiction. The term, however, does not include the classification of public lands for their mineral potential. The term "applicant" as used in this Chapter refers to Interior bureaus or offices filing a withdrawal application. In processing a withdrawal application, the following policy shall be observed.

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E. In order to ensure that these policies are observed within Interior, no official or employee of any Interior bureau or office shall file a withdrawal application with the Bureau of Land Management unless and until the appropriate program Assistant Secretary for the bureau or office concerned has approved a withdrawal petition. Where such program Assistant Secretary is other than the Assistant Secretary - Land and Minerals Management, the withdrawal petition, either with or without an accompanying application, shall be referred to the Assistant Secretary - Land and Minerals Management, for his or her comment before it is considered for approval.

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1.2 **Responsibilities.**

A. The Assistant Secretary - Land and Minerals Management is responsible for policy matters affecting land withdrawal related actions; for approving basic procedures affecting withdrawal related actions; and for establishing and maintaining relationships with other agencies necessary to the successful conduct of Interior's land withdrawal program with respect to such agencies. All Interior directives or initiatives relating to land withdrawals shall be submitted to the Assistant Secretary - Land and Minerals Management for approval.

B. The Bureau of Land Management is responsible for processing all withdrawal related applications or proposals; for making recommendations concerning them to the Assistant Secretary - Land and Minerals Management; for developing and conducting a withdrawal review program; for assisting applicants with their withdrawal related inquiries and needs; for devising effective, uniform operating procedures; for keeping the Assistant Secretary - Land and Minerals Management informed; and recommending to that official necessary improvements with respect to Interior's land withdrawal program.