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' REPLY BRIEF

Erin Whalen
Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751

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INTRODUCTION

This case is about BLM's obligation to implement NEPA fully in the context of the 1872 Mining Act. The critical NEPA requirement is for BLM to analyze the potential impacts of mine development before rendering a decision on Constantine's final exploration plan prior to development. Under the 1872 Mining Act, that decision is the last opportunity to preclude a mine before Constantine acquires extraction rights by operation of law, and there are a number of reasons NEPA requires that decision be informed by at least some understanding of potential development impacts. The basic thrust of the Government's argument is that BLM can proceed without this knowledge because mine development and mineral exploration are different stages of the mining process. That response, however, does not serve NEPA's purpose of ensuring BLM and the public understand the significant environmental effects of the agency's decision before the die is cast. Nor does the fact that mine development is a different stage preclude BLM from complying with NEPA's requirement to reasonably forecast and consider its significant effects. For BLM to avoid the analysis on that basis is inconsistent with the rule that NEPA applies to the fullest extent possible absent an irreconcilable statutory conflict.

STATEMENT OF STATUTORY AND REGULATORY AUTHORITIES

Except for authorities appearing in the addendum to this brief, all primary statutory, regulatory, and other authorities are contained in addenda to Appellants' opening brief and the Government's brief.

ARGUMENT

I. NEPA requires BLM to consider mine development impacts now because approving Constantine's final stage of mineral exploration is a crucial point of commitment.

The Government and Constantine (collectively, "Appellees") argue BLM's decision to approve Constantine's final exploration plan was not a crucial point of commitment because it does not affirmatively convey the right to extract minerals like the lease in *Conner v. Burford*, because BLM will still need to approve any future mine development plan, and because BLM had no choice *but* to approve the exploration. Appellees are wrong. Constantine can acquire extraction rights as a direct result of BLM's decision. The fact that the agency did not convey those rights in a lease merely reflects the difference between the 1872 Mining Act and the Mineral Leasing Act, and NEPA applies equally to activities under both statutes. The problem here is the same as in *Conner*: the government will lose its authority to preclude development without ever having considered its impacts, in violation of NEPA. BLM's ability to approve future development plans does not solve that problem, because that approval is only an opportunity to regulate, not to preclude otherwise lawful mining altogether. Finally, BLM had ample authority to

disapprove Constantine's exploration if necessary based on its own regulation, as the agency has done in analogous situations.

A. The 1872 Mining Act does not excuse BLM from complying with NEPA's timeliness requirements.

Conner v. Burford holds that NEPA prohibits an agency from relinquishing its authority to preclude resource development absolutely without first considering the environmental impacts of that development. 848 F.2d 1441, 1450-51 (9th Cir. 1988). Appellees argue that rule does not apply here because in *Conner*, the agency directly conveyed a right to extract oil in a lease under the Mineral Leasing Act, whereas under the 1872 Mining Act, the right to extract minerals vests by operation of law following the agency's decision. Government's Br. 30-31; Constantine's Br. 21-22. However, this distinction makes no difference in the application of the *Conner* rule. Just like the agency in *Conner*, BLM acted without any consideration of the development impacts to which its action might irreversibly commit the government. In either scenario, the agency's commitment will only matter if a third party eventually discovers sufficient resources to pursue development. *See Conner*, 848 F.2d at 1450 & n.21; Appellants' Br. 25. The contingent nature of the commitment, however, does not diminish the obligation to consider development impacts before giving up its last opportunity to exercise a full range of options. *Conner*, 848 F.2d at 1450-51. NEPA requires BLM to consider development impacts at some level before taking action that may

relinquish the authority to preclude those impacts, no matter which statutory regime applies.

Congress directed agencies to apply NEPA to the fullest extent possible to prevent them from narrowly construing other statutes to constrain NEPA implementation. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008). Thus, as this Court has held, NEPA applies unless it irreconcilably conflicts with another statute. *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 460 (9th Cir. 1994). Appellees do not address this authority at all. Nor have they identified any conflict between the 1872 Mining Act and NEPA's timeliness requirement described in *Conner*. The mere fact that rights vest under the 1872 Mining Act by operation of law does not create a conflict. The key point is BLM's decision "constitutes the 'point of commitment,'" because it will enable Constantine to accrue a right to mine, and "the government [will] no longer ha[ve] the ability to prohibit potentially significant inroads on the environment." *Conner*, 848 F.2d at 1451; Appellants' Br. 32-34. NEPA requires some analysis of development impacts before that commitment.

To the extent Appellees' argument is that NEPA's timeliness rule only concerns the direct effects of BLM's actions, *i.e.*, only applies when BLM directly relinquishes its discretion to preclude development, it must fail. As in *Conner*, 848

F.2d at 1451, the salient question is whether the challenged decision reflects the government's final say in whether development may happen. *Id.* In any event, NEPA encompasses both the direct effects of agency action and reasonably foreseeable indirect effects. 40 C.F.R. § 1508.8. Here, it is reasonably foreseeable that BLM will lose its preclusion authority after approving Constantine's exploration. Appellants' Br. 34. The very purpose of Constantine's exploration is to delineate a valuable mineral deposit that would deprive BLM of its authority to preclude mining. Further, that moment is imminent, as BLM knew when it made its decision. *See* II-ER-293 (forecasting a shift from exploration to engineering and development following the exploration plan). Indeed, Constantine argues that it may already have occurred. Constantine's Br. 23.

The Government attempts to minimize the loss of preclusion authority, characterizing the issue merely as whether BLM's action will "diminish the effectiveness of a possible future withdrawal." Government's Br. 22-23, 13, 14, 17, 28-29. If Constantine acquires the right to extract minerals from their claims by virtue of the exploration BLM approved, though, the government's authority to preclude the company absolutely from mining those claims will not be diminished, it will be lost. Appellants' Br. 33-34. This is because "[o]nce a valuable mineral deposit has been located, the unpatented mining claim is a property right in the full sense[.]" *McKown v. U.S.*, 908 F. Supp. 2d 1122, 1124 (E.D. Cal. 2012) (quotation

omitted), *aff'd*, 613 F. App'x 656 (9th Cir. 2015); *see also* 30 U.S.C. § 26 (describing legal effect of valid mineral discovery). Appellees do not dispute this, nor could they. Just as the lease decision in *Conner* was the last opportunity to preclude development absolutely before the leases committed the agency, BLM's decision on Constantine's final exploration plan is the last such opportunity before commitment occurs by operation of law. NEPA therefore required BLM to conduct at least some analysis of development impacts before approving the exploration.

The Government also minimizes BLM's commitment by arguing that the type of right Constantine will acquire is not the absolute right to have a development plan approved. Government's Br. 23-24. To be sure, even if Constantine acquires a right to extract minerals, BLM retains discretion to condition approval or even deny a development plan *if* it would cause unnecessary or undue degradation or violate other laws. Appellants' Br. 35. However, this Court has explained that such ongoing regulatory authority is not a substitute for absolute preclusion when it comes to environmental protection. *Conner*, 848 F.2d at 1450; *see* 43 C.F.R. § 3809.5(2) (defining "unnecessary or undue degradation" to exclude conditions "reasonably incident" to mining). Congress recognized total preclusion may be necessary to prevent environmental damage inherent in mine development, 43 U.S.C. § 1714(c), (d) (authorizing mineral withdrawals), as has

BLM. *Infra* p. 12. That is why NEPA bars agencies from yielding the authority blindly.

The Government emphasizes agencies "have substantial discretion to define an appropriate level of inquiry for their NEPA analyses." Government's Br. 18-19. The NEPA obligation described in *Conner* to conduct at least some analysis of reasonably foreseeable development impacts before relinquishing the authority to preclude that development, however, is not discretionary. 848 F.2d at 1451. Where BLM has discretion is in the appropriate level of detail for that analysis. Appellants' Br. 37-38.

The Government also cites *California v. Block*, Government's Br. 19, but far from requiring deference here, *Block* holds that when an agency "unfairly minimizes the consequences" of its action to narrow the scope of NEPA review, and fails to acknowledge "[f]uture decisions . . . will be constrained by" the action, the agency violates NEPA. 690 F.2d 753, 762-63 (9th Cir. 1982). That is precisely what BLM has done in refusing to analyze development impacts here.

Constantine emphasizes that the Ring of Fire Resource Management Plan identifies mineral exploration and mining as "important uses" in the area containing Constantine's claims. Constantine's Br. 1-2, 17. If Constantine intends to argue BLM already adequately considered mine development impacts there, they did not raise that argument in the district court and it is waived. *See Ingham*

v. U.S., 167 F.3d 1240, 1246 (9th Cir. 1999). It would not withstand scrutiny anyway. The Ring of Fire Resource Management Plan establishes general management direction for 1.3 million acres. I-FER-5. It does not consider the appropriateness of a mine on Constantine's federal claims. *See* I-FER-9 ("This approved plan does not authorize any project, approve any application, or provide approval for any specific future action within the planning area."); *accord* Government's Br. 8 n.3.

Constantine argues Appellants should have requested withdrawal when BLM amended the Ring of Fire Resource Management Plan or by petitioning the Secretary of the Interior. Constantine's Br. 16-17, 37-38. This confuses the relief Appellants seek, which is not withdrawal, but for BLM to analyze the environmental impacts of potential mine development at Constantine's claims. *See also* Government's Br. 17 (reflecting the same confusion). Appellants requested that analysis from BLM at the appropriate time in the NEPA process for the exploration plans. Appellants' Br. 19-22. Appellants were not obligated to seek a withdrawal to prevent impacts BLM had not even disclosed. Withdrawal is relevant only because it is how BLM could exercise discretion to preclude mining up until the point when Constantine acquires extraction rights. *See infra* pp. 9-14. BLM can seek withdrawal on its own initiative at any time. 43 U.S.C. § 1714(c)(1), (d); *see also infra* p. 12. However, such withdrawal may not

interfere with any "valid existing right," 30 U.S.C. § 26, and it is the potential accrual of such a right that is at issue in this case.

B. BLM had authority to act on information about the environmental impacts of future mine development.

Appellees argue BLM was not required to consider the environmental impacts of development because the agency can only reject an exploration plan for one of three reasons listed in its regulations, and development impacts are not one of them. Government's Br. 19-22; Constantine's Br. 25-26. They are wrong. Unlike the statutes in the cases they cite, BLM's regulations do not bar it from rejecting a plan for any other reason. But even if Appellees correctly interpret the regulations, BLM has authority to deny Constantine's plan based on one of the reasons listed—withdrawal or segregation from the mining laws—which is exactly what it *has* done when an otherwise approvable plan of operations posed unacceptable risks to public lands. If BLM considers the environmental impacts of potential mine development and finds them unacceptable, the agency has ample discretion to act on that knowledge.

It is incorrect that BLM's regulations only permit denying an exploration plan for one of three enumerated reasons. The regulations do not purport to limit the agency's authority. They do not say BLM "shall" approve a plan unless one of the three reasons applies. 43 C.F.R. § 3809.411; *compare Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 766 (2004) (it was reasonable to interpret a statute as

limiting the agency's discretion where it provided the agency "shall" act if criteria are met); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-66 (2007) (same); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1220-21 (9th Cir. 2015) (same). Instead, the regulations state BLM "will notify" an applicant that it approves or conditionally approves a plan of operations, or that it disapproves "because" any one of three conditions applies. 43 C.F.R. § 3809.411(d).

To conclude BLM *may not* deny a plan for any other reason could create conflict with other statutory duties. BLM has broad statutory obligations to protect resources on public lands. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 646 (9th Cir. 2010) ("In FLPMA, Congress declared that it is the policy of the United States to manage the public lands 'in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.'" (quoting 43 U.S.C. § 1701(a)(8))); 16 U.S.C. § 3112(1) (it is Congress' policy that "consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands"). The language of section 3809.411 does not compel an interpretation that bars BLM from disapproving an exploration plan inconsistent

with BLM's statutory obligations, even if none of the express criteria for disapproval apply. To interpret the regulation that way would risk conflict with those obligations, and would not be reasonable. *See Kisor v. Wilkie*, ___U.S.___, 139 S. Ct. 2400, 2414 (2019).

Even if BLM could only disapprove Constantine's exploration plans for one of the three reasons the regulation lists, however, Appellees' argument fails. Information about potential mine development impacts could lead to disapproval based on withdrawal or segregation from the mining laws, which is one of the three reasons listed. 43 C.F.R. § 3809.411(d)(3). BLM has no obligation to take final action on an exploration plan until the agency completes its review—including any necessary NEPA analysis—and satisfies other federal responsibilities. *Id.* § 3809.411(d), (a)(3)(ii), (a)(3)(iv). As discussed in the previous paragraph, BLM has numerous federal responsibilities with respect to public lands that could prompt a decision to withdraw the Chilkat Valley from the mining laws if the agency were sufficiently informed. Thus, should BLM find withdrawal necessary, it would be fully consistent with the regulations to delay final decision on Constantine's plan while the agency submits a withdrawal application, *i.e.*, fulfills another federal responsibility. *See id.* § 3809.411(a)(3)(iv). The application would segregate the land from further mineral entry. *Id.* § 2310.2(a). Then, even according to Appellees' interpretation, Constantine's plan would be subject to

disapproval except as to claims on which Constantine has already identified a valuable mineral deposit. *Id.* § 3809.411(d)(3)(ii).

BLM followed these exact steps elsewhere when an exploration plan met the regulatory requirements, but would not be consistent with preserving important values on public lands. In Montana's Sweet Grass Hills, there was substantial public concern that a proposed mineral exploration plan and the mine that might follow would have unacceptable impacts on water resources, habitat, and lands considered sacred by local tribes. *U.S. v. E. K. Lehmann & Associates of Montana*, 161 IBLA 40, 53-54 (Mar. 16, 2004). Observing that neither the proposed exploration nor potential future mine development was likely to cause unnecessary and undue degradation (and therefore would probably be approved), BLM applied to withdraw the land to protect its nonmineral values. *Id.* at 55-56. BLM deferred final decision on the plan until the withdrawal application was accepted, then suspended that decision to determine whether the applicant had made any valuable discoveries.[1] *Id.* at 56-57. BLM had discretion to do the same here.

The Montana case underscores that, contrary to the Government's suggestion, Government's Br. 17, 26-27, postponing decision on an exploration

[1] BLM has revised its regulations, but the version applicable in the Montana case provided no greater authority for BLM to defer decision on or reject exploration plans—in fact, unlike the current regulations, the prior version did not even explicitly acknowledge that BLM *could* reject exploration plans. *Compare* 43 C.F.R. § 3809.1-6 (1999) *with* 43 C.F.R. § 3809.411(d)(3) (2001).

plan to complete an appropriate review is not a "de facto withdrawal" or a way to circumvent FLPMA's withdrawal procedures. 43 C.F.R. § 3809.411(a)(3)(ii). And if NEPA review reveals an *actual* FLPMA withdrawal is appropriate, pursuing that withdrawal through FLPMA's normal procedures, as BLM did in the Montana case, would not improperly "block or delay application of the Mining Law." *Contra* Government's Br. 17; *see* 43 C.F.R. § 3809.411(a)(3)(iv) (allowing delay to complete other federal responsibilities). BLM has no greater obligation to implement the 1872 Mining Act than NEPA, FLPMA, and other public lands statutes, and may not exempt activities under the 1872 Mining Act from the operation of those other statutes by reading in conflict where none exists. The agency must apply NEPA, especially, to the fullest extent possible in the absence of irreconcilable conflict. *See supra* p. 4.

BLM's authority to apply for withdrawal and, if it is granted, disapprove exploration renders *Public Citizen*¸ *National Association of Home Builders*, and *Alaska Wilderness League* inapposite. *See* Government's Br. 21-22. Those cases stand for the proposition that agencies do not need to consider environmental effects they have "no ability to prevent." *Ctr. for Biological Diversity*, 538 F.3d at 1213 (discussing *Public Citizen*). By contrast, BLM "possesses the power to act on whatever information might be contained in" an analysis of development impacts, including the power to prevent those impacts. *Id.* This Court has

declined to stretch *Public Citizen*'s holding because of Congress' admonishment to apply NEPA "to the fullest extent possible," *id.*, and should likewise reject Appellees' attempt to broaden the doctrine.

II. Appellees' attempts to divorce the final stage of mineral exploration analytically from the prospect of mineral development are not persuasive.

In addition to running afoul of NEPA's timing requirements for consideration of direct and indirect effects, BLM's failure to analyze mine development violates NEPA because (A) its impacts will be cumulative to those of exploration and (B) it is a connected action. Appellants' Br. 40-49.

A. The impacts of future mine development are cumulative impacts because development is reasonably foreseeable at the final stage of exploration.

Appellees are also incorrect in asserting BLM did not need to consider the environmental impacts of future mine development as cumulative impacts because BLM reasonably determined such development was not reasonably foreseeable. Government's Br. 32-39; Constantine's Br. 29-33. In concluding that mine development was not reasonably foreseeable here, BLM erred in three respects. First, BLM primarily relied on an arbitrary bright-line rule that mine development is never reasonably foreseeable during mineral exploration. Appellants' Br. 43. Second, to the extent BLM considered the specific circumstances of Constantine's mineral exploration at all, the agency applied the wrong standard for reasonable

foreseeability and failed to address clear indications from Constantine that mine development was already reasonably foreseeable. *See infra* pp. 16-22. Third, BLM conceived of its options too narrowly by failing to consider any compromise between doing no analysis of mine development impacts and doing the kind of specific and detailed analysis that must normally await a mine plan proposal. Appellants' Br. 36-38. For these reasons, BLM's reasonable foreseeability determination was arbitrary and contrary to law.

The Government now abandons the argument that was the primary basis for the district court's decision in its favor on cumulative impacts, that only "proposed" actions are reasonably foreseeable.[2] *Compare* I-ER-44-47 *with* Government's Br. 34. This argument tracked BLM's main rationale, that mine development is never reasonably foreseeable until a mine plan is proposed. Appellants' Br. 43. The Government now argues that BLM based its consideration

[2] Constantine persists in arguing that only "proposed" actions are reasonably foreseeable. Constantine's Br. 29-33. But in support it cites portions of *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006) and *Jones v. National Marine Fisheries Service*, 741 F.3d 989 (9th Cir. 2013), that, like the district court here, quote language deleted from *Lands Council v. Powell* that conflicts with other preceding decisions. Constantine's Br. 30-32; Appellants' Br. 43-45. Despite quoting the deleted *Lands Council* language, neither *Jones* nor *Northern Alaska Environmental Center* upheld an agency decision not to include future actions in cumulative impacts simply because those actions were not yet proposed. *See N. Alaska Envtl. Ctr.*, 457 F.3d at 980 (rejecting the agency's argument that it had not proposed an action that would have cumulative effects); Appellants' Br. 43-45.

on specific facts about Constantine's exploration. Government's Br. 36. This is not consistent with what BLM said in its decisions, and is insufficient, regardless. Significantly, the argument cites only BLM's second EA. *Id.* at 32-34. The first EA flatly contradicts this notion. Appellants' Br. 43. Even in the cited EA, however, BLM effectively establishes the same bright-line rule, says next to nothing about the actual state of Constantine's exploration, and says nothing at all about the fact that the company informed BLM this was the last exploration phase prior to development. Appellants' Br. 37; *see generally* IV-ER-758-63.

To the extent BLM considered facts specific to Constantine's exploration at all, the agency applied the wrong standard for reasonable foreseeability. As the Government admits, the agency relied on informal guidance stating future actions without preexisting decisions, funding, or proposals are not reasonably foreseeable unless "highly probable." Government's Br. 32; IV-ER-762. This standard for "reasonably foreseeable" is inconsistent with the words' ordinary meaning, NEPA case law, and relevant regulations.

As an initial matter, the word's ordinary meaning demonstrates that "foreseeable" is not the same as highly probable and that potential mine development impacts are foreseeable. *See The Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/foreseeable (foreseeable means "being such as may be reasonably anticipated" or "lying within the range for which

forecasts are possible."); Black's Law Dictionary (11th Ed. 2019) (defining "foreseeability" as "the quality of being reasonably anticipatable."). It is obviously possible to anticipate or forecast an event even if that event is not highly probable.

Consistent with these ordinary definitions, this Court has held that where a later project represents the entire justification for an earlier one, the later project is reasonably foreseeable at the time of the earlier project. *See 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); *see also Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1372 (D.C. Cir. 2017). Similarly, this Court has held that NEPA required an agency to conduct further analysis of the cumulative impacts of potential oil development in connection with a lease sale, even though the agency "might well be right that the most likely outcome is that there will be no oil development." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 503-05 (9th Cir. 2014) ("*Point Hope*").

Moreover, though CEQ's NEPA regulations do not define "reasonably foreseeable," they do specify that in the context of future events that could have catastrophic impacts, even low probability events are reasonably foreseeable. 40 C.F.R. § 1502.22. "[E]ven one chance out of 10,000 that a catastrophic event . . . would occur is relevant to a decisionmaker." *Save Our Ecosystems v.*

Clark, 747 F.2d 1240, 1245 (9th Cir. 1984), *abrogated on other grounds by Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531 (1987). The unavoidable environmental impacts of a large-scale hardrock mine would cause substantial, permanent changes to the Chilkat Valley, and pose potential catastrophic risks. Appellants' Br. 11-16. This related regulation makes clear that NEPA's reasonably foreseeable requirement cannot be equated with only high probability events.

Finally, the Government cites BLM's NEPA regulation, Government's Br. 32, which define "reasonably foreseeable future actions" more broadly than simply those future actions that are highly probable, to include all actions "sufficiently likely to occur." 43 C.F.R. § 46.30. This regulation is fully consistent with the words' ordinary meaning and the case law, and, in any event, BLM did not even cite it in its decisions. *See generally* III-ER-362-564; III-ER-569-75; IV-ER-758-63; IV-ER-743-46.

Moreover, BLM's decision not to address the cumulative impacts of mine development turned on an artificial, all-or-nothing picture of what form that analysis could take. Appellants' Br. 36-38. Appellees rely on the same false dichotomy. Government's Br. 34, 36-37, 45; Constantine's Br. 26-29. This Court's decisions illustrate, however, that an initial analysis of projected development impacts is a routine and required part of NEPA compliance in staged

agency decision-making processes for extractive industries. *See Point Hope*, 740 F.3d at 497-505. In such circumstances, agencies may not postpone all analysis of development impacts until the development stage. Rather, an agency must do *some* level of analysis at each stage of the process, increasing in detail along the way. *See id.* at 498. And this Court's decisions recognize that the agency has some discretion as to the level of analysis "so long as the EIS provides as much environmental analysis as is reasonably possible under the circumstances, thereby providing sufficient detail to foster informed decision-making at the stage in question." *Id.* (quotation omitted). What an agency may not do is what BLM did here—refuse to consider those reasonably foreseeable impacts entirely. *See also Vill. of False Pass v. Clark*, 733 F.2d 605, 609, 616 (9th Cir. 1984) (though a lease sale itself does not immediately threaten an oil spill, analysis for a lease sale "does require an overview of those future possibilities."). The Government's apparent position, that any level of forecasting amounts to unreasonable speculation until Constantine submits a mine development plan, and that to prove analysis was possible, Appellants must essentially show it was already complete, Government's Br. 34, 36-37, is inconsistent with this principle.

The Government argues the agencies in *Northern Plains Resource Council v. Surface Transportation Board* and *Thomas v. Peterson* possessed more information about cumulative impacts of future actions they were required to

analyze than BLM did here. Government's Br. 38. Not so. In *Northern Plains Resource Council*, the information available to the agency was only a 20-year forecast for potential development in three counties. 668 F.3d 1067, 1079 (9th Cir. 2011). Moreover, there was substantial uncertainty—the estimated number of wells and other features was only a range in which the higher estimate could be more than twice that of the lower end. *Id.* at 1079. BLM has more specific information about both the location and timing of a potential mine at the Palmer Project. Appellants' Br. 22-23. In *Thomas*, the opinion noted but did not turn on the quantum of information available to the agency. 753 F.2d at 760. It turned on the link between building a road and the timber sales it would facilitate. *Id.* at 758-59. Like the road in *Thomas*, the late-stage exploration here is being undertaken to facilitate reasonably foreseeable mine development.

Appellees cite plainly distinguishable cases in support of their argument that future mine development is not reasonably foreseeable because it is "merely contemplated." Government's Br. 34-35; Constantine's Br. 30-33. In *League of Wilderness Defenders v. Connaughton*, an agency did not have to consider the cumulative impacts of a project that it had "disclaimed any intention to move forward on . . . in any particular time frame." 752 F.3d. 755, 762 (9th Cir. 2014). In *Jones v. National Marine Fisheries Service*, an agency did not have to consider cumulative impacts of "speculative widespread mining for mineral sands on the

Oregon coast" based only on a mining proponent's "general statements regarding a desire for increased mining [with] no information as to the scope or location of any future projects or even how many such projects [the company] is pursuing." 741 F.3d at 1001. Here, by contrast, Constantine has focused two decades of exploration on a defined set of mineral claims and has made clear both its intention to shift to mine development and the approximate, near-term timeframe in which it expects to do so. Appellants' Br. 41-43.

Kleppe v. Sierra Club is also inapposite; that case considered whether NEPA required an agency to analyze the impacts of coal mining across an entire region in a single comprehensive EIS, despite there being no relationship between the projects other than regional location. 427 U.S. 390, 408-14 (1976). The issues presented in that case are substantially different than the obligations with respect to the next foreseeable phase of a project in one location at issue here. Moreover, the language from *Kleppe* cited by the Government is inapplicable here. Government's Br. 35 n.9. In that context of a decision about how broad a geographic scope the agency must analyze, the Court commented that any comprehensive analysis could eschew "contemplated" projects and focus on proposed actions. *Id.* at 410 n.20. The footnote is best understood as pertaining to "cumulative actions" which have been defined subsequent to *Kleppe* as those which "when viewed with other proposed actions have cumulatively significant

impacts," 40 C.F.R. § 1508.25(a)(2), rather than to cumulative impacts, which include all those flowing from reasonably foreseeable future actions and are not limited by the concept of proposal. *Id.* § 1508.7. As this Court has explained, CEQ and the courts have defined different obligations for NEPA's cumulative actions requirement: an agency must analyze the cumulative impacts of reasonably foreseeable future actions even if they cannot be considered cumulative actions. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 n.2 (9th Cir. 2002). Here, the issue is the cumulative impacts analysis for a single, staged-development project that is not merely contemplated, but being actively pursued.

Constantine also cites *Center for Environmental Law and Policy v. Bureau of Reclamation*, 655 F.3d. 1000 (9th Cir. 2011). There, the Court found the agency could defer analyzing the cumulative impacts of a foreseeable, larger future project until the EIS for that project. *Id.* at 1009-11. However, unlike here, there was no risk that by deferring analysis the agency would risk losing its ability to preclude the larger project. *Id.*; *see also id.* at 1004-05.

B. Potential mine development is a connected action that provides the only justification for mineral exploration.

NEPA also requires BLM to consider the impacts of mine development together with those of exploration because it is a connected action. Appellants' Br. 46-49. The Government argues that connected actions are limited to those that have already been proposed, citing 40 C.F.R. § 1502.4. Government's Br. 39-40.

Not so. Section 1502.4(a) provides that to determine the appropriate subject of an EIS, an agency must use the criteria in 40 C.F.R. § 1508.25, adding that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." In turn, section 1508.25 describes the actions, alternatives, and impacts that should be included in an EIS, including connected, cumulative, and similar actions. *Id.* § 1508.25. It also defines each of these three types of action. The definition of connected action contains no reference to proposals. *Id.* § 1508.25(a).

The Government's argument appears to be that the sentence referencing proposals in section 1502.4 encompasses all three kinds of actions that section 1508.25 specifies should be included in an EIS (connected, cumulative and similar actions). Government's Br. 39-40. But that inference is uncalled-for; the sentence merely describes one circumstance in which multiple proposals must be addressed in a single EIS. Unlike the "proposal" sentence, section 1508.25 is not limited to actions that are in effect, a single course of action; it describes distinct but cumulative, connected, and similar actions that must also be considered in the same NEPA review. *Compare* 40 C.F.R. § 1502.4 *with id.* § 1508.25(a). Nor does the Government's reference to *Kleppe* aid it, because that case pertains to cumulative, not connected actions. *See supra* pp. 21-22.

In *Thomas*, this Court held that a logging road had no utility independent of the timber sales it would facilitate because the sales were its sole economic benefit and justification, 753 F.2d at 758-59, just as mine development is the sole economic benefit and justification for Constantine's exploration here. Appellants' Br. 47. The Government attempts to distinguish *Thomas* based on the fact that the agency was already planning the timber sales while the road was under consideration. Government's Br. 43. But the holding explicitly did not turn on that fact, which the Court cited only to rebut the agency's arguments that analysis was impractical because the sales were remote and speculative. *See Thomas*, 753 F.2d at 760. As the facts show and *Point Hope* and *Village of False Pass* further underscore, some meaningful analysis of development impacts was clearly practicable here. Appellants' Br. 22-23; *supra* pp. 18-19. The Government points out that in *Thomas*, the road's purpose was to access merchantable timber already known to exist, and here the purpose of Constantine's exploration project is to decide whether to proceed with a mine. Government's Br. 44. However, this distinction shows mineral exploration and mine development are more, not less, intertwined than the road and timber sales in *Thomas*. It might have been technically possible, even if not cost-effective, to log the trees in *Thomas* with another road or by helicopter. But here, mine development simply cannot occur

without exploration, and mineral exploration has no other value—facts that render them connected actions. *See* 40 C.F.R. § 1508.25(a)(1)(ii), (iii).

The Government also addresses the definition of "connected action" in section 1508.25(a)(1), which includes actions that meet one of three criteria or lack independent utility. Government's Br. 40-41. After arguing that future mine development does not meet the first criterion, which is not in dispute, *id.*; Appellants' Br. 46, the Government reaches its main argument that because mineral exploration often does not result in mine development, mineral exploration has independent utility. Government's Br. 41. Constantine echoes this argument. Constantine Br. 33-36. However, none of the cases Appellees cite hold that the initial phase of a staged process has independent utility simply because it may fail in its only goal of facilitating a later phase and therefore occur alone. Instead, the cited cases all involved actions that had independent value sufficient to justify taking them in isolation. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 970 (9th Cir. 2006); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974); *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 912 (D. Ariz. 2017); *Greater Yellowstone Coal. v. Reese*, 392 F. Supp. 2d 1234, 1240 (D. Idaho 2005). Here, the entire value

of Constantine's exploration is the prospect of mine development. Appellants' Br. 47. The Government argues briefly that all information-gathering activities by their nature have undefined independent value, Government's Br. 42, but the district court cases on which they rely only held that on the facts presented, the information-gathering activities at issue had value independent of the alleged connected actions. Appellants' Br. 48-49.

Finally, the Government argues "[t]here is no risk of improper segmentation" that would disguise the significance of BLM's actions because the agency will fully analyze development impacts once Constantine submits a proposed mine plan. Government's Br. 45. On the contrary, BLM's decision to segment and defer any analysis of mine development disguises the significance of its decision to approve this last stage of mineral exploration. By allowing Constantine to proceed with its final exploration, BLM risks relinquishing the government's authority to preclude mine development absolutely. *See Thomas*, 753 F.2d at 760 (explaining that NEPA's purposes cannot be fully served "if consideration of the cumulative effects of successive, interdependent steps is delayed until the first step has already been taken.").

III. Vacatur is warranted, or, in the alternative, injunctive relief.

Vacatur is the ordinary remedy in APA cases, and it is warranted here. Appellants' Br. 49-51. This Court has departed from the ordinary remedy in narrow circumstances, where it would undermine the purposes of the underlying statute or trigger large-scale consequences for public health and safety. Appellants' Br. at 50. Appellees do not even attempt to show similar circumstances are present here.

Appellees argue that BLM's error is not serious because BLM found the environmental impacts of the mineral exploration itself insignificant. Government's Br. 46; Constantine's Br. 39. To the extent that is relevant, it is wrong. The exploration harms *Appellants* irreparably, and threatens even greater harms if Constantine acquires extraction rights. *Infra* pp. 28-29.

Constantine argues vacatur is inappropriate because it would have to "await" a withdrawal process and "last for so many years that as a practical matter it would not be an interim remedy." Constantine's Br. 39-40. But vacatur is not required to be an interim remedy, and Appellants do not seek a withdrawal. *See supra* pp. 8-9.

The Government argues that if the Court finds BLM violated NEPA, it should remand to the district court "to consider in the first instance a remedy that may necessitate consideration of current or additional information," Government's Br. 45-46, but neither the Government nor Constantine provides or even describes

any such additional necessary information. This Court has all of the requisite information to determine the appropriate remedy, and Appellees provide no basis to depart from the normal remedy of vacatur.

In the alternative, an injunction is warranted to halt exploration activities until BLM has completed the requisite analysis. Appellants' Br. 51-55. Constantine argues Appellants' harm is not irreparable because Constantine's exploration itself will not have significant environmental impacts. Constantine's Br. 41. This conflates harm to Appellants with harm to the environment. Displacing Appellants from these public lands for five years constitutes irreparable harm. Appellants' Br. 52-53. Appellants in the Chilkat Indian Village of Klukwan, for example, depend on a relationship with the land for their cultural vitality and identity. *Id.* at 5-6. Elsie Spud explains that the noise of Constantine's helicopters in the otherwise quiet Chilkat Valley interferes with hunting, berry picking, gathering, and outdoor family and community time. II-ER-125, ¶¶21-22. "The project . . . deters my access to our traditional use areas and makes it uncomfortable for me to go to these areas." *Id.* Allowing the exploration to proceed also risks an irreversible commitment to mine development, which could harm Appellants even more significantly.

Constantine is also wrong that historical mining somehow precludes a finding that Constantine's expanded exploration causes irreparable harm.

Constantine's Br. 42. BLM's decisions allowed the company to expand its exploration from an area of less than five acres to over 35.9 acres, and that intensification has harmed and will continue to harm Appellants. III-ER-371; II-ER-146, ¶18; II-ER-133, ¶21; II-ER-117, ¶11. Moreover, whatever the area's history of mining in the 20th century, the Chilkat people have lived there far longer. II-ER-85, ¶6 ("The wealth of these lands has allowed our people to thrive for over 10,000 years . . . .").

Constantine argues Appellants have adequate remedies at law because they can petition for withdrawal and advocate against a mine in future NEPA processes. Constantine's Br. 43. Neither of these approaches would provide the remedy Appellants seek, which is BLM's timely consideration of mine development impacts.

This Court should also reject Appellees' arguments that the balance of hardships and public interest favor them. Government's Br. 47-48; Constantine's Br. 44-48. Constantine alleges an injunction would eliminate 65 jobs and potentially nullify Constantine's entire investment. However, all the alleged harms are premised on the fundamental misunderstanding that Appellants seek withdrawal, which Constantine believes would take "many years," and on the same misguided all-or-nothing conception BLM adopted regarding what form the analysis must take. *See supra* pp. 18-19; Constantine's Br. 39, 43. BLM will have

discretion to determine the appropriate depth and timeline for the analysis. *See supra* pp. 18-19; Appellants' Br. 37-38. Moreover, all of Appellees' alleged harms are financial, and not normally considered irreparable. Appellants' Br. 54-55. The Government protests that halting exploration work abruptly could create safety concerns, Government's Br. 48, but an injunction could easily allow the agency to prevent such problems during cessation.

Finally, Constantine argues that the Court should not issue an injunction because Appellants have not demonstrated that the company has not already made a discovery such that an injunction would afford then the relief they seek. Constantine's Br. 42-43. Setting aside the concession inherent in this argument that such a discovery is eminently foreseeable, significantly, they do not argue that a discovery *has* already occurred. As long as it remains unclear whether a discovery has occurred, NEPA's timeliness requirements mean that it is imperative no further exploration occurs which could narrow BLM's discretion before the agency has conducted the required analysis.

CONCLUSION

Appellants request that the Court vacate the Plan Approval and Road Extension decisions, or, in the alternative, remand to BLM with the direction to comply with NEPA and enjoin all activities under the Plan Approval and Road Extension decisions until BLM can complete an adequate NEPA review.

Respectfully submitted this 21st day of January, 2020.

s/ Erin Whalen

Erin Whalen
Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751

Attorneys for Plaintiffs Chilkat Indian Village of Klukwan, Southeast Alaska Conservation Council, Lynn Canal Conservation, and Rivers Without Borders, a project of the Tides Center

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.

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ADDENDUM

40 C.F.R. § 1502.4

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

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.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be:

(1) Direct;

(2) indirect;

(3) cumulative.