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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NORTHWEST MINING ASSOCIATION, Plaintiff, v. KENNETH L. SALAZAR, Secretary, Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; THOMAS J. VILSACK, Secretary, Department of Agriculture; and UNITED STATES FOREST SERVICE, Defendants.	Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, Northwest Mining Association ("NWMA"), by and through its attorneys, hereby file this Complaint for Declaratory and Injunctive Relief against the above-named Defendants. NWMA seeks judicial review of Defendants' actions in withdrawing over 1 million acres of federal lands in northern Arizona.

JURISDICTION AND VENUE

1. This Court has jurisdiction, pursuant to 28 U.S.C. § 1331, because the matter in controversy arises under the Constitution and laws of the United States, including but not limited to: (a) the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*.; (b) the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq*.; (c) the General Mining Law of 1872 ("Mining Law"), 30 U.S.C. § 22 *et seq*.; (d) the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et seq*.; (e) the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*.; and (f) Article I, Section 7 of the Constitution.

2. This Court can grant declaratory and injunctive relief and hold unlawful and set aside agency action under 28 U.S.C. § 2201, 28 U.S.C. § 2202, and the APA, 5 U.S.C. § 706, for violations of FLPMA, NFMA, NEPA, and the U.S. Constitution.

3. Venue rests properly in this Court, pursuant to 28 U.S.C. § 1391(e), because a "substantial part of property that is the subject of the action is situated" within this judicial district.

PARTIES

4. Plaintiff Northwest Mining Association ("NWMA") is a non-partisan, membership, trade association incorporated under the laws of the State of Washington, with its principal place of business in Spokane, Washington.

5. NWMA's purpose is to support and advance the mining related interests of its approximately 2,300 members; to represent and inform its members on technical, legislative, and regulatory issues; to provide for the dissemination of educational material related to mining; and to foster and promote economic opportunity and environmentally responsible mining.

6. In support of its mission to advance the mining related interests of its members, NWMA is committed to principles that embody the protection of human health, the natural environment, and a prosperous economy.

7. Several of NWMA members are actively engaged in exploration and/or development programs designed to explore for, discover, and produce the high-grade uranium collapse breccia pipe deposits located in northern Arizona. These deposits contain a significant percentage of the domestic uranium resources. These deposits are also enriched with Rare Earth Elements ("REEs") and Energy Critical Elements ("ECEs").

8. In furtherance thereof, these members have properly located and currently maintain hundreds of unpatented mining claims on and near the Arizona Strip. Virtually all of these claims are located within the over 1 million acres of federal lands withdrawn by Defendants. But for the withdrawal, NWMA's members would seek to locate additional claims on the withdrawn lands. Accordingly, NWMA and its members have suffered injury in fact and are adversely affected and/or aggrieved by Defendants' withdrawal.

9. Defendant Kenneth L. Salazar is the Secretary, Department of the Interior, and is responsible for administering, *inter alia*, Section 204 of FLPMA, 43 U.S.C. § 1714, and the public lands managed by the Bureau of Land Management ("BLM"). Defendant Salazar signed the Record of Decision ("ROD") and resulting Public Land Order ("PLO") 7787, which withdrew approximately 1,006,545 acres of federal lands from location and entry under the Mining Law. Defendant Salazar is sued in his official capacity.

10. Defendant BLM is the federal administrative agency within the Department of the Interior responsible for managing the public lands, under the supervision of Defendant Salazar. Defendant BLM prepared the underlying NEPA documents upon which Defendant Salazar's ROD and PLO 7787 were purportedly based.

11. Defendant Thomas J. Vilsack is the Secretary, Department of Agriculture, and is responsible for administering the National Forest System lands, including the National Forest lands affected by PLO 7787. Defendant Vilsack is sued in his official capacity.

12. Defendant United States Forest Service ("Forest Service") is the agency within the Department of the Agriculture responsible for administering NFMA on National Forest lands. Defendant Forest Service apparently consented to PLO 7787 and, thus, allowed the withdrawal of over 350,000 acres of National Forest lands.

LEGAL BACKGROUND

A. The Mining Law.

13. The Mining Law provides: "[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . . ." 30 U.S.C. § 22. Thus, the Mining Law grants all citizens a statutory right to enter upon unappropriated lands for the purpose of exploring for and developing "valuable mineral deposits." 30 U.S.C. § 22. In addition, a person who makes a "discovery" of a "valuable mineral deposit" and satisfies the procedures for "locating" a claim becomes the owner of a valid mining claim. 30 U.S.C. §§ 22, 23, 26. A valid claim "is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States." *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 317–18 (1930).

14. The purpose of the Mining Law, as reflected in the title of the Act (17 Stat. 91), is to increase the Nation's wealth by facilitating development of the Nation's minerals. *Deffeback v. Hawke*, 115 U.S. 392, 402 (1885). This stated purpose can be accomplished only if federal lands remain open to operation of the Mining Law, unless validly withdrawn.

B. The Mining and Minerals Policy Act of 1970.

15. Congress reaffirmed the policies embodied in the Mining Law when it passed the Mining and Minerals Policy Act of 1970 ("MMPA").

16. The MMPA provides:

> Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private

> enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs . . . .
>
> For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and *uranium*.
>
> It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section.

30 U.S.C. § 21a (emphasis added).

C. FLPMA.

17. In 1964, Congress established the Public Land Law Review Commission ("PLLRC") to study and to make recommendations regarding the management of federal lands. 78 Stat. 982-985 (1964). After six years of study and analysis, the PLLRC submitted its report to Congress in 1970. The PLLRC determined, *inter alia*, that: (1) "virtually all" of the public domain had been withdrawn; (2) it was difficult to determine "the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other;" and (3) there were inadequate records to show the purposes of the withdrawals and the permissible public uses of those withdrawn lands. Public Land Law Review Commission, *One Third of the Nation's Land*, 52 (1970). Consequently, the PLLRC recommended that Congress set standards that would expressly govern the actions of the Executive Branch in making withdrawals. *One Third of the Nation's Land*, at 54-55. Six years later, Congress acted on the PLLRC's recommendation when it passed FLPMA.

18. In Section 102(a)(4) of FLPMA, Congress declared that it was the policy of the United States that "Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specific purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislation." 43 U.S.C. § 1701(a)(4).

19. Accordingly, in Section 704(a) of FLPMA, Congress expressly repealed 29 withdrawal statutes, overruled *United States v. Midwest Oil Co*., 236 U.S. 459 (1915), and revoked any and all implied power that the Executive Branch may have had to withdrawal public lands. PL 94–579, § 704 (Oct. 21, 1976), 90 Stat 2743, 2792. Although Congress delegated to the Secretary of the Interior power to "make, modify, extend, or revoke withdrawals[,]" that power may only be exercised "in accordance with the provisions and limitations of [Section 204 of FLPMA]." 43 U.S.C. § 1714(a) (emphasis added).

20. Section 204(d) allows the Secretary to withdraw less than 5,000 acres on his own motion and without Congressional oversight.

21. Withdrawals of 5,000 acres or more may only be made for 20 years and upon making such a withdrawal, the "Secretary shall notify both Houses of Congress of such a withdrawal." 43 U.S.C. § 1714(c)(1). Moreover, the "withdrawal shall terminate and become ineffective at the end of ninety days . . . , if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal." 43 U.S.C. § 1714(c)(1).

22. In addition, for withdrawals of 5,000 acres or more, the Secretary must provide Congress with a comprehensive report on the withdrawal that explains, *inter alia*, why the withdrawal is necessary, the mineral potential of the area, and the economic impact of the withdrawal. 43 U.S.C. § 1714(c)(2).

23. With respect to "lands under the administration of any department or agency other than the Department of the Interior, the Secretary shall make, modify, and revoke withdrawals only with the consent of the head of the department or agency concerned." 43 U.S.C.A. § 1714(i).

24. FLPMA also requires that "[t]he Secretary . . . manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans developed by him . . . . ." 43 U.S.C. § 1732(a).

25. "Multiple use" is defined as:

> The management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, *minerals*, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (emphasis added).

26. In passing FLPMA, Congress also continued the policy of the MMPA by requiring public lands to be managed "in a manner which recognizes the Nation's need for domestic sources of *minerals*, food, timber, and fiber from the public lands including implementation of the [MMPA] as it pertains to the public lands . . . ." 43 U.S.C. § 1701(a)(12) (emphasis added).

D. NFMA.

27. It is the responsibility of the Secretary of Agriculture and the Forest Service to carry out the provisions of NFMA. 16 U.S.C. § 1613.

28. NFMA requires the Forest Service to develop and maintain "land and resource management plans for units of the National Forest System" ("forest plans"). 16 U.S.C. § 1604(a).

29. After a forest plan is developed, "all subsequent agency action . . . must comply with NFMA and the governing forest plan." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009); *Idaho Sporting Cong., Inc. v. Rittenhouse,* 305 F.3d 957, 962 (9th Cir. 2002).

E. NEPA.

30. The purpose of NEPA is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. NEPA does not mandate a particular result and does not require an agency to select the environmentally preferred alternative. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Instead, NEPA sets forth the procedural requirements an agency must follow to ensure that it has considered the environmental impacts of the proposed activity and has informed itself and the public of that information. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

31. NEPA also established, in the Executive Office of the President, a Council on Environmental Quality ("CEQ"). 42 U.S.C. § 4342. The CEQ has promulgated regulations for the implementation of NEPA. 40 C.F.R. §§ 1500–1508.

32. As reflected in the CEQ regulations, a primary purpose of NEPA is to provide the public and decision makers with "high quality" information and "accurate scientific analysis" before agency action is taken. 40 C.F.R. § 1500.1(b). These requirements are "essential to implementing NEPA." *Id*.

33. To fulfill its purposes, NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for every major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C).

34. Federal agencies must comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332.

F. The APA.

35. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 702.

36. The APA also provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

37. The APA also mandates that the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action" and "hold unlawful and set aside agency action, findings, and conclusions" found to be, *inter alia*:

a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

b. Contrary to constitutional right, power, privilege, or immunity;

c. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and

d. Without observance of procedure required by law.

5 U.S.C. § 706.

FACTUAL BACKGROUND

38. In the 1984 Arizona Wilderness Act, Congress, *inter alia*, designated over 250,000 acres of federal land on or near the Arizona Strip in northern Arizona as wilderness and released about 600,000 acres of land in the same area for multiple use, including uranium mining. Pub. L. 98–406, Title III, 98 Stat 1485 (August 28, 1984). This portion of the Act was the result of historic compromise between environmental groups, uranium mining interests, the livestock industry, and others. *See, e.g.*, *The Northern Arizona Mining Continuity Act of 2011: Hearing on H.R. 3155 Before the H. Subcomm. on National Parks, Forests and Public Lands* (November 3, 2011) (Statement of Sen. John McCain), *available at* http://naturalresources.house.gov/UploadedFiles/McCainOpening11.03.11.pdf.

39. On July 21, 2009, Defendant Salazar proposed to withdraw from location and entry under the Mining Law approximately 633,547 acres of public lands and 360,002 acres of National Forest System lands on and near the Arizona Strip for up to 20 years. 74 Fed. Reg. 35,887–88 (July 21, 2009). A substantial portion of these lands were made available for multiple uses, including mining, under the compromise that resulted in the 1984 Arizona Wilderness Act. The stated purpose of this proposed withdrawal was to

"protect the Grand Canyon watershed from adverse effects of locatable hardrock mineral exploration and mining." *Id.* at 35,887.

40. On that same date, Defendant Salazar segregated the above-described lands from location and entry under Mining Law for up to two years to allow time for the completion of a NEPA process, including the preparation of an EIS to determine whether or not to proceed with the withdrawal. *Id.* at 35,888.

41. In September 2010, the BLM completed a Mineral Potential Report for the proposed withdrawal. Although the BLM concluded that the mineral potential for uranium was high, it largely ignored both REEs and ECEs.

42. On February 18, 2011, Defendant BLM issued the *Northern Arizona Proposed Withdrawal Draft Environmental Impact Statement* (February 2011) (hereinafter "DEIS"). The DEIS included four alternatives. Alternative A, the No Action Alternative, would not withdraw any lands from location and entry under the Mining Law. Alternative B, the Proposed Action, would withdraw lands according to Defendant Salazar's July 21, 2009, proposal (*i.e.*, over 1,000,000 acres). Alternative C would withdraw 652,986 acres, whereas Alternative D would withdraw 300,681 acres. DEIS at ES-6 to ES-7.

43. In Chapter 4 of the DEIS, the environmental consequences of the four alternatives were analyzed. DEIS at 4-1 to Chapter 4-269. The BLM concluded that, under the No Action Alternative most resources would suffer no to little impact, and any impacts would be short in duration. DEIS at 2-33 to 2-45. Granted, the anticipated impacts under the No Action Alternative were greater than those under the alternatives considered. However, the impacts were not significant and actions could be taken to minimize any impacts that would occur. *See,* e.g., DEIS at 4-18 to 4-19.

44. Defendant BLM originally allowed public comments on the DEIS for 45 days but, after receiving many requests for extension of time, extended the public comment period to 75 days.

45. NWMA and other mining interests submitted extensive comments on the DEIS.

46. These commenters explained, *inter alia*, that the DEIS demonstrated that uranium mining is not an environmental threat to the Grand Canyon or the Colorado River watershed. This was especially true considering that existing state and federal laws would adequately protect the resources even if the lands were not withdrawn.

47. These commenters also explained that the extent of the uranium resources and the economic impact associated with a withdrawal were grossly underestimated.

48. These commenters also explained the costly and unnecessary delays that claimants would have to endure in obtaining an approved plan of operations if the lands were withdrawn.

49. On June 27, 2011, Defendant Salazar published notice of a 6-month "emergency withdrawal" under Section 204(e) of FLPMA. 76 Fed. Reg. 37,826 (June 27, 27, 2011). This withdrawal covered the same approximately 1 million acres of federal lands previously segregated from location and entry under the Mining Law. The stated basis for this emergency withdrawal was that "an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost." *Id*. This stated basis was truly extraordinary considering that the NEPA process to determine whether or not to proceed with a 20-year withdrawal had not been completed. Thus, the real basis for the emergency withdrawal was that the BLM had not completed the NEPA process.

50. On October 26, 2011, Defendant BLM issued the *Northern Arizona Proposed Withdrawal Final Environmental Impact Statement* (October 2011) (hereinafter "FEIS"). The Preferred Alternative in the FEIS involved withdrawing the federal locatable mineral estate underlying approximately 626,678 acres of public lands, 355,874 acres of National Forest lands, 4,204 acres of state lands, and 19,789 acres of private lands, subject to valid existing rights. FEIS at 2–13.

51. The FEIS demonstrates that the comments from NWMA and other mining interests were largely ignored, as well as REEs and ECEs.

52. On or about January 6, 2012, Defendant Forest Service purportedly sent a letter of consent to the Department of Interior, consenting to the withdrawal of the 355,874 acres of National Forest lands identified in the proposed withdrawal.

53. On January 9, 2012, Defendant Salazar signed a Record of Decision ("ROD") explaining that he had decided to implement the Preferred Alternative and the purported reasoning behind the withdrawal. Bureau of Land Management, *Notice of Availability of Record of Decision for the Northern Arizona Proposed Withdrawal*, 77 Fed. Reg. 2,317 (Jan. 17, 2012). On that same day, Defendant Salazar also signed PLO 7787, which withdrew 1,006,545 acres from entry and location under the Mining Law for twenty years. 77 Fed. Reg. 2,563–66 (Jan. 9, 2012). Notably, the withdrawal "does not restrict the disposition, use, or management of the lands for any minerals subject to disposition by lease or sale. It also does not affect disposition, use, or management of the lands other than under the Mining Law, including access to and across the lands." ROD at 7.

54. The ROD provides that it is final agency action that is not subject to appeal under the Department of the Interior's regulations at 4 C.F.R. § Part 4.

55. NWMA and its members have suffered injury in fact and are adversely affected and/or aggrieved by the FEIS, the ROD, and PLO 7787. Therefore, NWMA is therefore entitled to judicial review thereof. 5 U.S.C. § 702.

FIRST CLAIM FOR RELIEF
(Violation of FLPMA)

56. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

57. In his ROD, Defendant Salazar's stated that his decision was based upon four factors:

(a) First, "the USGS report (SIR 2010-5025) included in the EIS acknowledged uncertainty due to limited data" with respect to water resources. ROD at 9. Thus, in Defendant Salazar's mind, "[a] twenty-year withdrawal will allow for additional data to be gathered and more thorough investigation" to be done. ROD at 9.

(b) Second, "it is likely that the potential impacts to tribal resources could not be mitigated. Any mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them." *Id.*

(c) Third, development of the uranium resource will continue even if all of the lands in the proposal are withdrawn. *Id*.

(d). Finally, "the set of circumstances and the unique resources located in this area support a cautious and careful approach." *Id*.

58. None of these stated factors are supported by the record. Neither the record, nor these stated factors (alone or in combination), support the decision to withdraw over 1 million acres from location and entry under the Mining Law. For example:

(a) Under the No Action Alternative, the likelihood of adverse affects on water resources was not significantly greater than under the Preferred Alternative. FEIS at 4-73 to 4-74.

(b) Under the No Action Alternative, the implementation of mitigation measures according to current state and federal laws would reduce adverse impacts to cultural resources. *Id*. at 4-214. In addition, continued uranium mining and exploration would have no cumulative impacts on cultural resources. *Id.* at 4-215 to 4-216.

(c) The Preferred Alternative will substantially hinder continued mineral exploration and development in the area. It will not only prevent the location of

new claims in the area, but the withdrawal also slows and/or prevents the development of valid existing rights. In fact, the ROD acknowledges that

> On withdrawn lands, neither the BLM nor the USFS will process a new notice or plan of operations until the surface managing agency conducts a mineral examination and determines that the mining claims on which the surface disturbance would occur were valid as of the date the lands were segregated or withdrawn. Determining the validity of a mining claim is a complex and time-consuming legal, geological, and economic evaluation that is done on a claim-by-claim basis.

ROD at 6-7.

(d) Under the No Action Alternative, the likelihood of adverse affects on other resources was not significantly greater than under the Preferred Alternative. FEIS at 2-35 to 2-48.

59. Because none of Defendant Salazar's stated factors for the withdrawal are supported by the record, the ROD and PLO are arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

60. Because neither the record, nor Defendant Salazar's stated factors (alone or in combination), support the withdrawal, the ROD and PLO are arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

61. The ROD and PLO 7787 fail to recognize "the Nation's need for domestic sources of minerals . . . from the public lands," while adding zero to minimal protection to other resources. 43 U.S.C. § 1701(a)(8) & (a)(12).

62. Therefore, by signing the ROD and PLO 7787, the Secretary failed to manage public lands "under principles of multiple use and sustained yield," and, thereby, violated FLPMA.

63. Accordingly, this Court must hold unlawful and set aside the ROD and PLO 7787. 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF
(Violation of NFMA and NEPA)

64. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

65. PLO 7787 withdraws 355,874 acres of lands within Kaibab National Forest from location and entry under the Mining Law. ROD at 1.

66. Defendant Vilsack and/or Defendant Forest Service purportedly consented to the withdrawal of lands administered by the Forest. *Id.* at 1, 12.

67. This consent is major Federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C).

68. Neither Defendant Vilsack nor Defendant Forest Service prepared an EIS or otherwise complied with NEPA before consenting to the withdrawal.

69. The existing Kaibab National Forest Forest Plan allows for prospecting, exploration, and development of mineral resources on the lands withdrawn by PLO 7787.

70. The Notice of Availability of the ROD indicated that the Kaibab National Forest Plan would be retroactively amended to be consistent with the withdrawal. 77 Fed. Reg. at 2,317.

71. The Forest Service only has the authority to "change the legal consequences of completed acts . . . if Congress conveys such authority in an express statutory grant." *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1070 (9th Cir. 1998) (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)). NFMA does not authorize the Forest Service to retroactively amend its Forest Plans to comply with a withdrawal. *See id.*; *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1189 (9th Cir. 2011) (Opinion of Judge Reinhardt).

72. Defendant Vilsack and/or Defendant Forest Service could not lawfully consent to the withdrawal before first amending the Kaibab National Forest Plan in accordance with NFMA and NEPA.

73. Therefore, Defendant Vilsack's and/or Defendant Forest Service's purported consent to the withdrawal was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

74. Accordingly, this Court must hold unlawful the Forest Service's consent to the withdrawal and set aside the portions of PLO 7787 that withdraw National Forest Service lands from location and entry under the Mining Law.

THIRD CLAIM FOR RELIEF
(Violation of NEPA)
(Incomplete Information)

75. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

76. "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." 40 C.F.R. § 1502.22.

77. "If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement." 40 C.F.R. § 1502.22(a).

78. These CEQ regulations require an ordered process by an agency when it is proceeding in the face of uncertainty. 40 C.F.R. § 1502.22. "First, the agency must determine whether the information is important or essential and whether it can be obtained." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984).

79. The FEIS and the ROD acknowledge uncertainty with respect to any environmental impact of continued uranium mining on the water resources in the region. FEIS at 3-42 & 3-66, ROD at 10 n.1.

80. Defendant Salazar argued that despite this admitted uncertainty he could make a so-called "reasoned choice" because "there is data regarding dissolved uranium

concentrations near six previously-mined sites to inform a reasoned choice, and the EIS used reasonable conservative assumptions to estimate impacts as a method of addressing such unknowns." ROD at 10 n.1. Defendant Salazar failed to recognize that these six sites were mined when there was little, if any, regulation of mining activities. Indeed, the BLM's mining regulations were in their infancy and Arizona had not yet developed significant mining regulations when several of the sites were mined. Moreover, this admitted uncertainty upon which Defendant Salazar so heavily relied casts serious doubt on the legitimacy of the stated basis for the emergency withdrawal.

81. Instead of obtaining information that would remove uncertainties, Defendant BLM purportedly used "conservative assumptions" regarding "impacts," leading to specious conclusions in the FEIS that "potential impacts range up to moderate to major even though the probability of such impacts might be low or unknown." FEIS at 5-252 to 5-253.

82. Information that would remove the uncertainties in the FEIS is essential to making a reasoned choice among alternatives because FLPMA requires that federal lands be managed under principles of multiple use and sustained yield. 43 U.S.C. § 1732(a). A reasonable decision cannot be made about what alternative strikes a proper balance unless and until Defendant BLM acquires additional and necessary information that removes the uncertainty about what environmental consequences, if any, will result from continued mining.

83. The overall costs of obtaining information that would remove the uncertainties are not exorbitant and the USGS Report cited in the FEIS made suggestions on how uncertainty could be eliminated. U.S. Geological Survey, *Hydrological, Geological, and Biological Site Characterization of Breccia Pipe Uranium Deposits in Northern Arizona* 130 (hereinafter "USGS report"), *available at* http://pubs.usgs.gov/sir/2010/5025/.

84. The FEIS also indicated that there was incomplete or unavailable information on the potential impacts to air quality and climate, fish and wildlife,

soundscapes, and cultural resources as a result of continued mining and exploration. FEIS at 4-6. The FEIS and the ROD make no statement about whether this information is important or essential to making a reasoned choice among the alternatives, with one exception: the FEIS remarkably provides that "sufficient information is available to analyze potential effects on cultural resources types," although "survey coverage of the proposed withdrawal parcels ranges from less than 3% for the East Parcel, 5% for the North Parcel, and 23% for the South Parcel." *Id.* at 4-214.

85. Therefore, Defendant BLM failed to include information in the FEIS that was important and/or essential to making a reasoned choice among the alternatives, as required by NEPA and the CEQ regulations.

86. Therefore, the FEIS is necessarily arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

87. Accordingly, this Court must hold unlawful and set aside the FEIS, and the ROD and PLO 7787, which were based upon the flawed FEIS.

FOURTH CLAIM FOR RELIEF
(Violation of NEPA)
(Failure to Address Material Public Comments)

88. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

89. An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by: (1) modifying alternatives including the proposed action; (2) developing and evaluating alternatives not previously given serious consideration by the agency; (3) supplementing, improving, or modifying its analyses; (4) making factual corrections; or (5) explaining why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicating those circumstances which would trigger agency reappraisal or further response. 40 C.F.R. § 1503.4.

90. Furthermore, agencies are "obliged to provide a meaningful reference to all responsible opposing viewpoints concerning the agency's proposed decision . . . there must be good faith, reasoned analysis in response." *State of Cal. v. Block*, 690 F.2d 753, 773 (9th Cir. 1982) (internal quotations and citations omitted).

91. Knowledgeable commenters criticized the method used in the FEIS that estimated the mineral resources in the withdrawal area. *See* FEIS at 5-169 to 5–172. These commenters argued that the DEIS severely underestimated the amount of uranium, REEs, and ECEs in the withdrawal area and, as a result, incorrectly assessed the economic impact of a withdrawal. *Id.*

92. Defendant BLM dismissed these comments by stating:

> The USGS Report is a peer-reviewed publication that provided the estimated uranium endowment for the proposed withdrawal area. While some commenters have presented alternate or supplemental approaches to assessing the uranium endowment from that provided by USGS, these alternate approaches have not been developed or peer reviewed to the extent that they can replace or supersede the USGS endowment assessment presented in SIR 2010-5025. As with many scientific fields, new information is constantly being collected which leads to new or refined conclusions. However, at present, the USGS Report contains the best credible information available regarding the uranium endowment estimate and was therefore used as the basis for the reasonably foreseeable development scenarios in the EIS.

FEIS at 5-170

93. Defendant BLM made the above statement despite the fact that it acknowledged, elsewhere in the FEIS, that "[t]he best available data are not always peer-reviewed as sometimes peer-reviewed literature is not available for specific topics" and that "[t]here is no requirement to distinguish between peer-reviewed and non-peer reviewed sources." FEIS at 5-161.

94. The comments on the best method for assessing the mineral resources were based on current data, and provided a more reliable assessment than the method used in the DEIS.

95. Defendant BLM gave no explanation, other than lack of peer review, why the method used in the USGS Report for determining the mineral resources was more reliable than the methods proposed by knowledgeable commenters.

96. The lack of peer review is not an adequate and reasonable explanation for rejecting data for consideration. *See* FEIS at 5-161 ("[t]here is no requirement to distinguish between peer-reviewed and non-peer reviewed sources.").

97. Knowledgeable commenters also noted the inadequacy of the methodology in the DEIS with regards to potential impacts to land, water, and air resources.

98. In response to these comments, Defendant BLM did not defend its methodology on scientific or technical grounds; instead, it made statements such as "sufficient data are not available . . . therefore, conservative assumptions were made in an attempt to account for this uncertainty." FEIS at 5-259.

99. The Arizona Department of Environmental Quality ("ADEQ") criticized the DEIS for not giving "full consideration to modern uranium mining technology or ADEQ issued permits that require environmental controls, financial assurance, and reclamation," which would "ensure that new and reactivated mining clams can be safely worked." Arizona Department of Environmental Quality comments at 1, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/withdraw/deis/comments/w-attach.Par.29230.File.pdf/05-04-11_JSmit_AZDEQ.pdf. Defendant BLM failed to address this comment. *See* FEIS at 5-308 to 5-311 (responding to other ADEQ comments).

100. Knowledgeable commenters also explained that current laws and regulations were sufficient to manage this area in accordance with the principles of multiple use and sustained yield. Defendant BLM responded, without explanation, that "the purpose and need for the action . . . is not altered by the fact these regulatory controls are in place." *See*, e.g., FEIS at 5-120.

101. NWMA made similar comments about the adequacy of current laws and regulations in protecting the Grand Canyon, to which Defendant BLM responded that

"The DEIS . . . acknowledges the existing regulations and their effectiveness." FEIS at 5-127. Defendant BLM failed to explain if the existence and effectiveness of these regulations were taken into account when assessing potential environmental impact as a result of continued uranium mining.

102. Defendant BLM's responses to comments on the methodology used to determine mineral resources , methodology used to determine potential environmental impacts, and the role of the current regulatory scheme did not contain good faith, reasoned analysis.

103. Thus, Defendant BLM, violated NEPA and the CEQ regulations. *E.g.*, 40 C.F.R. § 1503.4.

104. Therefore, the FEIS is necessarily arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

105. Accordingly, this Court must hold unlawful and set aside the FEIS, and the ROD and PLO 7787, which were based upon the flawed FEIS.

FIFTH CLAIM FOR RELIEF
(Violation of NEPA)
(Range of Alternatives)

106. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

107. Analyzing different alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

108. "The existence of reasonable but unexamined alternatives renders an EIS inadequate." *Friends of Southeast's Future,* 153 F.3d at 1065.

109. In the DEIS and FEIS, the Defendant BLM purportedly analyze four different alternatives.

110. Defendant BLM mentioned other alternatives but ultimately eliminated them from detailed analysis. FEIS at 2-4–2-7. These alternatives were: change in duration of withdrawal, withdraw only lands with low mineral potential, no withdrawal—phased mine development, permanent withdrawal, change the Mining Law, and new mining requirements. *Id.* All of these alternatives, except change the Mining Law and permanent withdrawal, were feasible and reasonable alternatives that should have been thoroughly analyzed.

111. Therefore, Defendant BLM failed to examine reasonable alternatives during the NEPA process.

112. Furthermore, BLM failed to "rigorously explore and objectively evaluate" the No Action Alternative. 40 C.F.R. § 1502.14. When analyzing the No Action Alternative, BLM failed to take into account the effect of existing state and federal laws governing mineral exploration and development.

113. Thus, Defendant BLM, violated NEPA and the CEQ regulations. *E.g.*, 40 C.F.R. § 1503.4.

114. Therefore, the FEIS is necessarily arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

115. Accordingly, this Court must hold unlawful and set aside the FEIS, and the ROD and PLO 7787, which were based upon the flawed FEIS.

SIXTH CLAIM FOR RELIEF
(Violation of NEPA)
(Predetermined Decision)

116. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

117. The CEQ regulations provide: "Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g).

118. Defendant Salazar proposed the withdrawal to prevent environmental harm, but when the FEIS showed a lack of environmental harm, he ignored that information and proceeded with the withdrawal.

119. Although Defendant BLM received numerous public comments on the DEIS, the FEIS was not significantly changed. The ROD provides that "[n]one of the comments resulted in a substantial alteration to the Proposed Action and, to the extent any of them relied on new information, that information was not sufficient to show that the Proposed Action would affect the quality of the human environment to a significant extent not already considered." ROD at 20.

120. As noted above, prior to the completion of the NEPA process, Defendant Salazar effectuated a 6-month emergency withdrawal. As proven by both the DEIS and the subsequent FEIS, there was no emergency. Instead, the emergency withdrawal was a delay tactic to keep the area withdrawn until the NEPA process was completed to justify the predetermined decision to withdraw the area.

121. The ROD acknowledged that "The potential impacts estimated in the EIS due to the uncertainties of subsurface water movement, radionuclide migration, and biological toxicological pathways result in low probability of impacts, but potential high risk." ROD at 9. Despite this low probability of serious impact, Defendant Salazar argued that "A twenty-year withdrawal will allow for additional data to be gathered and more thorough investigation of groundwater flow paths, travel times, and radionuclide contributions from mining as recommended by USGS." ROD at 9.

122. The rationale that a twenty-year withdrawal would allow for additional data to be gathered was first raised in the ROD. The FEIS provided that "The need for the proposed action is to respond to a concern that recent increase in the number and extent of mining claims in the area could, if more are developed, have adverse effects on resources within the human environment."

123. When the FEIS demonstrated that the adverse environmental effects were unlikely, Defendant Salazar used new reasoning to justify the withdrawal instead of revising the action based on the data in the FEIS.

124. Therefore, the NEPA process was not used to assess the environmental impact of the proposed withdrawal, but was instead used to justify a predetermined decision to withdraw over 1,000,000 acres of federal lands.

125. Thus, by abusing the NEPA process, Defendant Salazar's ROD and PLO are necessarily arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

126. Accordingly, this Court must hold unlawful and set aside the ROD and PLO 7787.

SEVENTH CLAIM FOR RELIEF
(Section 204(c) of FLPMA is Unconstitutional)

127. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth here.

128. FLPMA contains a legislative veto provision that allows Congress to overturn a withdrawal of over 5,000 acres or more with the passage of a joint resolution. 43 U.S.C. §1714(c)(1).

129. The Presentment Clause of the U.S. Constitution provides "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. Const. art. I. § 7, cl. 2.

130. Congressional action which can properly "be regarded as legislative in its character and effect" is subject to the Presentment Clause. *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983).

131. A legislative veto constitutes an exercise of legislative power when its use has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the legislative branch." *Id.* at 954.

132. The legislative veto provision in FLPMA constitutes an exercise of legislative power because it alters the legal rights, duties, and relations of those interested in locating a mining claim on federal lands.

133. The legislative veto provision in 43 U.S.C. § 1714(c)(1) violates the Presentment Clause. U.S. Const. art. I. § 7, cl. 2.

134. A court cannot sever an unconstitutional provision from the remaining provisions if "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932).

135. FLPMA contains a severability clause which states, "If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby." PL 94–579, § 707 (Oct. 21, 1976), 90 Stat 2743, 2792-94.

136. Although a severability clause creates a presumption of severability, it is not dispositive. *See Chadha*, 462 U.S. at 932–33 (Analyzing legislative history to support presumption of severability that arose from the severability clause).

137. The legislative history indicates that the legislative veto was an essential aspect of FLPMA § 204(c). *See* Committee on Energy and Natural Resources United States Senate, *Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579)* (1978).

138. The plain language of FLPMA reflects that the legislative veto provision was essential to FLPMA § 204(c), as it grants the Secretary of the Interior withdrawal authority "only in accordance with the provisions and limitations of this section." 43 U.S.C. §1714.

139. "[I]t is clear that Congress intended with the passage of FLPMA to reassert control over the use of federal lands." *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 395 (D. Wyo. 1980).

140. Because FLPMA was passed with the goal to reassert Congressional control over the use of federal lands, the legislative veto was written into § 204(c) in order to achieve this goal. Thus, it was an essential part of the legislation because Congress would not have granted the Secretary authority to make withdrawals exceeding 5,000 acres without the legislative veto provision.

141. Therefore, the legislative veto provision in Section 204(c) cannot be severed from the remaining provisions therein, this Court must declare Section 204(c) in its entirety unconstitutional.

142. Furthermore, with the passage of FLPMA, Congress removed the President's implied authority to make withdrawals and reservations. PL 94–579, § 704 (Oct. 21, 1976), 90 Stat 2743, 2792–94. As a result, after severance, Section 204 only authorizes the Secretary to make withdrawals aggregating less than 5,000 acres. 43 U.S.C. §1714(d).

143. Thus, Defendant Salazar had no authority to withdraw over 1,000,000 acres.

144. Therefore, the ROD and PLO 7787 are necessarily arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law.

145. Accordingly, this Court must hold unlawful and set aside the ROD and PLO 7787.

PRAYER FOR RELIEF

WHEREFORE, NWMA respectfully request that this Court:

1. Declare Defendant Salazar's and Defendant BLM's actions in effectuating the withdrawal were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because, *inter alia*, the actions were taken in violation of FLPMA and NEPA.

2. Hold unlawful and set aside the FEIS, the ROD, and PLO 7787.

3. Declare Defendant Vilsack's and/or Defendant Forest Service's actions in purportedly consenting to the withdrawal were arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law because, *inter alia*, the actions were taken in violation of the NFMA and NEPA.

4. Hold unlawful and set aside those portions of PLO 7787 that withdraw Forest Service lands from location and entry under the Mining Law.

5. Declare 43 U.S.C. § 1714(c) unconstitutional as a violation of the Presentment Clause of Article I, Section 7 of the Constitution and sever that subsection from FLPMA.

6. Declare Defendant Salazar's actions in issuing PLO 7778: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and/or (d) without observance of procedure required by law.

7. Hold unlawful and set aside PLO 7787

8. Award NWMA its costs and attorneys' fees in accordance with law, including the Equal Access to Justice Act, 28 U.S.C. § 2412; and,

9. Award NWMA such further relief as this Court deems just and equitable.

DATED this 6th day of March 2012.

Respectfully Submitted,

/s/ Steven J. Lechner

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