No. 19-35424

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CHILKAT INDIAN VILLAGE OF KLUKWAN; SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Plaintiff-Appellants,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT, et al.,

Federal Defendants-Appellees,

and

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

Defendant-Intervenor-Appellees.

On Appeal from the United States District Court for the District of Alaska,
Case No. 3:17-cv-00253-TMB Hon. Timothy M. Burgess, District Judge

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DEFENDANT-INTERVENOR-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, defendant-intervenor-appellees inform the Court that: (1) Alyu Mining Co. Inc. and Haines Mining & Exploration, Inc. are privately held corporations that do not have any parent corporation that has offered shares to the public; and (2) Constantine North LLC, is a subsidiary of Constantine Mineral Resources Ltd., which is a publicly held corporation.

DATED this 27th day of November 2019.

/s/James F. Clark
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Attorney for Alyu Mining Co. Inc. et al.

I. INTRODUCTION

Consistent with Supreme Court and Ninth Circuit precedent, the district court properly concluded that the Bureau of Land Management (BLM) complied with the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4332 *et seq.*) when it approved the BLM's 2016 Exploration Mining Plan of Operations (MPO) and 2017 800' Road Extension MPO.

Nevertheless, Appellants continue to claim in this appeal that an analysis of the potential environmental impacts of the potential development of a hypothetical mine should have been included in those MPO Environmental Analyses (EAs) to assist BLM in deciding whether to withdraw the Palmer Project Area from location and entry under the Mining Act of 1872 (30 U.S.C. §§ 22 – 42) (Mining Act) prior to exploration which might lead to "discovery"[1] of a locatable mineral:

> **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.** (Appellants' Opening Brief at 37). (Emphasis added).

A significant fatal flaw with Appellants' argument is that BLM in fact prepared an Environmental Impact Statement (EIS) **"**recogniz[ing] mineral

[1] There is a "discovery" of minerals if the claimed mineral deposit is valuable enough that a prudent person would be justified in expending further labor and money to develop the minerals. Generally, this means that the miner must be able to make a profit by extracting the minerals and bringing them to market (called the "marketability test"). *Coleman v. United States,* 390 U.S. 599 (1968). "But this does not mean that the locator must prove that he will in fact develop a profitable mine." *Converse v. Udall* 399 F.2d 616, 622 (9th Cir. 1968).

exploration and mining activities as important uses of the land and resources within the Project Area" in the areawide Federal Land Policy & Management Act (43 U.S.C. §§ 1701 *et seq*.) (FLPMA) 2008 Ring of Fire Land and Resource Management Plan (RMP). (2016 EA Section 1.4 at 1-8 (III-ER-378)). Appellants did not offer withdrawal of the Project Area from location and entry under the Mining Act as an alternative in the 2008 Ring of Fire RMP or otherwise object to mineral exploration or mining in the Project Area. Further, Appellants do not explain why NEPA required a second such discussion in the 2016 and 2017 MPO EAs which were tiered to the 2008 Ring of Fire RMP.

For the reasons set out below the district court rightly found that FLPMA (43 U.S.C. § 1714), not NEPA, is the proper process for the Secretary to consider withdrawing public land from location and entry under the Mining Act.; that NEPA did not require BLM to include an analysis of the environmental impacts of potential mine development in Constantine's Exploration MPO EAs because discovery occurs by operation of law under the Mining Act outside of BLM's control (Order at 50; I-ER-52); and that BLM' regulations are non-discretionary - they '"establish specific and limited circumstances under which BLM may disapprove a proposed MPO or MPO modification.'" (Order at 51; I-ER-53).

Finally, the district court correctly decided that because potential future mine development was not reasonably foreseeable from BLM's approval of Constantine's

2016 Exploration MPO and 2017 Road Extension MPO (Order at 45; I-ER-47), and that because the MPOs had independent utility that was not connected to potential future mine development, the MPO EAs were not improperly segmented from an EIS analyzing potential future mine development. (Order at 40; I-ER-42).

Accordingly, Appellants' appeal should be denied.

II. STATEMENT OF JURISDICTION.

A. The Basis for the District court's Jurisdiction.

The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

B. The Basis for this Court's Jurisdiction.

Appellants correctly state that this Court has jurisdiction under 28 U.S.C. § 1291 because they appeal from the March 15, 2019 opinion of the district court (I-ER-3-55) which entered its final judgment on May 7, 2019 (I-ER-1-2). Appellants filed a timely Notice of Appeal on May 13, 2019. (II-ER-59-60).

III. ISSUES PRESENTED FOR REVIEW.

Whether the district court properly granted summary judgment in favor of the Appellees and Intervenor Appellees by concluding that the BLM complied with NEPA in authorizing the 2016 Exploration MPO EA and the 2017 Road Extension Amendment MPO EA for the Palmer Project by deciding that:

(1) NEPA review does not mandate – or even trigger – any process by which BLM would have to investigate the option of withdrawal of the

Project Area from location and entry under the Mining Act because withdrawal of an area from location and entry under the Mining Act is a separate agency action, governed by FLPMA, with independent statutory and regulatory standards to justify the withdrawal and a distinct procedure that BLM and the Secretary must follow.

(2) because NEPA does not require BLM to act on the possibility of an event (i.e., "discovery" of a locatable mineral under the Mining Act) that is outside of its control, but occurs due to operation of law and is contingent upon the actions of a third party, and not on any action by BLM, NEPA did not require the BLM to include an analysis of the environmental impacts of potential mine development as part of its 2016 Exploration MPO EA and its 2017 800' Road Extension Amendment EA.

(3) BLM's regulations do not give the agency discretion to disapprove an Exploration MPO and Road Extension MPO based on the potential future impacts that such exploration may have on the opportunity to withdraw an area from location and entry under the Mining Act.

(4) there was no proposal for development of mine, nor is potential future development of a mine reasonably foreseeable from approving a mineral exploration MPO, and thus NEPA did not require that the

potential environmental impacts of potential future mine development be analyzed in the same NEPA document as the cumulative impacts of the 2016 Mine Exploration MPO EA or the 2017 Road Extension Amendment MPO EA; and

(5) mining exploration has a utility and purpose separate and independent of mine development, and thus mine exploration and mine development are not connected activities that must be analyzed in the same NEPA document;

IV. STATEMENT OF THE CASE.

In December 2017, Appellants brought an action against Federal Appellees to halt implementation of the 2016 and 2017 Palmer Project Exploration MPO and MPO Amendment for construction of 2.5 miles of road, an 800' extension of the road (that generally followed a pre-existing trail), and 40 mine exploration drilling sites. (2016 EA at 1-8 through 1-13; III-ER-377-382). Appellants did "not challenge the impacts included in the EAs for the currently proposed activities in the Exploration Plan and Road Extension." (Order at 43; I-ER-45). Rather, Appellants alleged that in approving them the BLM violated NEPA and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA) by failing to analyze the potential environmental impacts from potential future mine development. (Order at 34; I-ER-36).

The district court authorized Intervenor Appellees to intervene on May 24, 2018. (Dkt 40; IV-ER-855). On March 15, 2019 the district court entered an Order upholding the BLM's 2016 and 2017 approvals of Constantine's MPO and MPO Amendment on the merits (Dkt. 61; I-ER-3-55) and entered final judgment in favor of Appellees and Intervenor Appellees on May 7, 2019. (Dkt. 62, I-ER-1-2).

On May 13, 2019, Appellants appealed the district court's judgment. (Dkt. 63, II-ER-56-60). The district court's final judgment in favor of the Appellees and Intervenor Appellees is now before this Court.

V. STATEMENT OF FACTS.

The Palmer Project is located within the Haines Borough on 340 federal mining claims to which BLM's FLPMA areawide 2008 Ring of Fire RMP and the Haines Borough 2025 Comprehensive Plan (September 2012) apply. (2016 EA at 1-8 – 1-13; III-ER-377-382). The Palmer Project is in steep, rugged mountainous terrain approximately 34 miles northwest of Haines, Alaska (population 2,500) and eight miles from the Canadian border. The Palmer Project is adjacent to Glacier Creek, which is a glacier fed stream five miles upstream from the Klehini River, which is 17 miles upstream of the Chilkat River. (2016 EA III-ER-371-374). Glacier Creek is non-fish bearing where the project is located but contains resident fish in its middle portion and anadromous fish in its lower reach approximately a mile from where it joins the Klehini. There has been placer mining in the area

(known as the Porcupine Mining District) commencing in the late 1890s. A history of mining in the District is set out in the Cultural Resource Survey Report prepared for BLM as part of the 2016 Exploration MPO EA. (S.E.R. 34 - 42).

Between 1969 and 1983 Haines resident and self-taught prospector Merrill Palmer and various colleagues located the 340 federal claims at issue in this case. From 1969 to 1998 Palmer contacted over 20 mining companies. Sixteen mining companies held leases to explore the claims, eight of which engaged in exploration through core drilling. Bear Creek Mining and Exploration, the largest exploration company in the United States, leased the property from 1994 until 1997 when that company was acquired by Rio Tinto which dropped the lease. (Palmer Declaration at Par. 15). (S.E.R. 4).

Each of the companies turned back the lease to Merrill Palmer's company – vividly illustrating that the BLM is correct in asserting that mineral exploration does not normally lead to mine development. (2017 EA at 12; IV-ER-762). Constantine's corporate predecessors and Constantine have held the lease to explore the claims since December 31, 1997. (Palmer Declaration at Par. 17) (S.E.R. 4).

Access to the Federal claims of the Palmer project has historically been by helicopter from a base about eight miles, as the crow flies, from the exploration area. There is an existing, now overgrown, cat trail access constructed in 1977-

1978 by Merrill Palmer, President and principle shareholder of the claims' owners (Alyu Mining Co. Inc. and Haines Mining & Exploration, Inc.) (Palmer Declaration at Pars. 8 and13) (S.E.R. 2 and 4).

In 2014 Constantine constructed a road from the existing logging road under a State permit on State claims towards the Federal claims at issue here. Pursuant to a Notice level categorical exclusion, BLM authorized Constantine to disturb up to five acres under which it extended the State permitted road for 1.2 miles on its leased Federal claims. (2016 EA at 1-7; Doc. III-ER-377). The Constantine road followed the cat trail where practical (Green Declaration at Par.13) (Dkt. 17; II-ER-63).

To more safely access the Federal mining claims, on August 18, 2016 the BLM approved an MPO for a 2.5-mile extension of the road along with exploration sites for 40 drill holes. (2016 Decision Record; III-ER-569 - 575). Pursuant to the September 21, 2017 BLM Decision Record, Constantine constructed another 800' of road for exploration access to the Project in 2017 which generally followed the Palmer cat trail. (Green Declaration at Par.13). (Dkt. 17; II-ER-63). These approvals were conditioned on Constantine meeting certain environmental Stipulations set out in the EA. (2017 Decision Record; IV-ER-743-744; Stipulations IV-ER-775-778).

Appellants incorrectly characterize the foregoing as "advanced exploration." (Appellants' Opening Brief at 16 - 21). In fact, the 2016 MPO EA on which

Appellants brought this action (and comprises the record describing the exploration activity on which this appeal is based), authorized disturbance of 35 acres consisting of construction of 2.5 miles of road and 40 20 x 20 drill sites. (III-ER-393). BLM characterized this as follows: "Constantine is in the early stage of the mine life cycle with operations currently focused on the Exploration step and refinement of their inferred resource." (2017 MPO EA; III-ER-763).

In its 2016 exploration MPO EA BLM explained that "[t]he General Mining Law of 1872, as amended (30 U.S. Code [USC] 2), FLPMA; and the FLPMA areawide 2008 BLM Ring of Fire RMP establish the need for BLM's action." (EA at 1-7; III-ER-377). The availability of the Project Area for mineral exploration and mining under the Mining Act was described in the areawide FLPMA 2008 Ring of Fire Land RMP EIS to which the 2016 and 2017 MPO EAs were tiered:[2]

> Several land and resource management plans are relevant to the Project Area, including the 2008 Ring of Fire Resource Management Plan (BLM 2008a) and the Haines Borough 2025 Comprehensive Plan**. Both of these plans recognize mineral exploration and mining activities as important uses of the land and resources within the Project Area.** Adjacent lands include those managed by the Haines State Forest Management Plan (ADNR 2002a) and the surface and mineral estate owned and managed by the Alaska Mental Health Trust Authority (Trust). (2016 EA Section 1.4 at 1-8 (III-ER-378)). (Emphasis added).

In its 2016 exploration MPO Decision Record the BLM stated:

[2] BLM's 2017 Decision to approve the road extension was also "based on the Ring of Fire Record of Decision and Approved RMP and a site-specific analysis." (2017 Decision Record at 2; IV-ER-744).

> The Ring of Fire RMP/ROD, approved in 2008, provides the overall long-term management direction for BLM-managed lands, which includes unpatented federal mining claims, in this area. The proposed action and alternatives are consistent with the RMP/ROD. Specifically, the proposed action is consistent with: B. Cultural Resources, C. Fisheries. G. Hazardous Materials, L. Minerals – Locatable and Saleable, N. Paleontology, Q. Soils, S. Vegetation, T. Visual Resources, U. Water Resources, V. Wetland/Riparian, and X. Wildlife (EA, Section 1.4.1 Bureau of Land Management – Ring of Fire Management Plan). (2016 Decision Record at 2 – 3; III-ER-570 – 571).

Four pages of specific management decisions and mineral goals from the 2008 Ring of Fire RMP were applied to Constantine's mineral exploration MPO. [3] (2016 EA at 1-8 and 1-9 through1-13. III-ER-378 and III-ER-379-383).

Intervenor Appellees adopt by reference the Federal Appellees Statement of Facts. Federal Rule of Appellate Procedure (FRAP) 28(i).

VI. SUMMARY OF ARGUMENT.

Appellants did not challenge the road construction and drilling activities proposed in the 2016 Exploration MPO EA or the 2017 MPO Road Extension EA. Rather, Appellants assert that the Exploration and Road Extension MPO EAs violated NEPA solely because they failed to forecast the potential environmental

[3] The Goal for Minerals in the areawide 2008 Ring of Fire RMP, to which the 2016 and 2017 EAs are tiered, is: "**Minerals - Locatable and Saleable** o *L-1: Goal* Manage the lands within the planning area to provide opportunities for mineral exploration and development in a manner that prevents undue and unnecessary degradation resulting from the development of locatable and saleable minerals. (III-ER-380).

impacts of potential full mine development. (Order at 43; I-ER-45). They explain that such a review is required for BLM to determine **"whether to allow hardrock mining in this area at all."** (Appellants' Opening Brief at 37). (Emphasis added).

In response to Appellants' arguments the district court held that BLM's 2016 and 2017 EAs and MPO approvals complied with all applicable environmental laws, including NEPA. Specifically, the district court found that Appellants pursued the wrong legal process in seeking to withdraw the Project Area from location and entry under the Mining Act through a NEPA action:

> NEPA review does not mandate – or even trigger – any process by which BLM would have to investigate the option of a land withdrawal. The issue of a land withdrawal would constitute a separate agency action governed by FLPMA, with independent statutory and regulatory standards to justify the withdrawal and a distinct procedure that BLM and the Secretary must follow. *See National Mining Association v. Zinke*, 877 F.3d 845, 855 – 858 (9th Cir. 2017) (describing withdrawal authority and process)." (Order at 50; I-ER-52).

This finding is supported by 43 § 1712 (e)(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 (citations omitted) or transferred to another department, bureau, to agency **only by withdrawal action pursuant to section 1714** or other action pursuant to applicable law. (Emphasis added).

The district court held that, because the BLM had no discretion or control over whether or when third party action might trigger discovery by operation of law under the Mining Act, NEPA did not require the BLM to describe the potential

environmental impacts of potential development of a hypothetical mine in the 2016 Exploration MPO EA or the 2017 800' Road Extension Amendment MPO EA. (Order at 50; I-ER-52).

The district court explained why Appellants' continuing reliance on *Conner v Burford,* 842 F.2d 1441 (9th Cir. 1988) in their Opening Brief is misplaced: "[U]nlike the cases Plaintiffs rely on[4] for the proposition that this is an irrevocable decision by the agency – all of which involved some affirmative act on the part of the agency – the vesting of rights under the Mining Act [in this case] occurs independent of any action by BLM."

As the district court recognized, 43 C.F.R. § 3809.411 (d) (3) (i-iii) '"establish specific and limited circumstances under which BLM may disapprove a proposed MPO or MPO modification.'" (Order at 51; I-ER-53). They do not give BLM the discretion to disapprove a proposed MPO because of potential future impacts that potential mining operations might have on a potential withdrawal the Secretary may wish to make at some future date pursuant to a separate process.

Finally, the district court decided that because potential future mine development was not reasonably foreseeable from approval of the 2016 Exploration MPO and 2017 800' Road Extension Amendment MPO (Order at 45; I-ER-47), and

[4] The district court cites *Pit River Tribe*, 469 F.3d at 775-76; *Bob Marshall v. Hodel*, 852 F.2d 1223, 1226 (9th Cir. 1988); *Conner v. Burford,* 848 F.2d 1441 at 1462 (9th Cir. 1988). (Order at 48 n.236; I-ER-50).

that because the MPOs had independent utility that was not connected to potential future mine development, the MPO EAs were not improperly segmented from an EIS analyzing potential future mine development. (Order at 40; I-ER-42).

VII. ARGUMENT.

A. LEGAL STANDARDS.

1. Standard of review.

The Intervenor Appellees agree with Appellants that the Court reviews the district court's summary judgment decision in this APA case de novo.

2. Judicial review under the APA.

The APA's arbitrary and capricious standard of review precludes a court from substituting its own (or a litigant's) judgment for that of the expert agency. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008), abrogated in part on other grounds by *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

Under the APA standard, federal agencies are owed substantial deference by courts reviewing agency action, particularly agency action involving scientific and technical matters within their expertise. *McNair,* 537 F.3d at 987-88. Reviewing courts should be at their *most* deferential when an agency is addressing difficult issues within its area of special expertise, such as the BLM's expertise in mining in this case. *Id.* at 993. *See also Marsh v. Oregon Natural Res. Council,* 490 U.S. 360,

376-77 (1989) (deference to an agency's decision is particularly appropriate where questions of scientific methodology or technical expertise are involved).

As a rule the Ninth Circuit will "uphold agency decisions so long as the agencies have 'considered the relevant factors and articulated a rational connection between the factors found and the choices made.'" *City of Sausalito v. O'Neill,* 386 F.3d 1186, 1206 (9th Cir. 2004) (quoting *Selkirk Conservation All. v. Forsgren,* 336 F.3d 944, 953-54 (9th Cir. 2003). *See Protect Our Communities Found'n v. LaCounte,* 939 F.3d 1029, 1034 (9th Cir. 2019).

B. THE DISTRICT COURT CORRECTLY HELD THAT NEPA IS NOT TRIGGERED BY THE ACTION OF A PRIVATE THIRD PARTY THAT CAUSES A RESULT WHICH OCCURS BY OPERATION OF LAW OVER WHICH THE AGENCY HAS NO DISCRETION OR CONTROL.

At pages 31 – 37 of their Opening Brief Appellants argue that NEPA's timeliness requirements obligated the BLM to analyze the potential environmental impacts of potential development of a hypothetical mine in the 2016 and 2017 MPO EAs to assist the BLM in deciding whether to withdraw the Palmer Project Area from location and entry under the Mining Act prior to exploration. Appellants assert that mineral exploration might lead to "discovery" of a locatable mineral

under the Mining Act thereby extinguishing "the agency's, authority to preclude mining in the area." [5] (Appellants' Opening Brief at 33).

> On the facts here, BLM's decision to approve the proposed exploration was a crucial point of commitment beyond **which the agency could lose the authority to absolutely preclude a mine.** (Appellants' Opening Brief at 32). (Emphasis added).
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> 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. (Appellants' Opening Brief at 33). (Emphasis added).
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> - - - -
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> 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 - likely will never be, another opportunity **for the agency to act** on that knowledge. (Appellants' Opening Brief at 35). (Emphasis added).
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>
> 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**

[5] Appellants argument depends upon their implicit assumption, unsupported by the record, that discovery had not already occurred prior to the BLM's decision to approve the Exploration and Road Extension MPOs, notwithstanding Alyu's exploration activities commencing in 1969 (Merrill Palmer Declaration at Pars. 2 – 20; S.E.R. 2 - 5) and Constantine's expenditure of $ 40 million in exploration activities since 1998. (Second Declaration of Darwin Green at Par. 7; I-ER-65).

> **whether to allow hardrock mining in this area at all.** (Appellants' Opening Brief at 37). (Emphasis added).

1. Appellants' Case Fails Because Only the Secretary, or a Person in His/Her's Office, Confirmed by The Senate (Not The BLM),[6] Has Authority to Withdraw Public Lands from Location and Entry Under the Mining Act (43 U.S.C.§ 1712 (e)(3)).

As the district court explained, FLPMA [i.e., 43 U.S.C.§ 1714 (a)], not NEPA, is the correct process for withdrawing land from location and entry under the Mining Act:

> NEPA review does not mandate – or even trigger – any process by which BLM would have to investigate the option of a land withdrawal. The issue of a land withdrawal would constitute a separate agency action governed by FLPMA, with independent statutory and regulatory standards to justify the withdrawal and a distinct procedure that BLM and the Secretary must follow. *See National Mining Association v. Zinke*, 877 F.3d 845, 855 – 858 (9th Cir. 2017) (describing withdrawal authority and process)." (Order at 50; I-ER-52).

Appellants are aware that FLPMA sets out the proper procedure for seeking a withdrawal of land from location and entry under the Mining Act: "BLM can petition the Assistant Secretary for Land and Minerals Management to withdraw land from

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[6] Effective Date 10/5/09 Series Delegation Part 235 Bureau of Land Management Chapter1 General Program Delegation, Director, Bureau of Land Management:

> 1. 2. The following authorities are **NOT DELEGATED** in the general authorities listed in 235 DM1.1:
>
> C. **The authority to issue, revoke, modify, or extend withdrawals or reservations of public domain lands. (Emphasis added).**

the 1872 Mining Act in order to maintain public values or reserve the area for other public purposes." (Appellants' Opening Brief at 23)., Yet, notwithstanding their awareness of the proper procedure, the record does not show that Appellants (or any other entity) ever petitioned the Secretary pursuant to 43 U.S.C. § 1714 (a) to withdraw the Project Area from location and entry under the Mining Act. Notwithstanding their awareness of the proper procedure, Appellants nevertheless continue to argue that BLM was required to use the NEPA MPO EA process in the case at bar to determine whether "to allow hardrock mining in this area at all." (Appellants' Opening Brief at 37).

Assuming *arguendo* that the district court were wrong and Appellants were correct in their contention that BLM should have used the NEPA process "to investigate the option of a land withdrawal," the record does not show that Appellants raised it during the FLPMA areawide 2008 Ring of Fire RMP NEPA process. Appellants could have proposed withdrawal of the Project Area from location and entry under the Mining Act as an alternative to be considered. They could have objected to, or appealed, the application of the FLPMA areawide 2008 Ring of Fire RMP's management decisions and mineral goals to the Project Area.

Finally, **"**mineral exploration and mining activities" were recognized "as important uses of the land and resources within the Project Area" in the areawide FLPMA 2008 Ring of Fire RMP. (2016 EA Section 1.4 at 1-8 (III-ER-378)).

Appellants do not explain why NEPA required a second such discussion in the 2016 and 2017 MPO EAs which were tiered to the 2008 Ring of Fire RMP.

Their failure to engage in the NEPA process which they (incorrectly) assert should have been used to assist BLM in determining whether "to allow hardrock mining in this area at all" is legally significant. As Justice Thomas pointed out in *Department of Transportation v. Public Citizen* 541 U.S. at 764-765:

> Persons challenging an agency's compliance with NEPA must "structure their participation so that it ... alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

2. **NEPA Was Not Triggered by Appellants Approval of an Exploration MPO Because Whether and When Discovery Occurs under the Mining Act is Outside BLMs' Discretion and Control.**

Appellants did not contest that discovery occurs under the Mining Act by operation of law as a consequence of non-agency, third-party action: "[A]s Plaintiffs recognize, '[t]his vesting of rights occurs by operation of law, triggered by third party actions, requiring no additional agency decision.'" (Order at 48-49; I-ER-50-51). Because discovery is not triggered by any action taken by BLM in approving the 2016 Exploration MPO EA and the 2017 Road Extension Amendment MPO EA, the district court correctly held:

> Absent some discretionary decision by the agency that represents a commitment of resources by affirmative act, NEPA's timeliness requirements cannot be said to be violated. The event Plaintiffs assert could result in an "irrevocable and irretrievable" commitment of resources (thus they argue, mandating agency environmental review *now*) depends on the actions of a private, third party, and is not within BLM's control. NEPA's regulations cannot bind BLM to act based on the possibility of an event that is not only outside their control but occurs due to operation of law and is contingent on the actions of third parties, without any action at all by BLM. (Order at pages 49-50; I-ER-51-52).

The district court's decision is supported by the Supreme Court's holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752, (2004). That case concerned safety regulations that were promulgated by the Federal Motor Carrier Safety Administration (FMCSA) and had the effect of triggering a Presidential directive allowing Mexican trucks to ply their trade on United States roads. The Court held that the NEPA did not require the agency to assess the environmental effects of allowing the trucks entry because "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.*, at 769.

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.

Id. at 770.

The Ninth Circuit has likewise long held that NEPA is not triggered in situations over which the agency has little or no discretion or control. In *Sierra Club v. Penfold,* 752 F.2d 1307, 1314 (9th Cir. 1988) the Court held:

> We hold that as a matter of law BLM's approval of Notice mines without an EA does not constitute major Federal action within the scope of NEPA, 42 U.S.C. § 4332(2)(c), or the CEQ implementing regulations, 40 C.F.R. § 1508.18. Neither BLM's approval process nor regulatory involvement is sufficient to trigger NEPA or ANILCA application.

More recently, the Ninth Circuit fully embraced the holding of *Dep't of Transp. v. Pub. Citizen* in *Alaska Wilderness League v. Jewell,*788 F.3d 1212, 1225 (9th Cir. 2015):

> NEPA requires federal agencies to provide an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *see also Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). NEPA's implementing regulations define "[m]ajor Federal action" to include "actions with effects that may be major, and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Even when a major federal action occurs, however, NEPA remains subject to a "rule of reason" that frees agencies from preparing a full EIS on "the environmental impact of an action it could not refuse to perform." *Pub. Citizen,* 541 U.S. at 769, 124 S.Ct. 2204. Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," the agency "[does] not need to consider the environmental effects arising from" those actions. *Id.*at 770, 124 S.Ct. 2204; *see also Sierra Club,* 65 F.3d at 1513 ("The [Bureau of Land Management's] inability meaningfully to influence Seneca's right-of-way construction leads us to conclude that the procedural requirements of NEPA do not apply to this case).

By analogy, because BLM had no authority "to prevent a certain effect [i.e. vesting of property rights] due to its limited statutory authority over the relevant action" [i.e. discovery of a locatable mineral during exploration under the Mining Act], "the agency [did] not need to consider the environmental effects arising from" those actions in authorizing the Exploration and Road Extension MPO EAs.

3. **The Cases on Which Appellants Rely Do Not Support Their Assertion That a Review of the Environmental Impacts of Potential Development of a Hypothetical Mine Must Be Part of the Exploration MPO EA.**

Appellants rely heavily (almost exclusively) on *Conner v Burford*, 848 F2d 1441 (9th Cir. 1988) for the proposition 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. (Appellants' Opening Brief at 32).

Conner does not apply here for two main reasons. First, unlike the agency's authority to write the terms of the lease affecting future development in *Conner*, BLM did not have the authority to withdraw the Project Area from location and entry under the Mining Act. That authority lies solely with the Secretary or his/her Senate confirmed delegee. (43 U.S.C. § 1714 (a); (43 U.S.C. § 1712 (e)(3)). Put another way - because BLM did not have authority to "preclude a mine," it was not required to consider the environmental impacts of doing so. *Alaska Wilderness League* at 1225.

Second, as the district court explained: "[U]nlike the cases Plaintiffs rely on for the proposition that this is an irrevocable decision by the agency – all of which involved some affirmative act on the part of the agency – the vesting of rights under the Mining Act occurs independent of any action by BLM." (district court Order at pages 48-49; I-ER-50-51).

Appellants disagree. They contend that, if the effect is the same, it makes no difference whether the vesting of rights is due to agency action (which the agency has the discretion to control) or is an indirect effect of an agency authorization due to third party action (outside the agency's control). (Appellants' Opening Brief at 35). However, the cases cited by Appellants do not support this contention. Again, NEPA applied in those cases because they involved a situation in which the agency controlled, and could change, the rights it granted to a third party and thus control the impact of such granted rights on future development. *See Conner*, 848 F.2d at 1451 (agency issuance of oil and gas leases represented a "point of commitment" after which "the government no longer has the ability to prohibit potentially significant inroads on the environment"). *See also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (agency issuance of 40-year lease extension which "did not reserve to the agencies the absolute right to deny development"); *Bob Marshall All. v. Hodel*, 852 F.2d 1223 (9th Cir. 1988) (agency issuance of oil and gas leases with terms similar to leases at issue in *Conner*).

In the case at bar BLM's discretion to restrict or prohibit future development activities was not limited *because of* any action BLM had proposed or rights it had conveyed – specifically, construction of 2.5 miles of road, an 800' extension of that road and 40 20 x 20 drilling pads. Instead BLM had "limited statutory authority" because the Mining Act authorized Constantine to explore its unpatented mining claims for locatable minerals (so long as it did not cause "unreasonable or undue" degradation of the surface 43 C.F.R § 3809)). *Department of Transportation v. Public Citizen*, 541 U.S. at 770. (See also 43 C.F.R. § 3809.411 (d) (3) (i – iii)).[7] Accordingly, BLM's approval of the Exploration and Road Extension MPOs "cannot be considered a legally relevant "cause" of the effect" – namely, discovery of a locatable mineral during such exploration. *Department of Transportation v. Public Citizen*, 541 U.S. at 770.

That it is not an effect of, or related to, the MPOs authorized by BLM is illustrated by the fact that "discovery" could have occurred by operation of law under the Mining Act at any time during Constantine's expenditure of $40 million dollars in the ten years of exploration prior to issuance of the MPOs. (Second Declaration of Darwin Green Par. 7; I-ER-65). There is no support in the record for Appellants' unproven assumption that discovery had not already occurred at the time the Exploration and Road Extension MPOs were authorized.

[7] See next Session: VII. B (3)

4. **BLM's Regulations Do Not Give the Agency Discretion to Disapprove an Exploration MPO Based on the Potential Future Impacts Such Exploration May Have on Withdrawal from Location and Entry Under the Mining Act.**

The district court's decision is also supported by the Supreme Court's decision in *Nat'l Assn. of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007). In *Nat'l Assn. of Home Builders*, the Supreme Court analyzed whether the Environmental Protection Agency (EPA) is required to engage in an Endangered Species Act (ESA) Section 7 consultation prior to transferring certain permitting authority to state officials under the Clean Water Act 33 U.S.C. §§ 1251 *et. seq* (CWA). The Supreme Court held that the statutory language of the CWA was "mandatory and the list exclusive; if the nine specified criteria [are] satisfied, the EPA [does] not have the discretion to deny a transfer application." *Id.* at 661. Consultation is required only where "there is discretionary Federal involvement or control." *Id.* at 669. Importantly, as a reason for its' holding the Supreme Court observed:

> Here, reading § 7(a)(2) as the Court of Appeals did would effectively repeal § 402(b)'s statutory mandate by engrafting a tenth criterion onto the CWA. Section 402(b) of the CWA commands that the EPA "shall" issue a permit whenever all nine exclusive statutory prerequisites are met. Thus, § 402(b) does not just set forth *minimum* requirements for the transfer of permitting authority; it affirmatively mandates that the transfer "shall" be approved if the specified criteria are met. The provision operates as a ceiling as well as a floor. By adding an additional criterion, the Ninth Circuit's construction of § 7(a)(2) raises that floor and alters § 402(b)'s statutory command. *Id.* at 663 – 664.

Just as EPA was not required to engage in an ESA consultation because it did not have discretion to deny a CWA transfer application if the applicant met certain criteria, Appellees correctly argued below that BLM's regulations (43 C.F.R. § 3809.411 (d) (3) (i-iii))[8] "do not give BLM discretion to disapprove a proposed MPO on the basis of potential future impacts that potential mining operations might have on the effectiveness of any potential withdrawal that the Secretary might want to make at some future date." (Dkt. 58 at 28; IV-ER-8).

In this case BLM determined that Constantine's exploration MPO met the requirements of § 3809.411 (d) (3) (i-iii), including that the proposed road construction and drilling "minimizes new disturbance to natural resources, prevents unnecessary or undue degradation of public lands, and promotes rehabilitation of previously mined areas within the claims block." (2016 Decision

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[8] **(d)** Upon completion of the review of your plan of operations, including analysis under NEPA and public comment, BLM will notify you that -

(3) BLM disapproves, or is withholding approval of your plan of operations because the plan:

(i) Does not meet the applicable content requirements of § 3809.401;

(ii) Proposes operations that are in an area segregated or withdrawn from the operation of the mining laws, unless the requirements of § 3809.100 are met; or

(iii) Proposes operations that would result in unnecessary or undue degradation of public lands.

Document at page 2; ER-III-570). As the district court pointed out, Appellants have never challenged any of these findings.[9]

Rather, contrary to the teaching of *Nat'l Assn. of Home Builders*, Appellants effectively seek to add a fourth criterion to 3809.411 (d) (3) (i-iii), namely to require BLM to disapprove an MPO that does not consider the potential environmental impacts of potential full mine development to assist it in determining "whether to allow hardrock mining in this area at all." (Appellants' Opening Brief at 37). Just as the Supreme Court refused to allow the Defenders of Wildlife to add a new criterion to the CWA process for approving a transfer of CWA permitting authority to a state, so should this Court refuse Appellants' effort to effectively add consideration of withdrawal of an area from location and entry under the Mining Act as a new criterion for BLM approval of a project level exploration MPO. The district court correctly held that FLPMA, not NEPA, provides the process for such consideration.

5. It Is Unreasonable to Expect Constantine to Know or Provide the Environmental Impacts of Full Mine Development While It Is Still in the Exploration Stage.

Appellants also argue that NEPA requires an agency to take a hard look at environmental impacts as soon as it can be reasonably done and that a thorough

[9] Order at 40, n.200; I-ER-42.

discussion of the environmental impacts of future mine development is possible because "BLM already had access to substantial information about potential information about potential mine development impacts in the Chilkat River watershed." (Appellants' Opening Brief at 38).

In considering Appellants' same argument below, the district court determined that the cases on which they relied were distinguishable and did not apply to the situation as bar:

> The cases Plaintiffs rely on for the proposition that review of future mining development must occur prior to approval of any Exploration are readily distinguishable from the present circumstances, and involve situations where the review at issue was for projects that were actually proposed, *See Te-Moak Tribe of Western Shoshone of Nevada v. Department of Interior*. 608 F.3d at 600 - 601 or where substantially more information was available to the agency about future activities. *See Northern Plains Resource Council, Inc. v. Surface Trans. Bd.*668 F.3d 1069, 1079 (9th Cir. 2011). (Order at 52).

Citing *California v. Block* and Wetlands *Action Network* [10] the district court held:

> Defendants correctly assert that any future mining development activities would require an MPO and would be subject to NEPA review, including an analysis of past, present, and future operations. 40 C.F.R. § 1508.7; 43 C.F.R. § 3809.401. Ninth Circuit law does not require this review to occur

[10] *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (noting that NEPA's timeliness requirements for a multi-step project are "tempered by the preference to defer detailed analysis until a concrete development proposal crystalizes the dimensions of a project's probable environmental consequences" (*Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976)) and *Wetlands Action Network v. U.S. Army Corps of Engineers,* 222 F.3d 1105, 1119 (9th Cir. 2000) (authorizing consideration of the phases of a multi-phased project separately where consideration together would be impractical due to incomplete planning for later phases),

> now, and, in fact, provides BLM the authority to defer that analysis until such a project is actually proposed. (Order at 52; I-ER-54).

The district court's decision aligns with NEPA's "rule of reason" that the Supreme Court described in *Department of Transportation v. Public Citizen*, 541 U.S at 767:

> Also, inherent in NEPA and its implementing regulations is a "'rule of reason,'" which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process. See *Marsh,* 490 U.S., at 373–374, 109 S.Ct. 1851. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.

Because Constantine has not made (and may never make) a proposal to develop a mine, it would be unreasonable to require the BLM to describe the potential environmental impacts of potential development of a hypothetical mine in an exploration MPO EA. As Appellees asserted below, to do so BLM would have to speculate about the components of a hypothetical mine, including the dimensions and location of the: i) orebody; ii) mining method; iii) processing facility; and iv) waste management plans, as well as the metallurgy of the orebody being developed. BLM averred in its Opposition brief below that to analyze future mine development under these circumstances BLM would have to "create a hypothetical mine development scenario – relying completely on speculation as to the location, duration, scope, etc., of such future actions." (Dkt. 58 at 13; IV-ER-857).

In the 2017 Mine Plan Modification EA BLM said: "When considering these exploration challenges and the current state of the resource information, Constantine's Palmer Project has a greater chance of not becoming a mine than it does at becoming a mine." (IV-ER-762). BLM further explained "Examination of environmental impacts, this early in the process, is limited by the available information, both about the potential for future mining and about the natural environment." (IV-ER 763). The district court agreed that BLM had no "specific, quantifiable information about the parameters of future mine development." (Order at 45; I-ER-47).

For the forgoing reasons, it would be unreasonable to require BLM to try to describe the impacts of a hypothetical mine in an exploration MPO EA that would be so speculative as to be meaningless to the decisionmaker and the public.

C. BECAUSE THERE WAS NO PROPOSAL FOR DEVELOPMENT OF A MINE, AND BECAUSE POTENTIAL FUTURE DEVELOPMENT OF A MINE IS NOT REASONABLY FORESEEABLE FROM APPROVAL OF A MINERAL EXPLORATION MPO, NEPA DID NOT REQUIRE THAT THE POTENTIAL ENVIRONMENTAL IMPACTS OF THE POTENTIAL DEVELOPMENT OF A HYPOTHETICAL MINE BE ANALYZED IN THE SAME NEPA DOCUMENT AS THE CUMULATIVE IMPACTS OF THE 2016 MINERAL EXPLORATION MPO EA OR THE 2017 ROAD EXTENSION AMENDMENT MPO EA.[11]

[11] As the district court explained: "Plaintiffs do not otherwise challenge the adequacy of BLM's cumulative impact analysis or the impacts identified that

In *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006) the Court explained when a cumulative impacts analysis is required:

> NEPA requires that an FEIS consider '[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.' 40 C.F.R. § 1508.25(a)(2). Ninth Circuit precedent defined a 'reasonably foreseeable action, for which cumulative impacts must be analyzed to include 'proposed actions.' (Citations Omitted).

Neither test applies to the Exploration and Road Extension MPO EAs: First, there is no other existing or proposed development in the Project Area with which the potential environmental impacts from potential mine development could cumulate. Second, until Constantine has sufficiently defined the orebody by exploration to prepare a mine plan and an economic analysis of that plan showing an economic return sufficient to justify such development, Constantine will be in no position to propose to develop a mine. (Second Green Declaration at Par. 6; I-ER-65). Thus, NEPA did not require the Exploration and Road Extension MPO EAs to include a cumulative impact analysis of the potential environmental impacts from potential mine development. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976).

In *League of Wilderness Defenders v. Connaughton*, 752 F.3d. 755, 762 (9th Cir. 2014) defined a "reasonably foreseeable future project" as follows:

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would directly result from the Exploration Plan or Road Extension activities. Rather, Plaintiffs challenge only whether additional activities should have been included in the scope of that analysis." (Order at 40, n.200; I-ER-42).

> A reasonably foreseeable future action is defined as an "[i]dentified proposal[]," 36 C.F.R. § 220.3, and an identified proposal exists where the agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 36 C.F.R. § 220.4(a)(1). Although "projects need not be finalized before they are reasonably foreseeable," *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011), they must be more than merely "contemplated," *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976). When looking at whether a potential future action is an identified proposal, courts must "focus upon a proposal's parameters as the agency defines them." *California. v. Block*, 690 F.2d 753, 761 (9th Cir.1982).
>
> In the case at bar the BLM's 2016 Decision Record explains that, because the Palmer Project is still in the exploration stage, mine development is not reasonably foreseeable:
>
> > Exploration must be conducted, in a reasonable methodology consistent with the industry standard, before the prospect can lead to an economical discovery that will support the pre- feasibility, feasibility, engineering, and construction processes that must take place before production of that deposit. Therefore, by allowing Constantine to continue to define the size and economic viability of the resource at the Palmer Project, the BLM is complying with the General Mining Law 1872, as amended, and the Federal Regulations. The proponent is still in exploration phase; therefore, it is not a reasonably foreseeable future action to consider mining in this analysis. (III-ER-572).
>
> BLM made the same point in the 2017 Mine Plan Modification:
>
> > When considering the Life Cycle of a Mine [See IV-ER-760 thru 763] in combination with the Reasonably Foreseeable Future Actions requirement for NEPA, the BLM is limited in its ability to analyze a future mine at Constantine's Project. Analysis of a future mine at the Project would require the BLM to have enough information to avoid speculation. Any assumption about the scope of the mine, prior to a feasibility determination, would be speculative considering that mining is not automatically triggered by exploration. (Citation omitted). (IV-ER-763).

BLM's above reasoning should be afforded deference. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 376-77 (1989) (deference to an agency's decision is particularly appropriate where questions of scientific methodology or technical expertise are involved). It is supported by *Jones v. National Marine Fisheries Service*, 741 F.3d 989, 1000 - 1001 (9th Cir. 2013). There the Court faced the question whether the company would engage in future mining beyond the sites included in a Corps of Engineers CWA § 404 permit application. The company had indicated that it intended to mine future sites but had also described barriers to developing any of the sites. The Court reasoned:

> An agency need only consider '[t]he cumulative effects of projects that [the applicant] is already proposing.' *Lands Council v. Powell,*395 F.3d 1019, 1023 (9th Cir. 2005). 'For any project that is not yet proposed, and is more remote in time,' by contrast, 'a cumulative effects analysis would be both speculative and premature.' *Id.*
>
> - - - - -
>
> Here, by contrast, there is no reliable study or projection of future mining in this case. ORC's general statements regarding a desire for increased mining give no information as to the scope or location of any future projects or even how many such projects ORC contemplates pursuing. The general plans for expanded mining recited by Woodlands do not require a cumulative impacts analysis. *Envtl. Protect. Info. Ctr. v. Forest Service (EPIC),* 451 F.3d 1005, 1014 (9th Cir. 2006).

Thus, the Ninth Circuit determined that the agency did not fail to analyze the cumulative impacts of the challenged mining project, despite plans for increased future mining, because the project plans were speculative and not "reduced to

specific proposals." For the same reasons NEPA does not require a cumulative impacts analysis in the case at bar.

It is also significant that if Constantine ultimately elects to proceed with mine development, that hypothetical project will be much larger and far more complex than the 2.5-mile road, the 800' road extension, and the 40 drill sites approved in the 2016 and 2017 Decision Records. It would be unreasonable to require BLM to speculate about the environmental impacts of the much larger project within the EA for the smaller project. As the Court found in *Center for Environmental Law and Policy v. Bureau of Reclamation,* 655 F.3d. 100, 1011 (9th Cir. 2011):

> We also note that the drawdown project discussed in the EA involves much smaller diversions of water than the Special Study, which could result in a drawdown of well over 300,000 acre-feet per year. To direct that Reclamation must account for the cumulative effects of the drawdown project and the Special Study in the drawdown project EA would thus be to direct the agency to wag the dog by its tail.

For these reasons the district court correctly held that BLM determined that mine development is not reasonably foreseeable from the mineral exploration approved by the 2016 and 2017 Decision Records and thus NEPA did not require the Exploration and Road Extension MPO EAs cumulative impact analyses to include an environmental analysis of potential full mine development.

D. THE MINERAL EXPLORATION APPROVED BY THE BLM IN THIS CASE HAS A UTILITY INDEPENDENT OF MINE DEVELOPMENT AND THUS EXPLORATION AND FULL MINE DEVELOPMENT ARE NOT CONNECTED ACTIONS.

To prevent agencies from "segmenting" the environmental impacts of proposed projects, the CEQ regulations and Ninth Circuit case law require that connected actions be considered in one NEPA document.[12] The Ninth Circuit test for connected actions is whether "each of two projects would have taken place with or without the other and thus had independent utility." *Wetlands Action Network,* 222 F.3d at 1118 (9th Cir. 2000). When one of the projects might reasonably have been completed without the other, each has independent utility and they are not connected for NEPA purposes. *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 894 (9th Cir. 2002), *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006), *Sierra Club v. Blank*, 786 F.3d 1219, 1225-1226 (9th Cir. 2015).

Based on this test Appellants are incorrect in contending that Constantine's 2016 and 2017 Exploration MPOs do not have independent utility:

> because Constantine Metals' mineral exploration has no utility other than to facilitate potential future mine development at the Palmer Project, and because a mine development cannot occur without such exploration, mine

[12] 40 C.F.R. § 1508.25 (a)(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 independent parts of a larger action and depend on the larger action for their justification. See also *Thomas v. Peterson,* 753 F.2d 754 (9th Cir. 1985).

> development is a connected action that the BLM could not refuse entirely to consider in approving Constantine Metals' advanced exploration."[13]

While mineral exploration may lead to mine development, mine development does not necessarily follow exploration – it depends on the results of exploration's definition of the nature and extent of the orebody and the costs and economic returns from mining that orebody which logically cannot be known at the time an exploration MPO is approved. Put another way, while mine development will not occur without mineral exploration, mineral exploration will most often occur without mine development.[14] As the BLM said in the 2017 Constantine Mine Plan Modification (Road Extension) EA:

> The Prospecting/Exploration step is a challenging process for an exploration company to move through. Very few exploration projects actually make it to a point that a mine can be developed. The challenges of moving a project to a producing mine means that 'about 1 out of every 200 projects that reaches the discovery stage moves to development. This is equivalent to about 1 out of every 10,000 grass roots projects.' (Canada 2010). (III-ER-762).

For these reasons, the district court correctly concluded that the 2016 Exploration MPO EA and 2017 Road Extension MPO EA have utility independent of mine development and are not "connected actions:"

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[13] Again, the record does not support Appellants' reference to the exploration approved by Appellees in the 2016 and 2017 MPO EAs as "advanced exploration." 2016 EA III-ER-393.

[14] The district court pointed out that Appellants conceded this point in their Brief below: "[e]xploration is not always successful – in some situations exploration may fail to reveal a profitable mine deposit, and so development will not follow." (Order at 38; I-ER-40).

> While Plaintiffs correctly assert that the purpose of exploration is to determine whether development is plausible, this does not mean that exploration is "irrational" without developing a mine. Rather, exploration is a necessary, rational step to determine whether such future activity will occur. "NEPA does not require the government to do the impractical," and where details, planning decisions, and precise information about future phases or activities are unavailable, NEPA does not require that an agency consider those activities together. *Wetlands Action Network,* 222 F.3d at 1119. *See also Hankins,* 456 F.3d at 969 – 970.[15] (Order at 40; I-ER-42).

E. **CONCLUSION.**

Appellants' appeal should be denied because the BLM was not authorized by FLPMA to withdraw the Project Area from location and entry under the Mining Act. Moreover, United States Supreme Court and Ninth Circuit case law uphold the district court's and BLM's conclusions that, because the BLM has no control or discretion regarding whether or when discovery takes place under the Mining Act, NEPA did not require an analysis of the potential environmental impacts of potential development of a hypothetical mine in the BLM's 2016 Exploration MPO EA and 2017 Road Extension MPO EA.

Ninth Circuit case law also substantiates with the district court's decision that, because mine development is not reasonably foreseeable from mineral exploration, and because no mine development proposal has been made, potential development of a hypothetical mine is not a cumulative impact of mine exploration that must be included in an exploration MPO EA. Finally, Ninth Circuit case law

[15] Order at 40, n.199; I-ER-42.

supports the district court's decision that, because mineral exploration has the independent utility of locating and defining an ore body, it is not a connected action with full mine development such that NEPA would require full mine development and mineral exploration to be included in the same NEPA document. 2017 Constantine Mine Plan Modification EA at 12-13; III-ER-762-763.

Accordingly, this Court should affirm the district court's grant of summary judgment to the Appellees and Intervenor Appellees and deny Appellants' appeal.

VIII. REMEDIES: APPELLANTS' VACATUR AND INJUNCTION REQUESTS LACK MERIT

A. It Would Be Inequitable to Grant Appellants the Relief They Seek

Appellants do not contest the sufficiency of BLM's description of the environmental impacts in the 2016 Exploration and 2017 Road Extension MPOs EAs. (Order at 43; I-ER-45). Appellants argue instead that in those MPOs BLM must also analyze the potential environmental impacts of potential development of a hypothetical mine to determine whether the Project Area should be withdrawn from location and entry under the Mining Act. But the BLM cannot provide this relief because withdrawal of public land from location and entry under the Mining Act is reserved to the Secretary (43 U.S.C. § 1712 (e)(3)). Thus, if granted, vacatur or an injunction would necessarily have to be for the period required to obtain a

Secretarial withdrawal of the Project Area from mining under FLPMA § 1714 (a) – an action having nothing to do with the MPOs at issue here:

> The environmental review procedure at issue here is BLM's review of two MPOs submitted by Constantine: on for the Exploration Plan and one for the Road Extension. Neither discovery of an economically profitable mineral deposit, nor withdrawal of the Project Area from mining under FLPMA is at issue here, or under review by the agency. (Order at 49; I-ER-51).

It would be inequitable to grant Appellants the relief they seek. They did not propose withdrawal of the Project Area as an alternative or otherwise object to mineral exploration or mining in Palmer Project Area during the areawide FLPMA 2008 Ring of Fire RMP NEPA process. They did not petition the Secretary for withdrawal of the Project Area from mining under FLPMA § 1714 (a). Under these circumstances granting vacatur or an injunction would reward Appellants for their failure to utilize the procedures provided by law for withdrawing the Project Area from location and entry under the Mining Act.

B. Vacatur Is Not an Appropriate Remedy in This Case.

Intervenor Appellees maintain that BLM's approval of Constantine's mineral exploration and Road Extension MPO EAs complied with the law. Nevertheless, vacatur would not be an appropriate remedy in this case.

In *Cal. Cmtys. Against Toxics v. EPA,* 688 F.3d 989, 994 (9th Cir. 2012) the Ninth Circuit said that vacatur depended upon the balancing of two factors: 1) the

serious of the agency's error; and 2) the disruptive consequences of a vacatur in light of the fact that vacatur is an interim remedy.

In this case Appellants concede, and the district court found, that: "Plaintiffs do not challenge the impacts included in the EAs for the currently proposed activities in the Exploration Plan and Road Extension." (Order at 43; I-ER-45). What Appellants contend was legal error (failure to use the NEPA process to consider withdrawing the Project Area from location and entry under the Mining Act), was not within the BLM's authority to do. (43 U.S.C. § 1712 (e)(3); 43 U.S.C. § 1714 (a); and 43 C.F.R. § 3809.411 (d)(3) (i-iii).[16] Thus, BLM committed no error in approving the MPOs and the first prong of *Cal. Cmtys. Against Toxics* is not satisfied.

Because vacatur would have to await the Secretary's consideration of withdrawing the Palmer Project Area from mining under the process described in 43 U.S.C. § 1714 (a), which itself would be subject to litigation, vacatur would necessarily have to last for so many years that as a practical matter it would not be

[16] Assuming *arguendo* that BLM had such authority, Appellants did not propose such a withdrawal as an alternative or otherwise object to mineral exploration or mineral development in the Project Area during the FLPMA areawide 2008 Ring of Fire RMP. Appellants thus failed to do in the FLPMA areawide 2008 Ring of Fire RMP what they fault BLM for failing to do in the project level Exploration and Road Extension MPO EAs.

an interim remedy. Thus, the second prong of *Cal. Cmtys. Against Toxics* would not be satisfied.

In *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337 (9th Cir. 1995), the Ninth Circuit ruled that the district court was "not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under [the] APA is controlled by principles of equity." *Id.* at 1343. Thus, the Ninth Circuit affirmed the district court's exercise of its equitable authority not to set aside a ROD, although it was deemed legally insufficient. Given Appellants' failure to avail themselves of the procedures provided by law to seek withdrawal of the Project Area from location and entry under the Mining Act, it would not be equitable to vacate BLM's 2016 and 2017 MPO Decision Orders.

C. Appellants Do Not Meet the Criteria for An Injunction

To obtain an injunction Appellants must establish a strong likelihood of prevailing on the merits and that they are entitled to equitable relief because: 1) Appellants and their members are likely to suffer irreparable injury; 2) Appellant's remedies at law are inadequate; 3) the balance of hardships favors Appellants; and 4) the public interest favors granting the injunction. *Amoco Production Company v. Village of Gambell,* 480 U.S. 531, 542 (1987).

For the reasons given by the district court in granting Summary Judgment to Appellees and for the reasons set out above, the Appellants have not established "a strong likelihood of prevailing on the merits." Actually, because the district court granted Appellees' Cross Motion for Summary Judgment (Order at 53; I-ER-55), Appellants must demonstrate the likelihood of obtaining a *reversal* of the district court's Judgment in this appeal. *Lopez v. Heckler,* 713 F.2d 1432, 1436 (9th Cir. 1983). Appellants also fail to meet the criteria for obtaining equitable relief.

1. Appellants Are Not Likely to Suffer Irreparable Injury.

Appellants claim that the first criterion is satisfied based upon two allegations of irreparable harm: 1) exploration precludes their members' use of the area; and 2) further exploration might result in discovery "before BLM is able to assess the potential impacts of mine development." (Appellants' Opening Brief at 52-53). The record contradicts Appellants' first allegation of irreparable harm. Appellant Rivers Without Borders acknowledged that the actions authorized by the 2016 Exploration and 2017 Road Extension MPO EAs did not cause "significant," much less "irreparable," harm:

> While the currently proposed actions are not in themselves a reason for significantly raised environmental concern, the ultimate goal of a large scale mine in this watershed is of great concern.
>
> Rivers Without Borders May 26, 2016 comments on 2016 MPO application. (S.E.R. 95).

The record also contradicts Appellants' first allegation of irreparable harm by fully documenting the use of the Porcupine District (which includes the Palmer Project area) for mining. Starting in the 1890s the Dalton trail has passed through what is now Constantine's mining camp. The area has been subject to exploration and placer mining for decades,[17] including exploration of the Palmer Project since 1969. (Cultural Resources Report S.E.R. 34 - 42) (Palmer Declaration at Pars. 2 – 19; S.E.R. 2 - 5). If Appellants' members have been "enjoying" the area for standing purposes, as they claim in their Opening Brief at 27-28, then they cannot be suffering irreparable injury for injunction purposes from what has been a long term, ongoing mineral exploration activity in the area. If they were, Appellants would have requested a stay of BLM's 2016 and 2017 Decisions approving the Road Construction, Exploration drilling, and Road Extension activities.

Regarding their second allegation of irreparable harm, Appellants have not shown that an injunction would provide the relief they seek. The record does not support Appellants' inherent assumption that discovery has ***not*** already occurred. To show that an injunction would provide the relief they seek, Appellants must show that, notwithstanding Constantine's ten years of exploration and expenditure of $40

[17] The BLM Mine 2017 Plan Modification FONSI says: "The project area has been mined since the 1930s and there is currently an access road to parts of the valley. (IV-ER-748).

million exploring the Project Area, discovery has not already occurred. (Second Green Declaration at Par. 7; II-ER-65).

2. Appellants Have Adequate Remedies at Law.

Appellants had/have adequate remedies at law to prevent future mine development if it is ever proposed: First, as Appellants recognize at page 23 of their Opening Brief, they could have petitioned the Secretary (43 U.S.C. § 1714 (a)) or Congress to withdraw the Project Area from location and entry under the Mining Act. Second, Appellants could have participated in the FLPMA areawide 2008 Ring of Fire RMP NEPA process by proposing withdrawal of the Project Area as an alternative and by objecting to the use of the Project Area for mineral exploration and mining. It is unreasonable for Appellants to seek equitable relief for alleged NEPA violations in the project level Exploration and Road Extension MPO EAs when they failed to raise NEPA objections in the Regional Plan. Third, when, if ever, full mine development is proposed Appellants could urge the permitting agencies to select the "no action" alternative which, if selected, would prevent potential mine development from proceeding, even if discovery has occurred, because Constantine cannot obtain surface use authorization to develop a mine that would cause unreasonable or undue degradation (43 C.F.R. § 3809).

3. The Balance of Hardships Favors Intervenor Appellees.

The third criterion requires the Court to decide whether Appellants would be harmed more if an injunction is NOT granted than Intervenor Appellees would be harmed if it were. Appellants claim that they would be harmed because, if allowed to continue mineral exploration, Intervenor Appellees might make a discovery that would create property rights that would prevent BLM from withdrawing the area from mining. There are several reasons why this claim of harm is insufficient to satisfy this criterion:

1) The record does not support Appellants' inherent assumption that discovery has ***not*** already occurred. To show that they could be harmed Appellants must show that discovery has not yet occurred. Were the Court to enjoin exploration to prevent Intervenor Appellees from making a discovery they have already made it would provide no relief to Appellants, but would irreparably harm Intervenor Appellees;
2) As they admit,[18] Appellants' alleged harms arise not from the Road Construction, Exploration drilling, and Road Extension MPOs that BLM has approved, but from a future project that has not yet even been proposed

[18] Rivers Without Borders May 26, 2016 comments on 2016 MPO application. (S.E.R. 95).

and may never be proposed.

3) Appellants' alleged future harms are speculative and not concrete. They are based upon a series of theoretical "worst case" assumptions set out at pages 11 – 16 of their Opening Brief which are not supported by the record. For Appellants to realize the environmental "harms" they conjure in their Brief, the permitting agencies would have to allow such a future mine to cause "unnecessary or undue degradation" in violation of 43 C.F.R. § 3809 – which assumption is inconsistent with the presumption that federal employees carry out their duties in accordance with the law. *United States v. Chemical Foundation, Inc.* 272 U.S. 1, 15 (1926).

Accordingly, Appellants have not shown that they would be sufficiently harmed by allowing mineral exploration to proceed to warrant an injunction.

On the other hand, Intervenor Appellees would suffer significant harms were mineral exploration enjoined for the considerable time it would take for BLM to hypothecate a mine based upon the limited mineralization information thus far collected, to speculate on the environmental impacts of such a hypothetical mine, and to prepare an EIS to display those impacts (which would likely be followed by litigation) or to obtain a Secretarial decision whether or not to withdraw the project Area from mining:

> The Palmer Project is Constantine's principal asset and the company has no cash flow from operations to fund expenditures. Constantine's ability to continue to raise the investment capital necessary to fund exploration, maintain the Project in good standing, and preserve the company's financial well-being would be harmed, likely irreparably harmed, by an injunction that stops work for a significant period of time. (Second Green Declaration at Par. 5; II-ER-65).

In addition:

> Because of the "cart before the horse" illogic and substantial difficulty of explaining the speculative environmental impacts from development of a hypothetical mine prior to completion of exploration, the cost and complexity of complying could have the practical effect of delaying, reducing, or completely eliminating the opportunity for conducting enough exploration at the Palmer Project to determine whether and how a mine might be developed. (Green Declaration at Par.15; II-ER-63).

This would have "a substantial negative impact on the Palmer Project and the Company's financial well-being and could potentially cause Constantine to lose its entire investment in the Palmer Project which would include more than 10 years of exploration and $40 million." (Second Green Declaration at Par. 7; II-ER-65).

Other harms to Constantine would include the loss of 65 employees and contract employees familiar with the Project; the financial costs of maintaining the property in "care and maintenance" during the period of the injunction, including lease payments to the claim holders; and the increased costs of exploration when the injunction was ultimately lifted. (Second Green Declaration at Pars. 8 and 9 (a); II-ER-65-66).

Alyu and Haines Mining would also suffer significant harms. Principle shareholder and President of both companies, Merrill Palmer, has "thousands of man hours invested in the Project prospecting for minerals, staking claims, doing assessment work on the claims and marketing the project to potential exploration companies." (Palmer Declaration at Par. 22; S.E.R. 5). Based on Constantine's then current 43-101 Report the claims have "a value of millions of dollars for our companies." (Palmer Declaration at Par. 20) (S.E.R. 5). Merrill Palmer is rightly concerned that "if mining companies are not permitted to complete exploration before they are required to describe the environmental impacts of a speculative hypothetical mine, it is highly unlikely that Alyu and Haines Exploration will be able to attract another mining company to explore our claims, thereby rendering our 340 claims worthless." (Palmer Declaration at Par. 21; S.E.R. 5).

The balance of harms thus tilts sharply in favor of Intervenor Appellees.

4. **The Public Interest Does Not Favor an Injunction.**

There would be adverse impacts on Haines due to the loss of 65 workers employed and contracted to assist with the exploration and construction work on the Project (Second Green Declaration at Par. 9 (a); II-ER-66), loss of future job opportunities, loss of Constantine's spending for its current employees and supplies in the community, and loss of Constantine's charitable contributions in the community. (Second Green Declaration at Par. 7; II-ER-65).

The harms that would flow from an injunction to Intervenor Appellees and Haines include social and economic harms of long duration. Such harms are particularly relevant where, as here, the local economy is not strong. See *Bering Strait Citizens for Responsible Resource Dev. v. U.S. Army Corps of Eng'rs*, 511 F.3d 1011, 1017 (9th Cir. 2008) (finding it significant in evaluating the public interest that there were "limited opportunities for economic development"); *Id.* at 1021-22 (observing that economic development associated with a proposed gold mine in Alaska was a "weighty" consideration in the context of a struggling local economy).

Accordingly, Appellants do not qualify for an injunction.

IX. CONCLUSION. For the foregoing reasons Intervenor Appellees respectfully urge the Court to affirm the district court's grant of summary judgment to the Appellees and Intervenor Appellees and deny Appellants' appeal.

RESPECTFULLY SUBMITTED this 27th day of November 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November 2019 I caused to be electronically filed the foregoing Defendant-Intervenor-Appellees' Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ James F. Clark
James F. Clark
Law Office of James F. Clark

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

9th Cir. Case Number: 19-35424

The undersigned attorney states that: I am unaware of any related cases pending in this Court.

Signature: */s/ James F. Clark* **Date:** November 27, 2019

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

9th Cir. Case Number: 19-35424

The undersigned attorney certifies that:

1. This brief contains 12,189 words and thus complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the type face volume of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010, font size 14 and Times New Roman type style.

Signature: */s/ James F. Clark* **Date:** November 27, 2019