

No. 25-5185

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARIZONA MINING REFORM COALITION; INTER TRIBAL ASSOCIATION
OF ARIZONA, INC.; CENTER FOR BIOLOGICAL DIVERSITY;
EARTHWORKS; THE ACCESS FUND; and SIERRA CLUB.

Plaintiffs-Appellants,

v.

BROOKE L. ROLLINS, U.S. SECRETARY OF AGRICULTURE; UNITED
STATES FOREST SERVICE; and NEIL BOSWORTH, SUPERVISOR OF THE
TONTO NATIONAL FOREST.

Defendants-Appellees,

and

RESOLUTION COPPER MINING LLC

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the District of Arizona
Honorable Dominic W. Lanza (No. 2:21-cv-00122-DWL)

***PLAINTIFFS-APPELLANTS’
PETITION FOR REHEARING EN BANC***

**WESTERN MINING ACTION
PROJECT**

Roger Flynn

Jeffrey C. Parsons

P.O. Box 349; 440 Main St., #2

Lyons, Colorado 80540

303-823-5738

wmap@igc.org

Attorney for All Plaintiffs-Appellants

**CENTER FOR BIOLOGICAL
DIVERSITY**

Marc D. Fink

209 East 7th Street

Duluth, Minnesota 55805

218-464-0539

mfink@biologicaldiversity.org

Attorney for All Plaintiffs-Appellants

**CENTER FOR BIOLOGICAL
DIVERSITY**

Allison N. Henderson

P.O. Box 3024

Crested Butte, CO 81224

970-309-2008

ahenderson@biologicaldiversity.org

Attorney for All Plaintiffs-Appellants

**MONTGOMERY &
INTERPRETER, PLC**

Susan B. Montgomery

3301 E. Thunderbird Rd.

Phoenix, AZ 85032

(480) 513-6825

smontgomery@milawaz.com

*Attorney for the Inter Tribal
Association of Arizona, Inc.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Plaintiffs-Appellants Arizona Mining Reform Coalition, Inter Tribal Association of Arizona, Inc., Center for Biological Diversity, Earthworks, the Access Fund, and the Sierra Club have no parent companies, no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

TABLE OF CONTENTS

<u>CORPORATE DISCLOSURE STATEMENT</u>	ii
<u>TABLE OF AUTHORITIES</u>	iv
<u>TABLE OF ACRONYMS</u>	v
<u>LIST OF EXHIBITS</u>	v
<u>STATEMENT OF NEED FOR EN BANC REVIEW</u>	1
I. Statutory and Regulatory Background.	3
II. The Majority’s Opinion Contradicts the Supreme Court’s U.S. v. Locke Precedent, and Ninth Circuit Precedent, Holding that the Federal Government Owns the Mineral Estate, Not a Mining Claimant—Minerals Which Must Be Appraised In a Land Exchange.	5
<i>A. The Federal Government, Not a Mining Claimant, Owns the Mineral Estate</i>	5
<i>B. Congress Required Valuation of the Federal Mineral Estate.</i>	8
III. The Majority’s View That Mining Claims Survive the Exchange Contradicts Supreme Court and Ninth Circuit Precedent Holding that Federal Mining Claims Do Not Exist On Private Land.	10
IV. The Majority Ignored the Controlling Ninth Circuit <i>Desert Citizens</i> Land Exchange Precedent, Which Requires that the Future Market, and “Highest and Best Use” of the Lands Proposed for Mining, Be Appraised.	12
V. En Banc Review Is Needed to Ensure Proper Valuation of Federal Minerals and Application of Federal Standards Across the West.	16
<u>CONCLUSION</u>	18
<u>STATEMENT OF RELATED CASES</u>	19
<u>CERTIFICATE OF COMPLIANCE</u>	19
<u>CERTIFICATE OF SERVICE</u>	20

TABLE OF AUTHORITIES

Federal Caselaw

<i>Alaska Miners v. Andrus</i> , 662 F.2d 577 (9th Cir. 1981))	10
<i>Assiniboine & Sioux Tribes v. Nordwick</i> , 378 F.2d 426 (9th Cir. 1967)	7, 10, 11
<i>Best v. Humboldt Placer Min. Co.</i> , 371 U.S. 334 (1963)	10
<i>Cameron v. United States</i> , 252 U.S. 450 (1920)	7
<i>Ctr. for Biol. Div. v. U.S. FWS</i> , 33 F.4th 1202 (9th Cir. 2022)	7
<i>Ctr. for Biological Diversity v. Dep’t of the Interior</i> , 623 F.3d 633 (9th Cir. 2010).	14
<i>Dent v. Holder</i> , 627 F.3d 365 (9th Cir. 2010)	11
<i>Desert Citizens Against Pollution v. Bisson</i> , 231 F.3d 1172 (9th Cir. 2000)	2, 3, 12, 13, 15, 16
<i>Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co.</i> , 463 U.S. 29 (1983)	16
<i>Shoshone-Bannock Tribes v. United States Dept. of the Interior</i> , Nos. 23-35543, 23-35544, 25 WL 2424422 (9th Cir. Aug. 22, 2025)	15
<i>U.S. v. Benning</i> , 330 F.2d 527 (9th Cir. 1964)	13
<i>U.S. v. Locke</i> , 471 U.S. 84 (1985)	5, 6, 17

Federal Statutes

Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §1713 (sales); §1716 (exchanges)	17
Section 3003 of the National Defense Authorization Act for Fiscal Year 2015, 16 U.S.C. §539p	<i>passim</i>

Federal Regulations

36 C.F.R. Part 254.....	4, 14
-------------------------	-------

Other Authorities

H.R. Rep No. 113-167 (2013)	9
-----------------------------------	---

TABLE OF ACRONYMS

AMRC	Arizona Mining Reform Coalition
ITAA	Inter Tribal Association of Arizona, Inc.
MCZ	Mining Claim Zone (appraised)
MWA	Mineral Withdrawal Area (appraised)
NDAA	Section 3003 of the National Defense Authorization Act for Fiscal Year 2015, 16 U.S.C. §539p

LIST OF EXHIBITS

U.S. Patent #02-2026-0002, March 13, 2026 (granting fee ownership of the lands
and minerals in the exchanged Federal Lands)

Court Amended Opinion, April 8, 2026 (Dkt. 174.1)

Statement of Need for En Banc Review

Appellants-Plaintiffs Arizona Mining Reform Coalition, et al. (“AMRC”) submit this Petition for Rehearing En Banc of the Amended Opinion (Dkt. # 174.1) concerning the Oak Flat land exchange that, as the majority acknowledges, will cause “grave harms to Native religious practices” and “fundamentally alter the nature of the land” to the detriment of AMRC. Amd. Op. at 40.

En Banc review is needed to both: (1) “secure or maintain uniformity of the court’s decisions,” as the majority fundamentally contradicts controlling Supreme Court and Ninth Circuit precedent governing federal minerals and land transfers; and (2) resolve “a question of exceptional importance” involving federal mining and public land law and appraisal standards for federal minerals and lands across the western states. FRAP 40(b)(2).

As Judge Rawlinson’s extensive dissent explained: “[T]his nonconforming appraisal flouted the provisions of the legislation authorizing the land exchange.” Amd. Op. at 54.

As detailed by Judge Rawlinson, the majority’s opinion suffers from three fundamental errors. First, in upholding the appraisal of the land to be used for mining, the majority wrongly assumes that Resolution Copper owned the federal mineral estate on the to-be-exchanged federal lands, simply because the company had staked paper mining claims on the lands. This ruling contradicts over a century of

Supreme Court and Ninth Circuit precedent holding that the mere filing of mining claims does **not** divest the United States' ownership of the minerals.

Second, the majority erroneously assumes that Resolution's mining claims survived the exchange and remained an encumbrance on the private fee land, eliminating the need to consider the mineral values on the open market, contradicting bedrock federal law holding that mining claims exist **only** on federal land.

Third, the majority controverts federal appraisal standards, which require that the post-exchange market value for the "highest and best use" of the privatized lands, for copper mining, govern the appraisal, **not** the land's pre-exchange status, and not for a fictional "surface use" appraised at a fraction of the true market value.

The majority ignores Ninth Circuit precedent on federal land exchanges, holding that the future, post-exchange market and uses of the lands govern federal appraisals. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d at 1172, 1180-84 (9th Cir. 2000). Indeed, **the majority does not even mention** *Desert Citizens* in its merits discussion.

The majority dissolved the injunction against the exchange, and within hours the Government handed over 2,422 acres of a nationally-recognized Native American sacred site to a multinational mining conglomerate, violating the strict prerequisites and appraisal standards Congress mandated in the National Defense Authorization Act ("NDAA"). 16 U.S.C. §539p. This resulted in an extraordinary windfall to Resolution (the new fee owner), as the appraisal zeroed-out the value of the

Government-owned minerals, and ignored the most obvious future market and use of the land—mining.

The majority’s view, that mining claimants own the minerals (eliminating the federal property interest), and that federal mining claims continue to exist on private lands, has ramifications across the western states, where well over a hundred million acres are open for claiming, sale, or exchange. This far-reaching precedent deprives the public of the required “fair market value” when the Government exchanges or sells federal land.

As Judge Rawlinson stressed: “[B]efore we stamp our imprimatur on a decision that will completely annihilate sacred Native lands, we must be certain that every i was dotted and every t was crossed. And that simply is not the case for the appraisal report [...]” Amd. Op. at 40.¹

I. Statutory and Regulatory Background.

The NDAA provides that, under specified conditions, the Forest Service will exchange 2,400+ acres of public land, including Oak Flat, to Resolution. The exchange is contingent on legally-compliant appraisals, including the requirement that “[t]he value of the Federal land and non-Federal land to be exchanged under this

¹ This court has authority to “unwind the exchange” and restore the federal lands. In *Desert Citizens*, even though the Government and mining company had consummated the land exchange, “[t]he district court’s dismissal and its denial of a preliminary injunction are reversed, and the case is remanded for entry of a preliminary injunction setting aside this land exchange.” 231 F.3d at 1188.

section shall be equal or shall be equalized.” 16 U.S.C. §539p(c)(5)(A). *See also* §539p(c)(5)(B)(i)(requiring conveyance of additional lands or money to buy additional lands in the area “[i]f the final appraised value of the Federal land exceeds the value of the non-Federal land”).

The appraisals must conform to the Uniform Appraisal Standards for Federal Land Acquisitions. §539p(c)(4)(B). The appraisals must also be “in compliance with the requirements of section 254.9 of title 36, Code of Federal Regulations.” §539p(c)(4)(A).

These standards and rules require that **all** values of the exchanged lands be calculated, including minerals, as private land in the future. The federal lands and minerals are appraised “as if in private ownership,” to their “highest and best use.” 36 C.F.R. §254.9(b). The appraisal must analyze “the market value of Federal and non-Federal properties involved in an exchange.” §254.9(a)(1). In determining the future “market value” of the federal parcels to be exchanged-away, the appraiser must calculate the value of the future “highest and best use” of the property, defined as “the most probable and legal use of a property.” §254.9(b)(1)(i); §254.2.

The 1,655-acre “Mining Claim Zone” parcel (“MCZ”) contains billions of pounds of copper ore, and is unquestionably being exchanged so that Resolution can mine it. Yet the Government’s appraisal nevertheless valued the to-be-exchanged minerals in the federal lands as **worthless**, valuing the federal lands/minerals for

mere “surface use” (**not** mining), thus appraising it at a paltry \$1.9 million, based solely on Resolution’s filing of paper mining claims. Amd. Op. at 21.

II. The Majority’s Opinion Contradicts the Supreme Court’s *U.S. v. Locke* Precedent, and Ninth Circuit Precedent, Holding that the Federal Government Owns the Mineral Estate, *Not* a Mining Claimant—Minerals Which Must Be Appraised In a Land Exchange.

A. The Federal Government, Not a Mining Claimant, Owns the Mineral Estate.

The appraisal and majority opinion were based on the erroneous view that, simply because Resolution filed paper mining claims on the lands it wished to acquire, the United States does not own the minerals in the MCZ parcel, as it “was not part of the estate owned by the United States.” 4-AMRCER-540 (appraisal). *See* Amd. Op. at 22. Accordingly, the appraisal valued the federal minerals as worthless.

That contradicts Supreme Court precedent, holding that while owners of unpatented mining claims have some interests in their claims, these are a “unique form of property” and certainly do **not** amount to ownership of the minerals. *United States v. Locke*, 471 U.S. 84, 104 (1985). “The United States, **as owner of the underlying fee title to the public domain**, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired.” *Id.* (emphasis added).

Thus, the mere filing of mining claims does not, as viewed by the majority, transform the federal lands into a “split estate.” *See* Dissent, Amd. Op. at 48-49, (noting because the MCZ appraisal considered that parcel as a “split estate,” it

erroneously never considered the future use of the lands for mining, which is the only likely use).

Nonetheless, the majority holds that this is appropriate because Resolution held unverified “rights” to mine minerals on the MCZ parcel, due merely to its filing of paper claims on the lands. Judge Rawlinson’s dissent explains that this is clear error, as the United States, not Resolution, owned the minerals, and the future market for these lands is obviously for mining, not a woefully undervalued “surface use” that Resolution’s planned mining operations would obliterate by creating a two-mile-wide subsidence crater at Oak Flat.

As Judge Rawlinson stated: **“The original sin of the appraisal report, which permeates the majority opinion as well, is that it treated Resolution Copper Mining’s (Resolution) unpatented mining claims as if those claims were equivalent to ownership of the mineral estate.** But an unpatented mining claim is simply a possessory property right to enter public land and extract valuable resources; it is not ownership of the underlying fee estate.” Amd. Op. at 41 (emphasis added), citing *Locke*, 471 U.S. at 86.

A claimant does not own the mineral estate, for “[a]n unpatented mining claim is a tenuous form of property created by the government and subject to its regulation.” Amd. Op. at 41, citing *Locke*, 471 U.S. at 104. “The only reason the appraisal did not evaluate the MCZ parcel for the highest and best use of copper mining is because it assumed the minerals were ‘not part of the estate owned by the

United States.” Amd. Op. at 45. But this is based on the legally-erroneous view that the paper filing of mining claims transforms the federal lands into a “split estate.”

The mere filing of mining claims does not create rights against the United States. “A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws.” *Cameron v. United States*, 252 U.S. 450, 460 (1920). *See also Ctr. for Biological Diversity v. U.S. FWS*, 33 F.4th 1202, 1217-18 (9th Cir. 2022)(mining claimant does not own the minerals and has no rights against the Government prior to meeting detailed claim validity requirements). That lands are claimed under the mining laws “does not foreclose the government from disposing of public lands and superseding the unpatented claim.” Amd. Op. at 43, citing *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426, 428 (9th Cir. 1967).

“Resolution’s existing unpatented mining claims did not convey ownership over the mineral estate, and the underlying premise of the appraisal, treating the parcel as a ‘split estate’ and assessing the highest and best use for only the surface estate is fatally flawed.” Amd. Op. at 44.

Judge Rawlinson explained that this is clear error, as the United States, not Resolution, owned the minerals, and the future market for these lands is obviously for mining, not a woefully undervalued “surface use” that Resolution’s mining operations would obliterate.

B. Congress Required Valuation of the Federal Mineral Estate.

The majority’s erroneous assumption that Resolution’s unpatented mining claims equated to ownership of the minerals led it to fundamentally contradict the NDAA, ignoring the statute’s requirement that the mineral values must be appraised in order to meet the “equal value” and appraisal standards. Congress expressly linked Resolution’s future payments to the Government to the mineral values in the appraisals: “The appraisal prepared under this paragraph ... shall be the basis for calculation of any payment under subsection (e).” 16 U.S.C. §539p(c)(4)(C).

In turn, subsection (e) requires that if the mine produces more mineral value than originally calculated in the appraisals, “Resolution Copper shall pay to the United States ... a value adjustment payment for the quantity of excess production at the same rate assumed for the income capitalization approach analysis prepared under subsection (c)(4)(C).” §539p(e)(2).

Thus, for the public to be compensated for future mineral production, as Congress required, the mineral values must be appraised/calculated **in the first place**, to gauge the difference in values after the mine begins. But under the majority’s view, the mineral values need not be appraised **at all**—rendering congressional mandates in subsection (e) meaningless.

The majority brushes off the congressional evidence and testimony of high-ranking Forest Service officials, which recognized that the mineral values in both parcels of the “Federal land” to be exchanged would be appraised. “Those appraisals

would determine the relative values of the properties affected by the exchange, including the value of mineral deposits that underlie the federal land.” H.R. Rep No. 113-167 (2013), 4-AMRCER-723. The Congressional Budget Office affirmed that “Those appraisals would determine the relative values of the properties affected by the exchange, including the value of mineral deposits that underlie the federal land.” 4-AMRCER-700-701. *See also* 4-AMRCER-644 (Assoc. Chief U.S. Forest Serv. Wagner testifying that “the value of Federal land (including the ore body)” would be appraised).

The majority believed that this evidence did not apply to the MCZ parcel, as it “most naturally appl[ies] [only] to the Mineral Withdrawal Area over which Resolution Copper holds no mining rights.” Amd. Op. at 24. But the statute contains no such language—or even an implication—creating different sets of standards for the two parcels.

The statute required appraisals of the “Federal land.” 16 U.S.C. §539p(c)(4). “The term ‘Federal land’ means the approximately 2,422 acres of land [to be exchanged],” §539p(b)(2), encompassing **both** parcels. Congress knew that Resolution had mining claims on the MCZ parcel, but nevertheless required that the appraisal standards/regulations applied equally to both.

The majority thus manufactured a statutory distinction, and different appraisal requirements, between the two parcels, where none exists.

III. The Majority’s View That Mining Claims Survive the Exchange Contradicts Supreme Court and Ninth Circuit Precedent Holding that Federal Mining Claims Do *Not* Exist On Private Land.

A related and fundamental legal error made by the majority was its belief “that [Resolution’s] unpatented mining claims survive transfer” and remain an encumbrance upon the privatized land such that “[t]he transfer of the land at issue here to any hypothetical party, therefore, would still be subject to Resolution’s mining claims.” Amd. Op. at 23, n. 3. This assumption, coupled with its erroneous view that Resolution owned the minerals on its claims (discussed above), led the majority to hold that there was no need to appraise the minerals. *Id.* (relying on *Alaska Miners v. Andrus*, 662 F.2d 577, 580 (9th Cir. 1981)). But this Court held in *Alaska Miners* that until the mining claimant obtained a fee patent—not the case here—the conveyed lands were “not encumbered by unpatented mining claims.” Dissent, Amd. Op. at 43.

Mining claims are only “valid against the United States” on public, not private, lands. *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336 (1963). “[A]n unpatented claim on public land is extinguished when the government disposes of those lands.” Amd. Op. at 45, citing *Assiniboine*, 378 F. 2d at 428. Thus, “a private owner would not be encumbered by the unpatented mining claim, which is ‘valid [only] against the United States.’” *Id.* at 45. “In a transaction involving the government transferring the mineral claim zone (MCZ) parcel to a third party, that

third party would obtain the entire estate ... and Resolution’s unpatented claims would be extinguished.” *Id.* at 44 (citing *Assiniboine*, 378 F. 2d at 428).

Indeed, in the fee patent the Government issued after the majority dissolved the injunction, there is **no** mention of any mining claim encumbrances on the property. And, the patent is for the entire “Federal land” parcel of 2,422 acres, with no distinction between the two parcels—undermining the majority’s assumption that the statute only required valuation of the minerals in the Withdrawn Area, and not in the MCZ parcel. *See* U.S. Patent #02-2026-0002 (attached).²

The majority relies on the provision that “nothing in this section shall interfere with, limit, or otherwise impair the unpatented mining claims or rights currently held by Resolution Copper on the Federal land.” Amd. Op. at 22, quoting §539p(i)(1)(C). But that language only dealt with the situation if Resolution decided **not** to accept the exchange, and its “currently held” “mining claims” remained on the federal lands. It had nothing to do with the appraisals of the lands and minerals—and did not change federal law which extinguishes mining claims upon privatization.

Resolution chose to eliminate federal ownership and authority, much to its advantage, choosing the route that extinguished its mining claims. Thus, the majority’s assumption that appraising the mineral values would somehow “wipe[] out the value of Resolution Copper’s mining claims ... forcing it to pay twice for its

² *See Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010)(holding that a court may take judicial notice of publicly available agency documents).

existing rights [which] would undeniably ‘interfere with’ and ‘impair’ those claims[.]” Amd. Op. at 22, is factually and legally incorrect.

That pre-exchange provision thus only applied if Resolution choose to keep its claims and proceed with its mine proposal on federal land. Valuing the minerals in the appraisal would have **no** effect on Resolution’s ability to submit a mining proposal.

As Judge Rawlinson highlighted, appraising the minerals would not require Resolution to “pay twice” as “Resolution never paid the government in the first instance.” Amd. Op. at 46. That is true, as except for a nominal \$200/yr. claim fee, Resolution pays nothing to keep its unpatented claims or submit a mine proposal. Yet under the majority’s view, Resolution still pays nothing, receiving billions of pounds of copper ore for free.

IV. The Majority Ignored the Controlling Ninth Circuit *Desert Citizens* Land Exchange Precedent, Which Requires that the Future Market, and “Highest and Best Use” of the Lands Proposed for Mining, Be Appraised.

Despite extensive briefing, the majority never mentions this Circuit’s controlling *Desert Citizens* precedent regarding federal land exchanges, which held that the “highest and best use” and “market value” requirements in the federal appraisal standards are based on the value of the “reasonably probable” **future** uses, **not** on the pre-exchange land status, as the majority erroneously held. “Uses that are ‘reasonably probable’ must be analyzed as a necessary part of the highest and best

use determination.” *Desert Citizens*, 231 F.3d at 1181 (quoting federal appraisal standards).

As Judge Rawlinson explained, “[u]nder our decision in *Desert Citizens*, we simply cannot pretend that this appraisal, which would result in ‘the transfer of a flagrantly undervalued parcel of federal land to a private party,’ complies with our precedent.” Amd. Op. at 53, quoting *Desert Citizens*, 231 F.3d at 1187 (emphasis added).

That case invalidated a land exchange that ignored the future market uses. That appraisal concluded that the “highest and best use” of the federal lands was “either open space or wildlife habitat, or mine support,” even though the lands “were expected to be used for landfill purposes.” *Desert Citizens*, 231 F.3d at 1180–84. Similarly, here, the appraisal ignored that the future market for the MCZ parcel, post-exchange, is obviously for copper mining, not low-valued “surface use.”

Desert Citizens rejected the same argument the majority now adopts, that the “market value” of the “reasonably probable” “highest and best use” is based on pre-exchange conditions. “The highest and best use is **not** found from the past history or present use of these lands but from reasonable **future** probability....” *Id.* at 1182 (quoting *U.S. v. Benning*, 330 F.2d 527, 531 (9th Cir. 1964))(emphasis added).

In another land exchange case involving a mining company, this Circuit noted that the federal government considered mining to be the future use when minerals existed on mining claims covering the lands to be exchanged. “The BLM based its

assumption that mining would occur in the same manner on the fact that Asarco already holds mining claims on the selected lands.” *Ctr. for Biological Diversity v. Dep’t of the Interior*, 623 F.3d 633, 642-43 (9th Cir. 2010). The appraised value of the lands and minerals to be exchanged was not an issue there, as the agency properly appraised the minerals and mining as the future use (unlike here). Although the Court vacated the exchange on other grounds, the fact that the mining claimant proposed mining on the lands to be obtained evidenced that the future market, mineral values, and mining uses must be appraised.

Here, despite the federal standards, which are based on the post-exchange market and uses, the majority relied on the pre-exchange status of the lands, (i.e., on Resolution’s mining claims) to eliminate the mineral values and obvious future uses. Amd. Op. at 22-24.

The majority erroneously believed that Resolution owned the minerals due to its unpatented claims, and since those claims continued to encumber the lands post-exchange, the “‘highest and best use’ of the property by any private party cannot legally include mining the mineral deposit over which Resolution holds its claims.” Amd. Op. at 23, n.3. But as detailed above, Resolution **never** owned the minerals, and their claims **cannot** exist after the transfer.

The appraisal must “estimate the value of the lands and interests as if in private ownership and available for sale in the open market.” 36 C.F.R. §254.9(b)(1)(ii). “[T]he plain language meaning of ‘as if in private ownership’ precludes an

interpretation that assumes federal ownership.” Dissent, Amd. Op. at 45. The appraisal standards are based on the future “hypothetical condition” of the value and uses of the lands and minerals once privatized (after the extinguishment of the mining claims). *Id.* (quoting standards). “And that hypothetical condition by definition also precludes considering federal ownership.” *Id.* (noting that was the situation in *Desert Citizens*).

“Market value refers to the lands’ value in a competitive and open market. ... ‘market value’ does not include the special value of property to the owner arising from its adaptability to his particular use.” *Shoshone-Bannock Tribes v. Dep’t of the Interior*, 153 F.4th 748, 780 (9th Cir., 2025)(Bumatay, J., dissenting on other grounds, citations omitted).

The appraisal standards specifically prohibit consideration of a company’s pre-exchange interests in the appraisal of post-exchange uses and markets. “[T]he appraiser must avoid estimating a property-specific investment value to a particular owner instead of developing an opinion of the market value of the property if it were placed for sale on the open market.” Standards at 47, 5-AMRCER-784. *Desert Citizens* requires that the appraisal be based on what the **future** market would value.

[W]e chastised the government for undervaluing land in a manner no private seller would do, knowing the value of the land to the proposed buyer. *See id.* (observing that “[a] private seller would, at the very least, want his property appraised for use as a landfill [the intended exchange use] before selling it”). The same is true in this case. “A private seller would at the very least want his property appraised for use as [mining] before selling.”

Amd. Op. at 45, quoting *Desert Citizens* at 1183. Yet the appraisal and the majority repeat the mistakes rejected in *Desert Citizens*—ignoring the future uses that an open market sale would certainly value.

For the MCZ parcel, the appraiser arbitrarily determined that its “highest and best use” is not to develop the mineral deposit, but rather for “surface land use in support of a mining operation.” 4-AMRCER-546. But those “surface uses” have never been proposed on these lands, as their intended use has always been to mine the minerals. Nobody would value these lands for mere “surface use,” when the true market value lies in the underlying copper. The agency cannot “offer[] an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

As Judge Rawlinson noted, in the post-exchange open market valuation, the appraisal standards and *Desert Citizens* require that “the highest and best use of that land would have to consider its use for mining rather than just surface support for mining.” Amd. Op. at 46. That did not happen here, and the agency cannot base its appraisal upon a fictional future use that will never occur.

V. En Banc Review Is Needed to Ensure Proper Valuation of Federal Minerals and Application of Federal Standards Across the West.

While this case is critically important to Native Americans and AMRC’s members, it is about much more than Oak Flat—vitally important as that is. The

majority fundamentally alters the legal regime for valuing federal minerals across the West. There is no support for the appraisal's position that the Government does not own the mineral estate on federal lands whenever a claimant files a mining claim, or that mining claims exist on private lands.

Although mining claimants have some possessory interests in their claims, they remain subject to the Government's "substantial regulatory authority," as owner of the surface and minerals, to condition or reject proposals that are not compliant with environmental and public land laws. *Locke*, 471 U.S. at 104. The majority undermines this precedent, erroneously assuming that the mere filing of mining claims represents an absolute property ownership interest against the United States.

Land exchanges/sales occur across the West, under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §1713 (sales); §1716 (exchanges). These sales/exchanges require that the public receive "fair market value" for federal lands and minerals. *Id.*

Under the majority's holding, however, mining companies can simply file mining claims on lands considered for transfer and zero-out all the mineral values—representing a tremendous windfall to private companies at the expense of the taxpayers.

To prevent that from happening, FLPMA, like the statute here, requires strict compliance with federal appraisal standards. These standards mandate, as held in

Desert Citizens, that the lands and minerals must be based on the future condition, not on the pre-exchange situation that no longer exists.

The majority's unprecedented view that mining claimants own federal minerals, and that their claims continue to exist on private lands, places in doubt and raises serious questions regarding title to lands across the West.

CONCLUSION

This Court should grant this Petition for Rehearing En Banc, and issue an Opinion reflecting Judge Rawlinson's correct analysis.

Respectfully submitted this 1st day of May, 2026.

/s/ Roger Flynn

Roger Flynn

Jeffrey C. Parsons

WESTERN MINING ACTION PROJECT

P.O. Box 349; 440 Main St., #2

Lyons, Colorado 80540

303-823-5738

wmap@igc.org

Marc D. Fink

CENTER FOR BIOLOGICAL DIVERSITY

209 East 7th Street

Duluth, Minnesota 55805

218-464-0539

mfink@biologicaldiversity.org

Allison N. Henderson

CENTER FOR BIOLOGICAL DIVERSITY

P.O. Box 3024

Crested Butte, CO 81224

970-309-2008

ahenderson@biologicaldiversity.org

Attorneys for All Plaintiffs-Appellants

/s/ Susan Montgomery

Susan B. Montgomery
MONTGOMERY & INTERPRETER, PLC
3301 E. Thunderbird Rd.
Phoenix, AZ 85032
(480) 513-6825
smontgomery@milawaz.com

Attorneys for Plaintiff-Appellant ITAA

STATEMENT OF RELATED CASES

The Amended Opinion deals with AMRC's appeal of the preliminary injunction denial, as well as the San Carlos Apache Tribe's related appeal of that decision. No. 25-5189, and the appeal of Lopez. No. 25-5197.

In different but related proceedings challenging the Exchange, the case of *Apache Stronghold v. United States*, No. 21-1529, is currently back before the District Court.

CERTIFICATION OF COMPLIANCE PURSUANT TO CIRCUIT RULE 40-1

I certify that: Pursuant to Circuit Rule 40-1(b), the above Petition is:

Proportionately spaced, has a typeface of 14 points or more, and contains no more than 4,200 words.

/s/ Roger Flynn

5-1-26

CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on May 1, 2026, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Roger Flynn

Form 1860-9
(January 1988)
AZA 37060 /AZAZ105847005

The United States of America

To all to whom these presents shall come, Greeting:

WHEREAS

RESOLUTION COPPER MINING LLC, a Delaware limited liability company

is entitled to a land patent pursuant to Section 3003 of Public Law 113-291 (16 U.S.C § 539p),
for all right, title, and interest of the United States in the following described lands:

Gila and Salt River Meridian, Arizona

T. 1 S., R. 13 E.,
tracts 49 and 50

T. 2 S., R. 12 E.,
tract 37

T. 2 S., R. 13 E.,
sec. 6.

The areas described aggregate 2,422.11 acres.

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES OF AMERICA,
unto the said Resolution Copper Mining LLC, a Delaware limited liability company, the land
described above; TO HAVE AND TO HOLD the said land with all the rights, privileges,
immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said
Resolution Copper Mining LLC, a Delaware limited liability company, its successors and
assigns, forever.

SUBJECT TO:

That certain Highway Easement Deed recorded March 18, 1991, at Docket 1732, Page 54,
Pinal County Recorder, Pinal County, Arizona.

By accepting this patent, and, to the extent allowed by law, the patentee agrees to indemnify,
defend, and hold the United States harmless from any costs, damages, claims, causes of action,
penalties, fines, liabilities, and judgments of any kind arising from the past, present, and future
acts or omissions of the patentee, its employees, agents, contractors, or lessees, or any third

Patent Number: 02-2026-0002

party, arising out of, or in connection with the patentee's use, occupancy, or operations on the patented real property which has already resulted or does hereafter result in:

- (1) Violations of Federal, State, and local laws and regulations that are now, or may in the future, become applicable to the real property;
- (2) Judgments, claims, or demands of any kind assessed against the United States;
- (3) Costs, expenses, or damages of any kind incurred by the United States;
- (4) Releases or threatened releases of solid or hazardous waste(s), and /or hazardous substance(s), as defined by Federal or State environmental laws, off, on, into or under land, property and other interests of the United States;
- (5) Activities by which solids or hazardous substance(s) or wastes, as defined by Federal and State environmental laws are generated, released, stored, used or otherwise disposed of on the patented real property, and any cleanup response, remedial action, or other actions related in any manner to said solid or hazardous substance(s) or waste(s); or
- (6) Natural resource damages as defined by Federal and State law. This covenant shall be construed as running with the patented real property and may be enforced by the United States in a court of competent jurisdiction.



IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 476), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand, in Phoenix, Arizona, the 13th day of March in the year of our Lord two thousand and twenty-six and of the Independence of the United States the two hundred and fifty,

By Raymond Suazo
Raymond Suazo
State Director

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARIZONA MINING REFORM
COALITION; INTER TRIBAL
ASSOCIATION OF ARIZONA,
INC.; EARTHWORKS; CENTER
FOR BIOLOGICAL DIVERSITY;
ACCESS FUND; GRAND
CANYON CHAPTER OF THE
SIERRA CLUB,

Plaintiffs - Appellants,

v.

UNITED STATES FOREST
SERVICE, an agency in the U.S.
Department of Agriculture; NEIL
BOSWORTH, Supervisor of the
Tonto National Forest; BROOKE
ROLLINS, US Secretary of
Agriculture,

Defendants - Appellees,

RESOLUTION COPPER MINING,
LLC,

No. 25-5185

D.C. No.
2:21-cv-00122-
DWL

AMENDED
OPINION

*Intervenor-Defendant -
Appellee.*

SAN CARLOS APACHE TRIBE, a
federally recognized Tribe,

Plaintiff - Appellant,

v.

UNITED STATES FOREST
SERVICE, an agency in the U.S.
Department of Agriculture; NEIL
BOSWORTH, Supervisor of the
Tonto National Forest; BROOKE
ROLLINS,

Defendants - Appellees,

RESOLUTION COPPER MINING,
LLC,

*Intervenor-Defendant -
Appellee.*

No. 25-5189

D.C. No.
2:21-cv-00068-
DWL

GOUYEN BROWN LOPEZ;
SINETTA LOPEZ, on behalf of
herself and her minor child L.B.;
NOMIE BROWN; ANGELA
KINSEY, on behalf of herself and her
minor children V.K. and M.K.,

No. 25-5197

D.C. No.
2:25-cv-02758-
DWL

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA;
UNITED STATES FOREST
SERVICE; BROOKE ROLLINS;
UNITED STATES DEPARTMENT
OF AGRICULTURE; TOM
SCHULTZ,

Defendants - Appellees,

RESOLUTION COPPER MINING,
LLC,

*Intervenor-Defendant -
Appellee.*

Appeal from the United States District Court
for the District of Arizona
Dominic Lanza, District Judge, Presiding

Argued and Submitted January 7, 2026
Phoenix, Arizona

Filed March 13, 2026
Amended April 8, 2026

Before: JOHNNIE B. RAWLINSON, MILAN D. SMITH,
JR., AND DANIEL A. BRESS, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.;
Partial Dissent by Judge Rawlinson

SUMMARY*

Southeast Arizona Land Exchange and Conservation Act

The panel affirmed the district court's denial of plaintiffs' request for a preliminary injunction seeking to block a land exchange, mandated by the Southeast Arizona Land Exchange and Conservation Act (the Land Exchange Act), that targets a large copper deposit in Southeast Arizona located in the Tonto National Forest.

The Land Exchange Act directs the United States Forest Service to transfer nearly 2,500 acres of National Forest land, including Oak Flat—an Apache ceremonial religious ground—and a deposit containing almost two billion metric tons of copper to a private mining company, Resolution Copper Mining LLC (Resolution Copper). In exchange, Resolution Copper must provide over 5,000 acres of equally appraised land to the federal government.

Three groups of plaintiffs—the Arizona Mining Reform Coalition (AMRC), the San Carlos Apache Tribe (the Tribe), and a separate set of Apache plaintiffs (the Lopez Plaintiffs)—brought suit under the Land Exchange Act, the National Environmental Policy Act (NEPA), the National

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Historic Preservation Act (NHPA), the Religious Freedom Restoration Act (RFRA), and the Free Exercise Clause of the United States Constitution.

Addressing threshold justiciability issues, the panel held that Plaintiffs had Article III standing because (1) they demonstrated actual or imminent injury flowing from the land exchange where the final environmental impact statement (FEIS) under NEPA showed that physical and visual impacts on traditional cultural places, special interest areas, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale; and (2) their injuries are redressable by a favorable judicial decision. The panel also held that AMRC had prudential standing to bring its claims challenging the land exchange appraisal. Finally, the panel held that Plaintiffs established that their NEPA claims are justiciable because the FEIS is reviewable as “final agency action.”

Turning to the merits, the panel held that Plaintiffs have not established a likelihood of success on the merits of their claims. First, AMRC is not likely to succeed on the merits of its claims challenging the appraisal under the Land Exchange Act. Second, Plaintiffs are not likely to succeed on the merits of their claims that the FEIS fails to comply with NEPA. Third, the Tribe and the Lopez Plaintiffs are not likely to succeed on the merits of their claims that the Government failed to satisfy its consultation obligations under the Land Exchange Act and the NHPA. Finally, the Lopez Plaintiffs’ claim that the land exchange would violate their religious liberty, as protected by RFRA and the Free Exercise Clause, is foreclosed by precedent.

Because Plaintiffs failed to show a likelihood of success on, or even serious questions regarding, any of their claims,

the panel did not reach any of the other preliminary injunction factors and affirmed the district court's denial of Plaintiffs' request for a preliminary injunction against the land exchange.

Judge Rawlinson partially dissented. She agreed with the majority that Plaintiffs' claims were mostly foreclosed by this court's precedent and recent Supreme Court rulings. She dissented from that portion of the majority opinion concerning the appraisal report prepared by the U.S. Forest Service because the appraisal did not conform to the requirements of the authorizing statute or this court's precedent. Because the nonconforming appraisal flouted the provisions of the legislation authorizing the land exchange, she would reverse the district court decision allowing the land exchange to proceed.

COUNSEL

Roger Flynn (argued) and Jeffrey C. Parsons, Western Mining Action Project, Lyons, Colorado; Marc D. Fink, Center for Biological Diversity, Duluth, Minnesota; Allison N. Henderson, Center for Biological Diversity, Crested Butte, Colorado; Susan B. Montgomery, Montgomery & Interpreter PLC, Phoenix, Arizona; Miles E. Coleman (argued), Nelson Mullins Riley & Scarborough LLP, Greenville, South Carolina; Jeffrey A. Wald, Nelson Mullins Riley & Scarborough LLP, Winston-Salem, North Carolina; Madeline C. Bergstrom, Nelson Mullins Riley & Scarborough LLP, Washington, D.C.; Bernardo M. Velasco (argued), Alexander B. Ritchie, Jana L. Sutton, Justine Jimmie, and Laurel Herrmann, San Carlos Apache Tribe Department of Justice, San Carlos, Arizona; Joe P. Sparks, The Sparks Law Firm PC, Scottsdale, Arizona; Colin C. Hampson, Sonosky Chambers Sachse Endreson & Perry LLP, Bonita, California; Frank S. Holleman IV, Sonosky Chambers Sachse Endreson & Perry LLP, Washington, D.C.; Steve Titla, Titla & Parsi PLLC, Globe, Arizona; for Plaintiffs-Appellants.

Robert N. Stander (argued), Deputy Assistant Attorney General; Erika D. Norman, Ezekiel A. Peterson, Thekla Hansen-Young and Angela Ellis, Attorneys, Environment and Natural Resources Division; Adam R. F. Gustafson, Acting Assistant Attorney General; United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

Michael R. Huston (argued), Diane M. Johnsen, Samantha J. Burke, Addison W. Bennett, and Nicholas S. Crown, Perkins Coie LLP, Phoenix, Arizona; Christopher D. Thomas, Andrea J. Driggs, Janet M. Howe, and Benjamin A.

Longbottom, Holland & Hart LLP, Phoenix, Arizona; for Intervenor-Defendant-Appellee.

Heather D. Whiteman Runs Him and Dana L. Chavis, Tribal Justice Clinic, Rogers College of Law, University of Arizona, Tucson, Arizona; Gerald Torres, Yale Law School, New Haven, Connecticut; for Amici Curiae National Native American Law Students Association, Yale Native American Law Students Association, University of Arizona Native and Indigenous Students Association, and Others.

Eric N. Kniffin and Rachel N. Morrison, Ethics & Public Policy Center, Washington, D.C.; Ian Speir, Covenant Law PLLC, Colorado Springs, Colorado; for Amici Curiae Religious Freedom Institute and Ethics and Public Policy Center.

Jack W. Fiander, Sacred Ground Legal Services, Yakima, Washington, for Amicus Curiae Sacred Ground Legal Services.

Steven T. Collis and John Greil, Law & Religion Clinic, University of Texas School of Law, Austin, Texas, for Amicus Curiae Lipan Native American Church.

Wesley J. Furlong, Native American Rights Fund, Anchorage, Alaska; Geoffrey C. Blackwell, National Congress of American Indians, Washington D.C.; for Amici Curiae National Congress of American Indians and National Association of Tribal Historic Preservation Officers.

Jennifer H. Weddle, Greenberg Traurig PA, Denver, Colorado, for Amicus Curiae Coalition of Large Tribes.

Jay C. Johnson and Megan Barbero, Venable LLP, Washington, D.C.; Erica Klenicki and Caroline McAuliffe, National Association of Manufacturers, Washington, D.C.;

Stephanie Maloney, U.S. Chamber Litigation Center, Washington, D.C.; for Amici Curiae National Association of Manufacturers and Chamber of Commerce of the United States of America.

Christopher G. Michel, Quinn Emanuel Urquhart & Sullivan LLP, Washington, D.C., for Amicus Curiae William P. Barr.

Svend A. Brandt-Erichsen, Nossaman LLP, Seattle, Washington; Michelle Burton, Nossaman LLP, Phoenix, Arizona; for Amici Curiae Greater Phoenix Chamber of Commerce.

Thomas J. Basile and Kory Langhofer, Statecraft PLLC, Phoenix, Arizona, for Amici Curiae Arizona Chamber of Commerce & Industry, Greater Phoenix Leadership, Arizona State Building and Construction Trades Council, and Arizona Plumbers and Pipefitters Local Union 469.

Ivan L. London and Grady J. Block, Mountain States Legal Foundation, Lakewood, Colorado, for Amici Curiae the Towns of Superior, Kearny, and Miami, Arizona, and Mayor Dean Hetrick of Hayden, Arizona.

James M. Auslander, Beveridge & Diamond PC, Washington, D.C.; Tawny Bridgeford, National Mining Association, Washington, D.C.; for Amici Curiae National Mining Association, American Exploration & Mining Association, Arizona Mining Association, Alaska Miners Association, MiningMinnesota, Montana Mining Association, Nevada Mining Association, Texas Mining and Reclamation Association, Utah Mining Association, Wyoming Mining Association, and National Tribal Energy Association.

OPINION

M. SMITH, Circuit Judge:

These consolidated cases concern a land exchange, mandated by the Southeast Arizona Land Exchange and Conservation Act (the Land Exchange Act), 16 U.S.C. § 539p, that targets a large copper deposit in Southeast Arizona located in the Tonto National Forest. Plaintiffs bring a variety of claims under the Land Exchange Act, the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Religious Freedom Restoration Act (RFRA), and the Free Exercise Clause of the United States Constitution. Because Plaintiffs' claims are unlikely to succeed on the merits, we affirm the district court's denial of Plaintiffs' request for a preliminary injunction against the land exchange.

FACTUAL BACKGROUND

I. Statutory History

In 2014, Congress passed the Land Exchange Act as part of the National Defense Authorization Act for Fiscal Year 2015. Pub. L. No. 113-291, § 3003, 128 Stat. 3292, 3732–41 (2014) (codified at 16 U.S.C. § 539p). The land exchange had, for many years, been hotly contested in Congress and in public debate. The Land Exchange Act directs the United States Forest Service to transfer nearly 2,500 acres of National Forest land, including Oak Flat—an Apache ceremonial religious ground—and a deposit containing almost two billion metric tons of copper, in addition to other minerals, to a private mining company, Resolution Copper Mining LLC (Resolution Copper). In exchange, Resolution Copper must provide over 5,000 acres of equally appraised

land to the federal government. 16 U.S.C. §§ 539p(b)(2), (4); (d)(1).

The Land Exchange Act includes a variety of procedural requirements. For instance, the Secretary of Agriculture must consult with Native American tribes regarding their concerns related to the land exchange, *id.* § 539p(c)(3)(A), and then “seek to find mutually acceptable measures” to address those concerns and “minimize the adverse effects on the affected” tribes. *Id.* § 539p(c)(3)(B). The Land Exchange Act also mandates appraisals of the land to ensure an exchange of equal value, “conducted in accordance with nationally recognized appraisal standards.” *Id.* §§ 539p(c)(4), (5). Furthermore, the Land Exchange Act requires the Government to “prepare a single environmental impact statement [(EIS)] under the National Environmental Policy Act of 1969” prior to conveying the land. *Id.* § 539p(c)(9)(B). That EIS, per the Land Exchange Act, “shall be used as the basis for all decisions under Federal law related to the proposed mine and the Resolution mine plan of operations and any related major Federal actions significantly affecting the quality of the human environment, including the granting of any permits, rights-of-way, or approvals for the construction of associated power, water, transportation, processing, tailings, waste disposal, or other ancillary facilities.” *Id.* Conveyance of the land must occur within 60 days of EIS publication. *See id.* § 539p(c)(10).

II. Procedural History

a. Original Litigation

Following issuance of the original EIS on January 15, 2021, three plaintiff groups filed suit seeking to enjoin the conveyance. Two of the groups, also Plaintiffs here—the

Arizona Mining Reform Coalition (AMRC)¹ and the San Carlos Apache Tribe (the Tribe)—challenged the EIS’s sufficiency and raised similar claims as Plaintiffs in this litigation. The third plaintiff group, Apache Stronghold (not involved in the instant litigation) raised religious freedom claims under the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA) in a separate case. *See Apache Stronghold v. United States*, No. 21-CV-00050 (D. Ariz.).

While the *Apache Stronghold* litigation was pending, the Forest Service withdrew the EIS in March 2021 to engage in further consultation with tribal groups. However, the *Apache Stronghold* case proceeded as to the plaintiffs’ RFRA and Free Exercise claims. The district court in that case eventually denied the request for a preliminary injunction, and a panel of this court affirmed; the full court then granted en banc rehearing. *See Apache Stronghold v. United States*, 519 F. Supp. 3d 591 (D. Ariz. 2021), *aff’d*, 38 F.4th 742 (9th Cir. 2022), *reh’g en banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022). The en banc panel reached the same result as the merits panel, ruling that the land exchange did not burden the plaintiffs’ religious exercise. *See Apache Stronghold v. United States*, 101 F.4th 1036, 1044, 1051–53, 1063 (9th Cir. 2024). The Supreme Court denied review over a dissent from Justice Gorsuch, joined by Justice Thomas. *See Apache Stronghold v. United States*, 145 S. Ct. 1480, 1480–89 (2025) (Gorsuch, J., dissenting from the denial of certiorari). Apache Stronghold filed a petition for rehearing in light of the Court’s subsequent decision in

¹ AMRC refers to Plaintiffs-Appellants Arizona Mining Reform Coalition, Inter Tribal Association of Arizona, Inc., Center for Biological Diversity, Earthworks, the Access Fund, and the Sierra Club.

Mahmoud v. Taylor, 606 U.S. 522 (2025), which the Court denied. *Apache Stronghold v. United States*, 146 S. Ct. 285 (2025) (mem.). Justice Gorsuch again noted he would have granted the petition. *See id.*

b. Current Litigation

The Forest Service issued the revised Final EIS (FEIS) on June 20, 2025, restarting the Land Exchange Act's 60-day clock for conveyance of the land. The Forest Service also conducted the required appraisal process pursuant to the Land Exchange Act. This included one appraisal report detailing the area of federal land over which Resolution Copper holds unpatented mining claims, known as the "Mining Claim Zone," and another regarding the "Mineral Withdrawal Area," the federal land over which Resolution Copper holds no mining claims.

AMRC and the Tribe filed motions for a preliminary injunction in early 2025 in anticipation of the Forest Service's filing of the revised Final EIS, which the district court denied on June 6, 2025. However, with the Government's consent, the court entered a temporary stay until August 19, 2025, to allow for a second round of preliminary injunction briefing; the court denied that injunction request on August 15, 2025. The district court found that the plaintiffs had not "established a likelihood of success or even serious questions going to the merits of any of their" appraisal, NEPA, consultation, or National Forest Management Act (NFMA) claims.

Simultaneously, a separate set of Apache plaintiffs (the Lopez Plaintiffs) filed their own suit in the District Court for the District of Columbia on July 24, 2025, which was transferred to the District of Arizona upon the Government's motion. *See Lopez v. United States*, 2025 WL 2193001

(D.D.C. Aug. 1, 2025). The Lopez Plaintiffs raised RFRA, Free Exercise, NHPA, and NEPA claims, which the district court rejected on August 17, 2025, when denying their motion for a preliminary injunction. Under *Apache Stronghold*, the district court ruled, the Lopez Plaintiffs' religious liberty claims were foreclosed, and nothing in *Mahmoud* changed that.

All three Plaintiff groups appealed to this court and simultaneously filed for injunctions pending appeal, seeking to block the land transfer. A motions panel of this court entered an administrative stay on August 18, 2025, referring the motions for injunction pending appeal to the merits panel.

STANDARD OF REVIEW

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). We have “adopted a sliding-scale approach to the *Winter* factors,” where “serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.” *Bennett v. Isagenix Int'l LLC*, 118 F.4th 1120, 1126 (9th Cir. 2024) (cleaned up).

We review a district court's decision to deny a motion for a preliminary injunction for abuse of discretion. See *Betschart v. Oregon*, 103 F.4th 607, 616 (9th Cir. 2024). The district court abuses its discretion “when it fails to identify ‘the correct legal rule to apply to the relief requested’ or applies the correct rule in a way that is illogical, implausible,

or unsupported by the facts.” *Shayler v. 1310 PCH, LLC*, 51 F.4th 1015, 1020 (9th Cir. 2022) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). In evaluating agency action, the court must determine if the agency decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This “deferential standard simply ensures that the agency has acted within a zone of reasonableness.” *League of California Cities v. FCC*, 118 F.4th 995, 1014 (9th Cir. 2024) (internal quotation marks omitted).

ANALYSIS

I. Threshold Justiciability Issues

Plaintiffs must establish Article III standing as to each of their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.”); *Davis v. FEC*, 554 U.S. 724, 734 (2008) (“Standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” (cleaned up)). To establish standing, Plaintiffs must show: (1) they have suffered an injury in fact that is “concrete and particularized” and “actual or imminent”; (2) that the injury they show is traceable to the challenged action; and (3) that it is likely that a favorable decision would redress their injury. *Lujan*, 504 U.S. at 560–61.

Absent a specific private right of action, plaintiffs must assert their administrative claims via the Administrative Procedure Act’s (APA) judicial review provisions. *See* 5 U.S.C. §§ 701–706. “[A] person suing under the APA must satisfy not only Article III’s standing requirements,” but

also, “[t]he interest he asserts must be ‘arguably within the zone of interests to be protected or regulated by the statute’ that he says was violated.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)). “[I]n the APA context . . . the test is not especially demanding,” and “forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (cleaned up).

Finally, under the APA, only “final agency action” is reviewable. 5 U.S.C. § 704. Agency action is “final” if it “both (1) ‘mark[s] the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature,’ and (2) is ‘one by which rights or obligations have been determined, or from which legal consequences will flow.’” *Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 417 (9th Cir. 2023) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). This inquiry is meant to consider the “practical and legal effects of the agency action” and should be “pragmatic and flexible.” *Id.* (citing *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)).

Plaintiffs have established that all of their claims are reviewable.

a. Article III Standing

Defendants challenge Plaintiffs’ Article III standing on two grounds: first, that they have not demonstrated actual or imminent injury flowing from the land exchange, and

second, that their injuries would not be redressed by a favorable judicial decision. We disagree on both counts.

As for actual or imminent injury, under this court's precedents, "plaintiffs may satisfy standing by showing that they face a future injury that is 'imminent,' or 'certainly impending.'" *Int'l Partners for Ethical Care Inc v. Ferguson*, 146 F.4th 841, 851 (9th Cir. 2025) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 564 n.2 (1992)) (emphasis omitted). Here, the FEIS points out that "[p]hysical and visual impacts on [traditional cultural places], special interest areas, and plant and mineral resources caused by construction of the mine would be *immediate, permanent, and large in scale.*" That is enough to show imminent injury.

To demonstrate redressability, "a federal plaintiff must show only that a favorable decision is likely to redress his injury, not that a favorable decision will inevitably redress his injury." *Desert Citizens*, 231 F.3d at 1178 (quoting *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994)). "Plaintiffs have standing if 'there is some possibility that the requested relief will prompt the injury-causing party to reconsider' its actions." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). As for Plaintiffs' appraisal claims, we have held before that injuries flowing from a flawed land exchange appraisal are redressable. *See Desert Citizens*, 231 F.3d at 1178. As we noted, if an agency is required to redo a flawed appraisal, "the particular exchange would not go through" and plaintiffs can continue to use the public land. *Id.* That is the case here.

Plaintiffs' appraisal, consultation, and NEPA claims are also redressable by favorable judicial action, as we have held that even a temporary cessation of agency action can redress

connected injuries. *See W. Watersheds Project v. Grimm*, 921 F.3d 1141, 1148 (9th Cir. 2019). As the district court correctly noted, “every day that Oak Flat remains intact is another day that members of the Tribe can use the land in its current, unspoiled form for religious purposes and ceremonies. Thus, even a temporary delay may, for example, allow another Sunrise Ceremony to take place.”

Therefore, Plaintiffs have demonstrated that they have Article III standing.²

b. Prudential Standing

The Government and Resolution Copper next argue that AMRC has no prudential standing to bring its appraisal claim under the APA. In their view, there is no injury to AMRC from an incorrect appraisal (to the degree the appraisal was incorrect). The district court rejected those arguments below, holding that this court’s decision in *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), permits standing for appraisal claims in land exchange cases like this one. The Defendants attempt to distinguish *Desert Citizens* on the grounds that it involved a discretionary land exchange under the Federal Land Policy and Management Act (FLPMA). In their view, AMRC’s appraisal claims do not fall within the zone of interests of the Land Exchange Act’s appraisal provisions, and *Desert Citizens* is inapposite because the Land Exchange Act,

² Though the parties do not contest Plaintiffs’ standing for their religious liberty claims, we must nonetheless ensure Plaintiffs have standing for those claims. *See United States v. Hays*, 515 U.S. 737, 742 (1995). Here, the Lopez Plaintiffs face an imminent inability to practice their religion at Oak Flat, an injury traceable to the Government’s decision to transfer the land to Resolution and redressable by a decision barring that transfer. That suffices to establish standing.

unlike the FLPMA, does not contain a judicial review provision.

Though the FLPMA and Land Exchange Act are different in some respects, the flexible zone-of-interests test supports prudential standing here. We have held that we “may look beyond the section sued under to the statute or act as a whole ‘to understand Congress’ overall purposes.” *Nat’l Wildlife Fed’n v. Burford*, 871 F.2d 849, 852 (9th Cir. 1989) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 401 (1987)), and here, the Land Exchange Act contains statutory provisions that seek to protect the public and Native groups’ interests in the land. *See* 16 U.S.C. §§ 539p(c)(3), (9); (d)(2); (g); (i)(3). There is also a “public review” sub-provision in the Land Exchange Act’s appraisal section. *See id.* § 539p(c)(4)(B)(iv). Taking these provisions together, and given the “lenient approach” to the zone-of-interests test in the APA context, *Lexmark*, 572 U.S. at 130, AMRC has established standing for its appraisal claim.

c. Final Agency Action

Finally, the FEIS is reviewable as “final agency action” because publication triggers the 60-day time limit for the land exchange, and no further agency action or decision-making process is needed for that deadline to run. *See Ctr. for Biological Diversity*, 58 F.4th at 417 (“An agency action is ‘final’ only if it both (1) ‘mark[s] the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature,’ and (2) is ‘one by which rights or obligations have been determined, or from which legal consequences will flow.’” (quoting *Bennett*, 520 U.S. at 177–78)); *Oregon Nat. Desert Ass’n*, 465 F.3d at 982 (“In determining whether an agency’s action is final, we look

to whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance with the terms is expected." (cleaned up)); *id.* at 984 ("[W]e look to see whether the agency has rendered its last word on the matter to determine whether an action is final and is ripe for judicial review." (internal quotation marks omitted)). Accordingly, Plaintiffs have established that their NEPA claims are justiciable.

II. Plaintiffs have not established a likelihood of succeeding on the merits, nor raised serious questions regarding, any of their claims.

a. AMRC is not likely to succeed on, nor has it raised serious questions regarding, its appraisal claims.

The Land Exchange Act sets out a set of appraisal requirements governing the land at issue. *See* 16 U.S.C. §§ 539p(c)(4), (5). These include the requirements that the appraisals be prepared "in accordance with nationally recognized appraisal standards" and that the land then be exchanged for non-Federal land of equal value. *Id.* § 539p(c)(4)(b)(i). Among other things, national appraisal standards require the value of the appraised land to reflect "the highest and best use of the property" "as if in private ownership and available for sale in the open market," 36 C.F.R. § 254.9(b)(1)(i), meaning "the most probable and legal use of [the] property." *Id.* § 254.2.

These appraisals also reflect the general mining laws, pursuant to which "[d]iscovery' of a mineral deposit, followed by the minimal procedures required to formally 'locate' the deposit, gives an individual the right of exclusive possession of the land for mining purposes." *United States*

v. Locke, 471 U.S. 84, 86 (1985) (quoting 30 U.S.C. § 26); *see also United States v. Shumway*, 199 F.3d 1093, 1098–99 (9th Cir. 1999) (“[T]he finder of valuable minerals on government land is entitled to exclusive possession of the land for purposes of mining and to all the minerals he extracts.”). “[A]n unpatented mining claim remains a fully recognized possessory interest.” *Locke*, 471 U.S. at 86.

The Forest Service prepared one appraisal report detailing the area of federal land over which Resolution Copper holds unpatented mining claims, known as the “Mining Claim Zone” (MCZ), and another regarding the “Mineral Withdrawal Area” (MWA), the federal land over which Resolution Copper holds no mining claims. There are two main differences between these two parcels. First, the MCZ contains approximately 35 billion pounds of copper ore, while the MWA contains approximately 5 billion. Second, the MCZ is “encumbered by 148 unpatented mining claims that give Resolution . . . the exclusive right to extract the minerals beneath the MCZ,” while Resolution has no such claims against the MWA.

In its appraisal for the MWA, the Forest Service concluded that the parcel was worth \$22 million after factoring in the value of the underlying copper ore (valued at approximately \$17.5 million). It determined that the highest and best use of the land was “exploration and development of a mineral resource,” as no party had mining claims to the underlying minerals. However, for the MCZ, the agency noted that because Resolution had unpatented mining claims to the minerals, the mineral rights were “not part of the estate owned by the United States.” Therefore, the highest and best use was “surface land use in support of a mining operation,” and the land was only worth about \$2 million.

There was no error in this appraisal. As the district court correctly explained, “AMRC’s criticisms all flow from a misunderstanding of how unpatented mining claims work.” The United States has a “finders keepers” regime for mining claims. In other words, whoever finds minerals on federal land gains an exclusive possessory interest in the land “for purposes of mining and to all the minerals he extracts” from that land. *Shumway*, 199 F.3d at 1098–99. Here, Resolution Copper owns the right to mine the minerals in the MCZ and the minerals themselves, once mined. As the district court determined, if the appraisal had included the value of the MCZ minerals in what the federal government owned, that “would force Resolution Copper, as part of the land exchange, to pay the federal government for the copper it effectively already owns the exclusive right to mine.” Indeed, the Land Exchange Act itself indicates that Congress did not contemplate that the appraisal would include the value of the minerals in the MCZ. The statute emphasizes that “[n]othing in this section shall interfere with, limit, or otherwise impair, the unpatented mining claims or rights currently held by Resolution Copper on the Federal land.” 16 U.S.C. § 539p(i)(1)(C). Effectively wiping out the value of Resolution Copper’s mining claims and forcing it to pay twice for its existing rights would undeniably “interfere with” and “impair” those claims. *Id.*

AMRC’s arguments to the contrary are unavailing. AMRC first argues that the appraisal improperly “based its ‘highest and best use’ valuation on the current status of the federal lands, instead of its value on the future open market after the lands are private.” To reach this conclusion, AMRC seems to assume that “as if in private ownership” means as if owned by Resolution or some other private party in fee simple after the land exchange has concluded. But this is an

erroneous reading of the regulations. The better interpretation of the term “as if in private ownership” is that the appraiser needs to determine the present value of the federal lands as if they are exploited for profit by a hypothetical private party. AMRC has failed to highlight any authority suggesting that Congress’s decision to transfer this land to Resolution somehow defeats Resolution’s already-existing mining claim over that land.³

AMRC’s remaining arguments fare no better. For instance, AMRC points to regulations that require appraisers to “consider the contributory value of any interest in land such as water rights, minerals, or timber, to the extent they

³ The dissent claims that our precedent allows for the government to dispose of federal land and extinguish unpatented mining claims. But the dissent’s own cases emphasize that unpatented mining claims survive transfer absent congressional direction to the contrary. *See, e.g., Alaska Miners v. Andrus*, 662 F.2d 577, 580 (9th Cir. 1981) (“[T]he government may withdraw or convey the title to land *subject to valid, unpatented claims.*”) (emphasis added); *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426, 432 (9th Cir. 1967) (“Accordingly, we conclude that withholding provisions of the 1927 Act did not apply to lands subject to pending but unperfected homestead entries under the 1908 Act.”). And here, the dissent ignores the fact that Congress expressly chose to preserve Resolution’s mining claims in the Land Exchange Act, which states that “[n]othing in this section shall interfere with, limit, or otherwise impair, the unpatented mining claims or rights currently held by Resolution Copper on the Federal land.” 16 U.S.C. § 539p(i)(1)(C). The transfer of the land at issue here to any hypothetical third party, therefore, would still be subject to Resolution’s mining claims. *See Shumway*, 199 F.3d at 1098–99. Contrary to the dissent, there are no conditions for maintaining the mining claims that Resolution failed to fulfill. And the “highest and best use” of the property by any private party cannot legally include mining the mineral deposit over which Resolution holds its claims. *See* Uniform Appraisal Standards for Federal Land Acquisitions § 1.4.5 (the highest and best use must be “legally permissible”).

are consistent with the highest and best use of the property.” 36 C.F.R. §254.9(b)(1)(iv). That is what the appraiser did here. While it is true that the Government owns the underlying mineral estate, that interest has no practical value because the Government does not own the right to mine those minerals. AMRC ignores language in the regulations that requires appraisers to account for “all encumbrances” on the property. *Id.* § 254.9(c)(4). Indeed, § 4.6.5.2 of the Uniform Appraisal Standards for Federal Land Acquisitions (which apply “to the extent appropriate” under § 254.9) emphasizes that it is “improper to disregard preexisting encumbrances and their impact on the property,” and when encumbered property is totally acquired, “the measure of compensation is the market value of the property as encumbered.”

Finally, AMRC also points to various statements in the legislative history suggesting that the appraisals must include a valuation of relevant mineral rights. But as the district court aptly explained, those references most naturally apply to the Mineral Withdrawal Area, over which Resolution Copper holds no mining rights.

AMRC’s appraisal arguments are really a challenge to the general mining laws. But “[d]espite much contemporary hostility to the Mining Law of 1872 and high level political pressure by influential individuals and organizations for its repeal, all repeal efforts have failed, and it remains the law.” *Shumway*, 199 F.3d at 1098. Accordingly, we reject AMRC’s appraisal claims.

b. Plaintiffs are not likely to succeed on, nor have they raised serious questions regarding, their NEPA claims.

“NEPA imposes no substantive environmental obligations,” but instead “is a purely procedural statute that . . . simply requires an agency to prepare an EIS.” *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 173 (2025). “Importantly, NEPA does not require the agency to weigh environmental consequences in any particular way. Rather, an agency may weigh environmental consequences as the agency reasonably sees fit under its governing statute.” *Id.* Arbitrary and capricious review of NEPA compliance involves only “confirm[ing] that the agency has addressed environmental consequences and feasible alternatives as to the relevant project.” *Id.* at 180. This review “should afford substantial deference to the agency” and “should not micromanage those agency choices so long as they fall within a broad zone of reasonableness.” *Id.* at 180, 183.

Plaintiffs argue that the FEIS here fails to comply with NEPA in six ways: (1) it fails to properly analyze the land exchange’s impacts on water; (2) it fails to consider comments from other agencies; (3) it fails to consider sufficient mitigation measures; (4) it fails to consider certain expert evidence; (5) it fails to consider reasonable alternatives; and (6) it violates NEPA’s length requirement. Under the deferential review the Supreme Court mandated in *Seven County*, these arguments are unlikely to succeed.

i. Cumulative Water Impacts

AMRC first argues that the Government failed to consider “the Mine’s cumulative pumping impacts on the aquifer or existing wells alongside the groundwater impacts

of the 275-square mile ‘Superstition Vistas’ mega development.” AMRC asserts that the Government only analyzed a portion of the impact and dismissed the rest as “speculative.” In AMRC’s view, this “conceptual” discussion of the development’s water demands is insufficient to comply with NEPA. Where there are “plain facts before” an agency, AMRC suggests, it cannot choose “to ignore [that] existing and readily available technical information.”

Under the circumscribed NEPA review standard the Supreme Court set out in *Seven County*, however, the Government’s water analysis as to the Superstition Vistas development suffices. First, the Court in *Seven County* expressly denied that the Government has an obligation under NEPA to consider the impact of “a housing development that might someday be built” near the operative project, even if the “effects from [that] separate project may be factually foreseeable.” 605 U.S. at 187; *see also id.* at 190 (distinguishing separate, future projects from ones “interrelated and close in time and place to the project at hand,” such as a “residential development next door to and built at the same time as a ski resort”). This is especially true because AMRC has made no argument nor provided any evidence suggesting that the Forest Service has regulatory authority over the Superstition Vistas development. *See id.* at 188 (discussing limited agency obligation to consider “separate projects” over which it “possesses no regulatory authority”).

Second, the Government’s decision to draw a line between modeling and analyzing the cumulative water impact from “the portion of Superstition Vistas that has a demonstrated source of water,” and not “[o]ther portions of Superstition Vistas without demonstrated water supplies,” is

the type of discretionary decision about “how far to go in considering indirect environmental effects” that we must defer to pursuant to *Seven County*. *Id.* at 182. This is particularly true given the agency *did* analyze the impact of the Superstition Vistas development on water supplies. While it did so qualitatively, rather than quantitatively, as Plaintiffs would prefer, the government’s chosen method of analysis is entitled to substantial deference. AMRC’s cumulative water NEPA claim is therefore unlikely to succeed on the merits.

ii. Other Agencies’ Comments

In determining whether the Government has complied with NEPA, the court must generally defer to “the agency regarding what level of detail is required.” *Cascadia Wildlands v. United States Bureau of Land Mgmt.*, 153 F.4th 869, 903 (9th Cir. 2025). “Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness.” *Id.* (quoting *Seven Cnty.*, 605 U.S. at 183). Under this deferential standard of review, AMRC’s arguments regarding comments from other agencies are unlikely to succeed.

AMRC argues that the “the Forest Service failed to consider the full scope of criticisms raised by the Bureau of Land Management (‘BLM’) and the Arizona State Land Department (‘ASLD’) about the FEIS.” It contends that the FEIS does not acknowledge the BLM Report at all, ignoring that agency’s water-related concerns. AMRC also asserts that the FEIS fails to sufficiently address the ASLD’s “actual and specific concerns related to the Mine’s direct, indirect, and cumulative socioeconomic impacts on” Arizona’s State Land Trust.

As the district court explained, “it will always be possible to identify some argument, raised by some stakeholder, that could have been analyzed in more detail in the FEIS.” But the Supreme Court has made clear that “the question of whether a particular report is detailed enough in a particular case itself requires the exercise of agency discretion—which should not be excessively second-guessed by a court.” *Seven Cnty.*, 605 U.S. at 181. Here, Chapter 4 of the FEIS contains an analysis of regional groundwater, including qualitative and quantitative analyses of water sufficiency. The Government therefore did not ignore the agencies’ comments, and arguments about the relative detail it afforded particular comments must fail. AMRC’s claims regarding the FEIS’s treatment of the BLM and ASLD’s comments are unlikely to succeed.

iii. Mitigation Measures

AMRC’s final argument fares no better. AMRC contends that the FEIS “failed to fully analyze potential mitigation measures, especially regarding the groundwater pumping and transport of water via the proposed pipelines.” But as the district court correctly concluded, the Forest Service considered mitigation measures across “hundreds of pages” in the FEIS. The FEIS explicitly discusses various commenters’ concerns about groundwater impacts and notes the limits of the Forest Service’s regulatory authority. AMRC’s argument is just another example of it taking issue with the depth of treatment the Forest Service afforded certain issues in the FEIS. But as with AMRC’s other arguments, the Supreme Court has made clear that it is largely within the agency’s discretion to determine the detail afforded to particular issues in an EIS, especially those issues over which it lacks regulatory authority. *See Seven Cnty.*, 605 U.S. at 181, 188. AMRC’s claim regarding the

FEIS's treatment of possible mitigation measures is therefore also unlikely to succeed on the merits.

iv. Extra-Record Evidence

The Tribe's NEPA claim centers around two extra-record declarations submitted in the district court. The Tribe argues that we should consider those declarations even though they were not part of the administrative record, and that on the merits, the FEIS fails to address concerns raised by the declarations regarding tailings storage and transport, acid rock damage, and hydrological concerns.

Judicial review of agency decision-making should be focused on the administrative record. *See Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). However, there are

four exceptions to this rule, allowing extra-record materials (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Id. (cleaned up). These exceptions are “narrowly construed,” and the party invoking them has a “heavy burden to show that the additional materials sought are necessary to adequately review” the agency decision. *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

Even assuming, without holding, that an exception applies here, the Tribe's arguments fail on the merits. The FEIS addressed each of the topics the Tribe highlights from the declarations, including tailings and pipeline safety, acid rock drainage, and hydrological concerns. Indeed, the Forest Service directly responded to comments by Plaintiffs' experts regarding the same concerns. The Tribe's arguments amount to a disagreement with the FEIS's scientific conclusions as to each of these topics. Judicial review, however, must be at its most deferential "when an agency makes . . . predictive or scientific judgments." *Seven Cnty.*, 605 U.S. at 182; *see also Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) ("[A]n agency is entitled to wide discretion in assessing the scientific evidence, so long as it takes a hard look at the issues and responds to reasonable opposing viewpoints."). Accordingly, the Tribe's NEPA claim is unlikely to succeed.

v. Alternative Mining Techniques

The Lopez Plaintiffs argue that the FEIS is "deficient" because it does not analyze alternative mining methods that might preserve Oak Flat. They draw on case law explaining that the "heart" of an EIS is its effort to "study, develop, and describe appropriate alternatives to the proposed agency action, thus informing policymakers and the public of options that would avoid or minimize adverse effects on the environment." *Ctr. for Biological Diversity v. United States Bureau of Land Mgmt.*, 141 F.4th 976, 990 (9th Cir. 2025) (cleaned up).

In determining whether an EIS has appropriately considered alternatives, we have set out a two-step process. First, we must determine "whether or not the EIS's Purpose and Need Statement was reasonable." *Id.* at 995 (cleaned

up). Second, we “employ a rule of reason analysis to determine whether the agency considered an adequate range of alternatives to the proposed action.” *Id.* (internal quotation marks omitted). However, “an agency need not consider an infinite range of alternatives, only reasonable or feasible ones. Nor does NEPA require a discussion of alternatives that are unlikely to be implemented or that are inconsistent with the agency’s basic policy objectives.” *Id.* (cleaned up). If an alternative is eliminated from detailed consideration, all the agency is required to do is to “briefly discuss the reasons for [its] elimination.” 40 C.F.R. § 1502.14(a).

The Lopez Plaintiffs challenge only the adequacy of the range of alternatives the FEIS considered. They argue that the Government should have analyzed “techniques like cut-and-fill or sublevel stoping.” Ultimately, as with the Tribe’s NEPA claim, the heart of this claim is a disagreement with the Government’s scientific conclusions as to the feasibility and appropriateness of potential alternative mining approaches. Even if the Forest Service’s lack of regulatory authority over the eventual mine was not itself a bar to the Lopez Plaintiffs’ argument, *see Seven Cnty.*, 605 U.S. at 188, the agency’s approach to analyzing the alternatives is entitled to substantial deference. *See id.* at 181–82 (“[A] reviewing court must be at its most deferential” when considering an agency’s “predictive and scientific judgments in assessing . . . alternatives.” (internal quotation marks omitted)). The record shows that the agency adequately considered possible alternatives and reasonably rejected them due to technical and economic infeasibility. As the agency noted, if alternative techniques were used on the Oak Flat deposit, an estimated 80 percent of the copper tonnage would have to be abandoned, as it would be uneconomical

to mine. This explanation is sufficient under NEPA, and under the highly deferential scheme the Supreme Court set out in *Seven County*, we must afford the agency's reasonableness determinations significant deference. Therefore, the Lopez Plaintiffs' NEPA claim based on potential mining technique alternatives is unlikely to succeed.

vi. Page Limits

Finally, the Lopez Plaintiffs argue that the FEIS exceeds the page limit requirements established by recent amendments to NEPA under the BUILDER Act. 42 U.S.C. § 4336a(e)(1). In their view, this impeded NEPA's goals by "forcing them to digest thousands of pages of material and litigate their claims in a matter of days, without an easily comprehensible administrative record."

We assume, without holding, that these page limits—enacted seven years after the FEIS process began—apply here. Regardless, the Lopez Plaintiffs' claims are unlikely to succeed. Even if the Government violated the new page limit requirement, that violation did not "materially impede[] NEPA's goals" and was therefore harmless error. *Friends of the Inyo v. United States Forest Serv.*, 103 F.4th 543, 557 (9th Cir. 2024) (internal quotation marks omitted). Though the FEIS's length may have made it more difficult for affected parties and the public at large to digest, it was the result of a decades-long process involving countless stakeholders, comments, and analyses. As evidenced by the various other NEPA claims Plaintiffs collectively raise in the instant case, not even at its current length does the FEIS satisfy all those parties. Where NEPA's goal is ultimately "to inform agency decisionmaking," *Seven Cnty.*, 605 U.S. at 173, a too-thorough analysis of a highly controversial, complicated

project can hardly be said to conflict with that goal. The agency here made a reasonable judgment about the level of detail to include, balancing the need to manage the FEIS's length with the need to adequately address the various issues. That decision is afforded "substantial deference," and courts "should not micromanage those agency choices." *Id.* at 183. The Lopez Plaintiffs' page limit requirement argument is therefore unlikely to succeed on the merits.

c. The Tribe and Lopez Plaintiffs are not likely to succeed on, nor have they raised serious questions regarding, their consultation claims.

The Tribe and Lopez Plaintiffs argue that the Government has failed to satisfy its consultation obligations under the Land Exchange Act and the NHPA. They are not likely to succeed on either point.

The Land Exchange Act sets out general requirements for the Government's consultation with impacted Native groups. Specifically, the Government must "engage in government-to-government consultation with affected Indian tribes concerning issues of concern to the affected Indian tribes related to the land exchange." 16 U.S.C. § 539p(c)(3)(A). Then the Government must "consult with Resolution Copper and seek to find mutually acceptable measures to" both "address the concerns of the affected Indian tribes" and "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper." *Id.* § 539p(C)(3)(B).

Section 106 of the NHPA, a more general consultation statute, similarly requires the federal government to "take into account the effect of" any government "undertaking on

any historic property” and “afford the [Advisory Council on Historic Preservation (ACHP)] a reasonable opportunity to comment.” 54 U.S.C. § 306108. Pursuant to the Section 106 process, the federal government “must make *a reasonable and good faith effort* to identify historic properties . . . assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (emphasis added) (citations omitted); *see id.* (describing Section 106 as a “stop, look, and listen” provision).

The Tribe argues that when the Government withdrew the original 2021 EIS to undertake further consultation with impacted Native groups, that was “an admission that, through March 2021, Federal Defendants had not satisfied” their consultation obligations under the Land Exchange Act. And in their view, the Government has done nothing to remedy that failure in the interim; the Tribe requested, but has not received, written responses to various documents and a draft memorandum of understanding (MOU) was never finalized. To the Tribe, any pre-2021 consultation efforts by the parties are not relevant in determining whether the Government has today satisfied its consultation obligations. Nor, the Tribe argues, do letters and emails sent while “the Forest Service, at the very same time, was negotiating a MOU to govern a future consultation” satisfy the Government’s consultation obligations.

The Lopez Plaintiffs similarly argue that the Government failed to satisfy its Section 106 obligations by failing to negotiate a “programmatic agreement” with the ACHP to mitigate adverse impacts on the historic properties at issue here. When the ACHP instead terminated the consultation

process, they assert, the Government was required to respond in writing to the ACHP's final recommendations. The Government's written response, in the Lopez Plaintiffs' view, was inadequate under Section 106 because it failed to give "genuine attention" to those recommendations. *See Concerned Citizens All., Inc. v. Slater*, 176 F.3d 686, 696 (3d Cir. 1999).

We find neither argument compelling. At bottom, both the Land Exchange Act's consultation provisions and Section 106 are procedural statutes like NEPA—in other words, they do not mandate any particular substantive outcome from the consultation process. *See Muckleshoot*, 177 F.3d at 805. Therefore, the Tribe and Lopez Plaintiffs cannot use these provisions to attack the ultimate outcome of the consultation process here.

What remains, then, is whether the Government's actions were "arbitrary and capricious" under the Land Exchange Act and Section 106. As the district court correctly explained, they were not. Over the course of two decades, the Government engaged in thorough consultation with the Tribe, both electronically and in person. The Tribe's attempt to discount the pre-2021 consultation efforts fails because it fails to explain how that earlier portion of the consultation process was at all deficient or irrelevant. This includes failing to cite any case law standing for the idea that re-opening a consultation process negates all pre-reopening consultation efforts. The Tribe's arguments amount to a disagreement with how the Government engaged in consultation, including a belief that the consultation was not sufficiently substantive. But the record evinces a thorough consultation process that ultimately resulted in a conclusion contrary to the Tribe's hopes. That is not enough to render the consultation process "arbitrary and capricious."

The same holds true for the Section 106 consultation requirements. The Lopez Plaintiffs argue that the Government ignored the ACHP's recommendation "to assess alternative mining techniques" or "incentivize the consideration of those alternatives." But the Government's response letter explained that "[the Land Exchange Act] limits the authority the USDA will have over most elements of the proposed Resolution Copper Mine (RCM) because once the land is exchanged, the project will be almost entirely on private land." And it further elaborated in the FEIS that "[m]ining operations within the area conveyed by the Forest Service in the exchange are not subject to regulation by the Forest Service, since Forest Service regulation of mining operations pertains only to mining operations conducted on NFS land under the jurisdiction of the Secretary of Agriculture." The FEIS also analyzed the these proposed alternative mining techniques and dismissed them as "not appropriate for a deposit like the Resolution Copper deposit." These written materials, taken together, evince the agency's good faith effort to address possible mitigation and "demonstrate that it has read and considered" the ACHP's recommendations. *Concerned Citizens All., Inc. v. Slater*, 176 F.3d 686, 696 (3d Cir. 1999).

Because the Government adequately fulfilled its consultation obligations under the Land Exchange Act, Plaintiffs have failed to demonstrate a likelihood of success on the merits for their consultation claims.

d. The Lopez Plaintiffs are not likely to succeed on, nor have they raised serious questions regarding, their religious liberty claims because they are foreclosed by precedent.

The Lopez Plaintiffs argue that the land exchange here would violate their religious liberty, as protected by RFRA and the Free Exercise Clause. RFRA bars the federal government from “substantially burden[ing] a person’s exercise of religion” unless that burden satisfies strict scrutiny. 42 U.S.C. § 2000bb-1(a)–(b). And the Free Exercise Clause protects parental rights surrounding their children’s religious upbringing, and more generally requires “any government action that burdens religion” to “survive strict scrutiny unless it qualifies as a ‘neutral law of general applicability.’” *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990).

But this court foreclosed these arguments in *Apache Stronghold v. United States*. See 101 F.4th at 1044, 1051–52, 1063. The en banc court explained that pursuant to the Supreme Court’s decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988):

[A] disposition of government real property is not subject to strict scrutiny when it has “no tendency to coerce individuals into acting contrary to their religious beliefs,” does not “discriminate” against religious adherents, does not “penalize” them, and does not deny

them “an equal share of the rights, benefits, and privileges enjoyed by other citizens.”

Apache Stronghold, 101 F.4th at 1055 (quoting *Lyng*, 485 U.S. at 449–50, 453). The *Apache Stronghold* court held that the land transfer under the Land Exchange Act here was “indistinguishable from that in *Lyng*,” and therefore was not subject to strict scrutiny under either the Free Exercise Clause or RFRA. *Id.* at 1051–52, 1056. Though the Lopez Plaintiffs detail their disagreement with the en banc court, we remain bound by the en banc court’s decision. *See McBurnie v. RAC Acceptance E., LLC*, 95 F.4th 1188, 1193 (9th Cir. 2024).

Recognizing this, the Lopez Plaintiffs seek refuge in the limited exception to that rule, where en banc review is not required if “intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority.” *Id.* (internal quotation marks omitted). They argue that the Supreme Court’s decision in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), abrogated *Apache Stronghold* by clarifying the meaning of a “religious burden.” In their view, *Mahmoud* stands for the proposition that the court must determine if “looking to ‘the specific religious beliefs and practices asserted,’ the challenged government actions pose an ‘objective danger,’ or ‘very real threat’ to the claimant’s religious exercise, thus ‘substantially interfer[ing]’ with it.” *See Mahmoud*, 606 U.S. at 549–50, 553 (internal quotation marks omitted). By contrast, the Lopez Plaintiffs argue, the *Apache Stronghold* majority rejected an inquiry into the relative objective or subjective nature of an asserted interference with religious practice in favor of an inquiry focused on coercion.

But this view of *Mahmoud* does not survive scrutiny. As an initial matter, the Supreme Court itself declined to rehear

its denial of certiorari in *Apache Stronghold* in light of *Mahmoud*. See *Apache Stronghold v. United States*, 2025 WL 2824572 (U.S. Oct. 6, 2025). Regardless, the Lopez Plaintiffs misrepresent the thrust of *Mahmoud* by selectively quoting from it. Their focus on the “objective danger” language ignores that *Mahmoud* centers on (1) the education context and (2) policies that directly coerce or indirectly compel behavior at odds with individual religious beliefs or practices, not involving the disposition of government property. *Mahmoud*, 606 U.S. at 546–50.

Mahmoud highlights the risk of “impos[ing] upon children a set of values and beliefs that are ‘hostile’ to their parents’ religious beliefs.” *Id.* at 553–54 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972)). But risks of these kinds, the Court explained, are different in nature for Free Exercise purposes than those in *Lyng*, which involved “incidental interference with an individual’s spiritual activities,” as opposed to coercion. *Id.* at 557 (quoting *Lyng*, 485 U.S. at 450). Because *Apache Stronghold* involved neither education nor an attempt by the government to affirmatively coerce or indirectly compel behavior at odds with the plaintiffs’ religious beliefs, it is not “clearly irreconcilable” with *Mahmoud*. *Apache Stronghold* therefore bars the Lopez Plaintiffs’ identical claims here.⁴

III. Other Injunction Factors

Because Plaintiffs have failed to show a likelihood of success on, or even serious questions regarding, any of their claims, we need not reach the other injunction factors. We

⁴ Perhaps understanding this, the Lopez Plaintiffs also offer a version of their religious liberty arguments cast in parental-rights language. But there is no “coercive interaction[]” here “between the State and its young residents.” *Mahmoud*, 606 U.S. at 557.

nonetheless recognize that this land transfer will fundamentally alter the nature of the land, including destruction of those sites sacred to the Tribe, the Lopez Plaintiffs, and similarly situated Native individuals. Despite those grave harms to Native religious practice, Congress has chosen to transfer this land, and Plaintiffs have not raised any viable challenges to that decision.

CONCLUSION

Because Plaintiffs' claims are unlikely to succeed on the merits, we **AFFIRM** the district court's denial of Plaintiffs' request for a preliminary injunction against the land exchange and **DENY AS MOOT** their request for an injunction pending appeal, Dkt. 12. The administrative stay currently in effect, Dkt. 19, is **DISSOLVED**.⁵

Rawlinson, Circuit Judge, dissenting in part:

I agree with my colleagues in the majority that the Plaintiffs' claims are mostly foreclosed by our precedent and recent Supreme Court rulings. But before we stamp our imprimatur on a decision that will completely annihilate sacred Native lands, we must be certain that every i was dotted and every t was crossed. And that simply is not the case for the appraisal report prepared by the United States Forest Service (USFS) in this case. I respectfully dissent from that portion of the majority opinion because the

⁵ The motion for leave to file an amicus brief, Dkt. 44, is **GRANTED**. The motions to file oversized briefs, Dkts. 6, 9, 17, 136, & 139, are **GRANTED**. The motions to dissolve the administrative stay, Dkts. 83 & 84; motions for an extension of time, Dkts. 90 & 91; and motions to expedite, Dkts. 164 & 166, are **DENIED AS MOOT**.

appraisal did not conform to the requirements of the authorizing statute or our precedent.

The Southeast Arizona Land Exchange and Conservation Act (The Act) requires an independent appraisal of both the private and government lands involved in the exchange. *See* 16 U.S.C. § 539p(c)(4). The Act also provides that the appraisal must be prepared “in accordance with nationally recognized appraisal standards.” *Id.*

The original sin of the appraisal report, which permeates the majority opinion as well, is that it treated Resolution Copper Mining’s (Resolution) unpatented mining claims as if those claims were equivalent to ownership of the mineral estate. But an unpatented mining claim is simply a possessory property right to enter public land and extract valuable resources; it is not ownership of the underlying fee estate. *See United States v. Locke*, 471 U.S. 84, 86 (1985). An unpatented mining claim is a “unique form of property,” *id.* at 104 (citation omitted), that “partake[s] more of the character of use rights.” *Kunkes v. United States*, 78 F.3d 1549, 1554 (Fed. Cir. 1996). “Title to the land remains with the United States, and the unpatented mining claim holder has the right to use the Government's fee simple estate [only] for mining purposes.” *Id.*

An unpatented mining claim is a tenuous form of property created by the government and subject to its regulation. “The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired.” *Locke*, 471 U.S. at 104 (citation omitted). “Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.” *Id.* at 105 (citation

omitted). “The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector.” *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 339 (1963).

Courts have consistently acknowledged that failure to adhere to government-imposed conditions may lead to forfeiture of an unpatented mining claim. *See, e.g., Cameron v. United States*, 252 U.S. 450, 460 (1920) (upholding authority of the government to investigate the validity of an unpatented mining claim and “declare it null and void if . . . found invalid”); *see also Locke*, 471 U.S. at 89-91 (allowing the government to deem an unpatented claim abandoned and void for failing to meet annual filing requirements); *Kunkes*, 78 F.3d at 1554, 1556 (permitting the government to declare an unpatented claim abandoned for failure to pay \$100 annual fee even though the failure was due to lack of funds and not neglect).

A holder of an unpatented mining claim “may go through an additional process to obtain a patent,” to convert “the right to extract all minerals from the claim without paying royalties to the United States,” into “fee-simple title to both the surface estate and the mineral deposits.” *McMaster v. United States*, 731 F.3d 881, 885 (9th Cir. 2013) (citations omitted). However, legislation has decreased the rights available through patenting. *See id.* at 886 (noting that after passage of the Wilderness Act, “subject to valid existing rights, patents that issued after the effective date of the Wilderness Act, would convey title only to the mineral deposits, with the surface estate being reserved to the United States”) (citation, alteration and internal quotation marks omitted).

In *McMaster*, we affirmed the district court’s dismissal of the mining claim owner’s quiet title action seeking title to the surface estate on the basis that his interest in a fee simple patent was not a “valid existing right” to fee simple title because he had not fulfilled the requirements for obtaining a patent until years after the Wilderness Act had taken effect. *Id.* at 896-97. Our decision in *McMaster* confirms that an unpatented claim is not an ownership interest in the mineral estate.

Importantly, an unpatented claim does not foreclose the government from disposing of public lands and superseding the unpatented claim. *See Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426, 428 (9th Cir. 1967) (“Land remains subject to the disposing power of Congress until a homestead or pre-emption entryman satisfies the conditions imposed by law for issuance of a patent. . . .”) (citations omitted); *see also Cameron*, 252 U.S. at 460 (“A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. . . .”). Under this reasoning, land the United States conveyed to Alaska Native corporations and villages was not encumbered by unpatented mining claims if the miners failed to obtain a patent within the statutory grace period. *See Alaska Miners v. Andrus*, 662 F.2d 577, 579-80 (9th Cir. 1981) (“[T]he interest of a claimant in a mining claim, prior to the payment of any money for the granting of the patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator’s interest in the claim[,]” so “the government may withdraw or convey the title to land subject to valid, unpatented claims.”).

Thus, Resolution's existing unpatented mining claims did not convey ownership over the mineral estate, and the underlying premise of the appraisal, treating the parcel as a "split estate" and assessing the highest and best use for only the surface estate is fatally flawed. In a transaction involving the government transferring the mineral claim zone (MCZ) parcel to a third party, that third party would obtain the entire estate unless portions were reserved by the United States, and Resolution's unpatented claims would be extinguished. *See Assiniboine & Sioux Tribes*, 378 F.2d at 428. Resolution would only be entitled to just compensation for the taking of its property interest in the unpatented mining claim through a separate condemnation process. *See United States v. Shumway*, 199 F.3d 1093, 1105 (9th Cir. 1999).

The appraisal simply did not consider this scenario. Because the mineral estate is an integral part of the transaction, the appraisal deviated from accepted appraisal standards in determining that the highest and best use of the land was "surface land use in support of a mining operation," rather than mining. The appraiser was required to "[e]stimate the value of the lands and interests as if in private ownership and available for sale in the open market," and to "[c]onsider the contributory value of any interest in land such as . . . minerals . . . to the extent they are consistent with the highest and best use of the property." 36 C.F.R. §§ 254.9(b)(1)(ii), (iv); *see also* Uniform Appraisal Standards for Federal Land Acquisitions (Uniform Standards), § 1.4.5 (2016).

The majority interprets the term "as if in private ownership" as requiring the appraiser "to determine the present value of the federal lands as if they are exploited for profit by a hypothetical private party." *Majority Opinion*, p. 23. But the majority offers no citation for this definition

which conflicts with the Uniform Standards and our precedent.

As an initial matter, the plain language meaning of “as if in private ownership” precludes an interpretation that assumes federal ownership. Indeed, the Uniform Standards interpret this direction as “an assignment condition that . . . creates a hypothetical condition.” Uniform Standards § 1.12. And that hypothetical condition by definition also precludes considering federal ownership. *See id.* Indeed, in *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1183 n.14 (9th Cir. 2000), we chastised the government for undervaluing land in a manner no private seller would do, knowing the value of the land to the proposed buyer. *See id.* (observing that “[a] private seller would, at the very least, want his property appraised for use as a landfill [the intended exchange use] before selling it”). The same is true in this case. “A private seller would at the very least want his property appraised for use as [mining] before selling.” *Id.*

The only reason the appraisal did not evaluate the MCZ parcel for the highest and best use of copper mining is because it assumed the minerals were “not part of the estate owned by the United States.” But, as explained above, an unpatented claim on public land is extinguished when the government disposes of those lands. *See Assiniboine & Sioux Tribes*, 378 F.2d at 428. And a private owner would not be encumbered by the unpatented mining claim, which is “valid [only] against the United States.” *Best*, 371 U.S. at 336; *see also* 30 U.S.C. § 22 (providing that “mineral deposits in lands *belonging to the United States* . . . shall be free and open to exploration and purchase”) (emphasis added).

If the government had sold the land to any other mining company, that hypothetical company would take ownership of the entire estate and Resolution's unpatented mining claims would be extinguished. *See Best*, 371 U.S. at 336. Undoubtedly, Resolution would receive just compensation for its unpatented mining claims, *see Shumway*, 199 F.3d at 1105, but the acquiring company would not be excused from paying full value for the land it just acquired. And the highest and best use of that land would have to consider its use for mining rather than just surface support for mining. *See* 36 C.F.R. § 254.9(b)(iv); *see also Desert Citizens*, 231 F.3d at 1183 n.14. As we held in *Desert Citizens*, at a minimum the land should be appraised for the use contemplated by the transferee. *See id.*

As for the argument made by the district court and the majority that Resolution would be forced to pay twice for its existing rights, the fact is that Resolution never paid the government in the first instance. The Mining Law is essentially a government giveaway to anyone who discovers valuable minerals on lands belonging to the United States. *See Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 33 F.4th 1202, 1208 (9th Cir. 2022) ("The Mining Law of 1872 . . . gives to United States citizens free of charge . . . mining rights . . .). Once perfected "[a] mining claim . . . may be bought, sold, and conveyed." *Belk v. Meagher*, 104 U.S. 279, 283 (1881). Resolution acquired its unpatented claims from a predecessor mining company, and presumably paid some consideration in that deal. However, because an unpatented claim is merely a possessory right to extract minerals from land owned by the United States (and subject to substantial oversight by the United States), what Resolution purchased was far less than the entire,

unregulated mineral estate that it now stands to acquire from United States taxpayers.

Under the governing regulations, prior to a land exchange, an appraiser must determine “the highest and best use of the property.” 36 C.F.R. § 254.9(b)(1)(i). “Highest and best use means an appraiser’s supported opinion of the most probable and legal use of a property, based on market evidence, as of the date of valuation.” *Id.* § 254.2. The appraiser must “[e]stimate the value of the lands and interests *as if in private ownership* and available for sale in the open market,” and “[c]onsider the contributory value of any interest in land such as . . . minerals . . . *to the extent they are consistent with the highest and best use of the property.*” *Id.* §§ 254.9(b)(1)(ii), (iv) (emphasis added). Under the Uniform Standards, the “highest and best use . . . must be: (1) physically possible; (2) legally permissible; (3) financially feasible; and (4) *must result in the highest value.*” Uniform Standards § 1.4.5 (emphasis added); *see also National Parks & Conserv. Assn. v. BLM (NPCA)*, 606 F.3d 1058, 1067 (9th Cir. 2010) *as amended*.

We addressed this issue in depth in *Desert Citizens*. In that case, Plaintiffs challenged the BLM’s appraisal of a land exchange that was to become part of a landfill. *See* 231 F.3d at 1175. The appraisal evaluated the highest and best use of the federal land as “either open space or wildlife habitat, or mine support,” because the land transferee was the only party that would reasonably desire to use the land as a landfill. *Id.* at 1180. The district court concluded that the BIA’s reliance on the appraisal “was proper as there was no general market for use of the land as a landfill.” *Id.* (internal quotation marks omitted).

We determined that this appraisal was inadequate because it failed to consider potential landfill use for the exchanged property. We reasoned that “[w]hile uses that are merely speculative or conjectural need not be considered, uses that are ‘reasonably probable’ must be analyzed as a necessary part of the highest and best use determination.” *Id.* at 1181. We remarked that the transferee’s “proposed use of a parcel of property is certainly relevant to showing a market demand for that use.” *Id.* at 1183. We set aside the land exchange until a proper appraisal could be put in place, emphasizing that “[t]he government must not wear blinders when it participates in a real estate transaction, particularly if the result, as here, is the transfer of a flagrantly undervalued parcel of federal land to a private party.” *Id.* at 1187. We explained that “[w]hether [the land transferee] and BLM would negotiate a new exchange after a proper appraisal and BLM valuation had been made, and what that new exchange would be is sheer speculation at this stage of the proceedings. *If the current exchange is not based on a proper valuation, it must be set aside.* What the parties do after that is up to them.” *Id.* at 1179; *see also NPCA*, 606 F.3d at 1067-69 (upholding a district court order setting aside a land transfer under “virtually identical” facts).

Here, the appraisal for the MCZ parcel treated the property as a “split estate since the unpatented mining claims confer all rights to locatable minerals.” Because it considered only the surface estate for the best “legally permissible, physically possible, and financially feasible use,” the appraisal determined that “the highest value is of surface land use in support of a mining operation.” As a result, the MCZ parcel was priced by comparing other land that was essentially empty desert purchased to support mining or mineral processing, valued at only \$1,200 per

acre, with a total value of \$1.9 million. In contrast, the mineral withdrawal area (MWA) parcel included the value of the mineral estate and properly considered mining as the highest and best use. That appraisal also accounted for the value of the unmined minerals, valuing the parcel at \$22 million.

As previously discussed, Resolution possesses a present interest in extracting copper in the MCZ parcel, and that interest is subject to substantial government oversight. *See Locke*, 471 U.S. at 104. Thus, the value of Resolution's present unpatented mining claim, for which it must receive government approval to conduct mining operations, is substantially less than the unrestricted ability to mine copper that it would obtain in the land transfer. *See United States v. 191.07 Acres of Land*, 482 F.3d 1132, 1137-38 (9th Cir. 2007) ("[A] highest and best use determination is subject to pre-existing restrictions on land use on the date of valuation.") (citation omitted). The FEIS also states that "[o]nce the land exchange is completed, Forest Service management regulations would no longer apply on 2,422 acres of the Oak Flat Federal Parcel transferred to Resolution Copper" (emphasis added). The land exchange thus transforms Resolution's property interest in the copper beneath the MCZ from a limited interest to an unlimited one, an eventuality that was totally elided in the appraisal.

Fundamentally, the appraisal failed to analyze the market value as if the land were in private ownership and available for sale in the open market. *See NPCA*, 606 F.3d at 1066. The "unique form of property" that is an unpatented mining claim applies only to "lands belonging to the United States." *Locke*, 471 U.S. at 104; *see also* 30 U.S.C. § 22. A hypothetical private owner would not be subject to this claim. If the United States were to transfer the MCZ to a

third party on the open market, the third party would obtain the complete estate including the mineral rights. *See Assisibone & Sioux Tribes*, 378 F.2d at 428.

My colleagues in the majority essentially accuse me of misrepresenting the holdings of our court. *See Majority Amended Opinion*, p. 23 n.3. To support this accusation, the amended opinion cites language from *Alaska Miners*, 662 F.2d at 580 (“[T]he government may withdraw or convey the title to land *subject to valid, unpatented claims.*”) (alteration and emphasis in amended opinion). However, the amended opinion did not emphasize use of the word “*may*,” an indication of permissiveness rather than a mandate. *See Patterson v. Wagner*, 785 F.3d 1277, 1281 (9th Cir. 2015). More importantly, the amended opinion completely ignores the text preceding and following the quoted language. *See Alaska Miners*, 662 F.2d at 579 (“[T]he interest of a claimant in a mining claim, prior to the payment of any money for the granting of the patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, *a failure to fulfill which forfeits the locator’s interest in the claim. . . .*”); *id.* at 580 (“[T]he land *remains subject to the disposing power of the Congress until [the unpatented holder] satisfies the conditions imposed by law for the issuance of a patent. . . .*”) (emphasis added). I stand by my accurate characterization of our precedent.

The same is true for the majority’s reliance on our decision in *Assiniboine & Sioux Tribes*, 378 F.2d at 432. *See Majority Amended Opinion*, p. 23 n.3. However, it is the majority that misreads this case. In *Assiniboine & Sioux Tribes*, the issue addressed was whether oil and gas deposits on land allotted to the Tribes was reserved to the Tribes in the Act of 1927 or passed to a homesteader. *See* 378 F.3d at 428.

In 1908, Congress passed an act to allot a portion of the land comprising the Fort Peck Reservation to members of the Tribes. *See id.* The balance of the land was to be sold for the benefit of the Tribes. *See id.* The unallotted land was made available for homestead at prices “fixed by appraisal.” *Id.* Homesteaders were given five years to pay the purchase price and seven years to finalize their patents. *See id.* The Act of 1927 amended the 1908 Act by “specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of” as of the date the 1927 Act was approved. *Id.*

In 1925, R.E. Nordwick (the homesteader) filed a homestead application under the 1908 Act. *See id.* When the 1927 Act was passed, the homesteader had not paid the purchase price in full or satisfied the requirements to finalize his patent. *See id.* With these facts, the issue before us was “whether the oil and gas rights were reserved to the Tribes by the 1927 Act, or passed to [the homesteader].” *Id.* It was within that context that we cited the established rule that “[l]and remains subject to the disposing power of Congress until a [homesteader] satisfies the conditions imposed by law for issuance of a patent.” *Id.* We said nothing to disturb that rule. Rather, we reiterated that “Congress . . . had power to amend the 1908 Act to reserve oil and gas deposits in land subject to an unperfected homestead.” *Id.* at 428-29. The question then was “whether Congress intended to do so.” *Id.* at 429. This language proves the point that an unpatented claim can be voided by the government at any time before it is perfected.

In deciding whether Congress intended to reserve the oil and gas deposits to the Tribes in the land subject to the unperfected homestead claim, we interpreted the language of the 1927 Act: “specifically reserving to the Indians having

tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act.” *Id.* at 428. We noted that “statutes withdrawing tribal lands from further alienation commonly include provisions expressly preserving outstanding but unperfected rights.” *Id.* at 429 (footnote reference omitted). We acknowledged that the “omission of such a savings clause from the 1927 Act [could] be taken as deliberate,” *id.*, thereby reserving to the Tribes the unpatented oil and gas reserves claimed by the homesteader. We ultimately were persuaded that “the virtually unbroken administrative practice of issuing patents on pre-1927 homestead applications after passage of the 1927 Act without reserving oil and gas rights . . . seemingly reflects a uniform contemporaneous interpretation of the 1927 Act by persons presumably familiar with its background and purpose.” *Id.* at 432. Accordingly, we held that the “withholding provisions of the 1927 Act did not apply to lands subject to pending but unperfected homestead entries under the 1908 Act.” *Id.* The important takeaway is that our thorough and detailed analysis would not have been necessary if, as the majority argues, the unperfected patent ran with the land.

Turning to the case before us, it is undisputed that the Land Exchange Act contains no language “expressly preserving outstanding but unperfected rights.” *Id.* at 429. Instead, the majority relies on language in the Act stating that “[n]othing in this section shall interfere with, limit, or otherwise impair, the unpatented mining claims or rights currently held by Resolution Copper on the Federal land.” *Majority Amended Opinion*, p. 23 n.3 (quoting 16 U.S.C. § 539p(i)(1)(C) (alteration in majority amended opinion). But this language does not and cannot preempt the requirement that the appraisal be conducted in conformity

with “nationally recognized appraisal standards” 16 U.S.C. § 539p(c)(4)(B)(i). Because, of course we must give effect to *every* provision of a statute. *See Saldana v. Bronitsky (In re Saldana)*, 122 F.4th 333, 342 (9th Cir. 2024). And adherence to “nationally recognized appraisal standards” requires the appraiser to “[e]stimate the value of the lands and interests *as if in private [not government] ownership*.” 16 U.S.C. § 539P(c)(4)(B)(i); 36 C.F.R. § 254.9(b)(1)(ii) (emphasis added). In any event, an accurate appraisal will not impermissibly “interfere with, limit, or otherwise impair, the unpatented mining claims.” 16 U.S.C. § 539p(i)(1)(C). As we explained in *Desert Citizens*, “[w]hether [Resolution] and [the government] would negotiate a new exchange after a proper appraisal and [government] valuation had been made, and what that new exchange would be is sheer speculation at this stage of the proceedings. *If the current exchange is not based on a proper valuation, it must be set aside. What the parties do after that is up to them.*” 231 F.3d at 1179; *see also NPCA*, 606 F.3d at 1067-69.¹ Under our decision in *Desert Citizens*, we simply cannot pretend that this appraisal, which would result in “the transfer of a flagrantly undervalued parcel of federal land to a private party,” complies with our precedent. 231 F.3d at 1187.

In sum, the district court abused its discretion when it determined that the Arizona Mining Reform Coalition failed to show that it was likely to succeed, or at least raised serious questions, on the merits of its appraisal challenge. There are at least serious questions as to whether it was arbitrary and capricious for the USFS to proceed with a land exchange based on an appraisal that did not include the value of the

¹ The majority amended opinion completely ignores this precedential direction.

mineral rights, and accordingly valued the land under a less valuable highest and best use determination. *See Desert Citizens*, 231 F.3d at 1183, 1187; *see also NPCA*, 606 F.3d at 1066-69. Because this nonconforming appraisal flouted the provisions of the legislation authorizing the land exchange, I would reverse the district court decision allowing the land exchange to proceed. *See* 16 U.S.C. § 539p(c)(4) (requiring an independent appraisal of the land to be exchanged in accordance with nationally recognized appraisal standards); *see also Desert Citizens*, 231 F.3d at 1188 (reversing the district court’s denial of a preliminary injunction and remanding “for entry of a preliminary injunction setting aside [the] land exchange”).

I respectfully dissent from the majority amended opinion allowing this non-compliant land exchange to proceed.