No. 09-15230

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTH FORK BAND COUNCIL OF WESTERN SHOSHONE OF NEVADA, *et al.*

Plaintiff-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendant-Appellees,

BARRICK CORTEZ, INC.,

Defendant-Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA (No. 08-616)

BRIEF FOR FEDERAL APPELLEES

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GLOSSARY

BLM	Bureau of Land Management
CGM	Cortez Gold Mines, now Barrick Cortez, Inc.
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
ER	Excerpts of Record
FLPMA	Federal Land Policy and Management Act
FONSI	"finding of no significant impact" – a term of art under NEPA
KOP	Key Observation Point
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
RMP	Resource Management Plan
ROD	Record of Decision
SER	Supplemental Excerpts of Record
UUD	"unnecessary or undue degradation" – a term of art under FLPMA
VRM	Visual Resource Management

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JURISDICTIONAL STATEMENT

Plaintiff-Appellants appeal from a district court order denying their motion for a preliminary injunction. Plaintiff-Appellants filed a timely notice of appeal on February 6, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

STATEMENT OF THE ISSUE

On November 8, 2008, the Bureau of Land Management issued a Record of Decision in which it authorized Barrick Cortez, Inc. to expand its existing gold mine in Nevada. Plaintiff-Appellants claim that the Bureau violated federal law in issuing the Record of Decision and its associated Environmental Impact Statement. Plaintiff-Appellants filed suit in district court and moved for a preliminary injunction to stop the mine expansion. The district court denied the preliminary injunction. The issue on appeal is whether the district court abused its discretion in doing so.

INTRODUCTION

South Fork Band Council of Western Shoshone of Nevada, Te-Moak Tribe of Western Shoshone Indians of Nevada, Timbisha Shoshone Tribe, Western Shoshone Defense Project, and Great Basin Resource Watch (collectively "Plaintiffs") challenge a November 2008 Bureau of Land Management (BLM) decision that allows Barrick Cortez, Inc. ("Cortez") to expand an existing gold mine and ore processing facility near Beowawe, Nevada, called the Cortez Joint Venture (hereafter "the Mine"). The area surrounding the Mine is rich in silver, gold, lead, barite, turquoise, and other valuable minerals, and has been heavily mined since the mid-19th century.

Before approving the proposed mine expansion, BLM published a lengthy Environmental Impact Statement (EIS) in which it identified the cultural, biological, and other impacts that the project might cause, and various measures that would mitigate those impacts. BLM conditioned its approval on Cortez's agreement that it would adopt these mitigation measures.

Plaintiffs filed suit in the District of Nevada, alleging that BLM's decision to approve the mine expansion violated a number of federal laws. The district court denied their preliminary injunction request, holding that Plaintiffs had shown neither that they were likely to succeed on the merits nor that the balance of hardships tipped in their favor. Plaintiffs sought emergency relief from this Court, but this Court denied it. Plaintiffs now appeal the district court's order denying the preliminary injunction.

STATEMENT OF FACTS

A. Statutory Background

Plaintiffs claim that they are likely to succeed on the merits of legal claims arising out of two federal statutes:

1. The Federal Land Policy and Management Act

Plaintiffs first contend that BLM violated the Federal Land Policy and Management Act, or FLPMA. 43 U.S.C. §§ 1701 *et seq*. FLPMA requires BLM to manage public lands for multiple use, including recreation, wildlife preservation, scenic value, and the extraction of renewable and non-renewable resources. 43 U.S.C. § 1702(a), § 1732(a).

BLM must manage these lands according to Resource Management Plans that it develops, *id.* § 1712, and must "by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* at § 1732(b). The parties to this lawsuit often abbreviate the phrase "unnecessary or undue degradation" as "UUD."

Congress did not define "unnecessary or undue degradation" in FLPMA, and instead gave BLM authority to define the phrase. BLM's regulatory definition says that UUD happens when "conditions, activities, or practices" at a mine, among other things:

* Violate federal laws related to environmental protection and protection of cultural resources;

* Are not "reasonably incident" to prospecting, mining, or processing operations; or

* Fail to comply with mining regulations set out in 43 C.F.R. § 3809.420.

43 C.F.R. § 3809.5. BLM's mining regulations, in turn, set out specific guidelines for mining activity. They say, for example, that mine access routes have to be as narrow as possible, and must follow natural contours where practicable. *Id.* § 3809.420(b)(1). Mine operators cannot knowingly destroy historical or archaeological sites without prior

federal approval. *Id.* § 3809.420(b)(8). They have to comply with applicable laws governing air quality, water quality, and their disposal of solid wastes. *Id.* § 3809.420(b)(4,5,6). And, as soon as possible after disturbing a given area, the mine operator has to "reclaim" it by reshaping it, revegetating it, and rehabilitating it for wildlife. *Id.* § 3809.420(b)(3).

BLM polices its regulations and the UUD standard throughout the life of a mine. *See generally Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 44 (D.D.C. 2003). Before a company can begin a mining project, it must submit a "plan of operations" that explains in detail what it wants to do and how it proposes to comply with mining and environmental regulations. 43 C.F.R. § 3809.11. That plan has to include, among other things, a monitoring program to identify environmental impacts in time for corrective action, *id.* and a reclamation plan that details how the mine site will be restored. *Id.* § 3809.401(b)(3),(b)(4). BLM reviews the plan to see if the project will cause UUD; the agency can reject the plan, approve it, or approve it subject to additional monitoring, mitigation, and reclamation

requirements. BLM must also obtain financial guarantees to ensure that mitigation and reclamation work will be done. *Id.* §§ 3809.500 *et seq*.

During the course of a given mine project, BLM can inspect the site at any time. *Id.* § 3809.600(a). If the mine operator is causing UUD, deviating from its plan of operations, or violating any applicable mining or environmental regulation, BLM can suspend work—immediately if necessary—revoke the plan of operations, and seek criminal penalties if appropriate. *Id.* §§ 3809.601(b)(2), 3809.602, 3809.604, 3809.700. After active mining is finished, BLM reviews the reclamation work; if it isn't satisfactory, BLM can order further efforts or do the work itself using the company's financial guarantee money and suing for any further costs. *Id.* §§ 3809.595-3809.598.

2. The National Environmental Policy Act

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*., requires federal agencies to prepare a detailed statement on the environmental impacts of any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C.

§ 4332(2)(C). The resulting Environmental Impact Statement, or EIS, must describe "any adverse environmental effects which cannot be avoided" and "rigorously explore and objectively evaluate" alternatives that would minimize the adverse impacts or improve the environment. *Id.*; *see also* 40 C.F.R. §§ 1502.1, 1502.14. NEPA doesn't dictate substantive results, but it does require agencies to take a "hard look" at potential environmental consequences and make relevant information available so that the public can play a role in the decisionmaking process. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007).

FLPMA and NEPA are both procedural in nature, and neither statute provides a private right of action. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1111 (9th Cir. 2005). Accordingly, Plaintiffs have filed suit under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*.

B. Factual Background

The Cortez Mining District is located in Lander County, Nevada, about 45 miles southwest of Elko. Govt. SER 115 (EIS at 3.10-2). The area is dry, mountainous, and isolated—the nearest town is over 7 miles away and has less than four hundred residents—but it is rich in minerals like gold, lead, barite, and turquoise. Govt. SER 87, 150 (EIS at 3.8-8, 3.14-6). In 1862, prospectors discovered silver in quartzite outcroppings at the base of Mount Tenabo, also known as "White Cliffs," and mining has dominated the region's history ever since. Govt. SER 16, 87 (EIS at 2-1, 3.8-8). Thousands of miners have come to the area to stake claims, dig tunnels, and build camps, leaving behind ghost towns like Cortez and Shoshone Wells. Govt. SER 87 (EIS at 3.8-8). Mining remains the area's dominant land use. It provides a third of the jobs in Lander County, and over ninety percent of the jobs in neighboring Eureka County. Govt. SER 142, 144 (EIS at 3.11-2, 3.13-2).

Gold mining in the area began in the 1950s, and the Cortez Mine itself began operating in 1968. Govt. SER 16 (EIS at 2-1). Since then, BLM has approved the addition of several additional excavation areas

and processing facilities designed to take advantage of newly discovered gold deposits. *Id.*

Between 1999 and 2004, miners identified two new gold sources—the "Pediment" and "Cortez Hills" deposits—within a few miles of Cortez's existing mining activities. Govt. SER 17 (EIS at 2-2). In 2005, Cortez submitted a proposed Plan of Operations for the Cortez Hills Expansion Project ("the Mine Expansion"), which would extend existing mining activities to take advantage of the newly discovered deposits. Among other things, Cortez proposed to dig a new mining pit, add new ore processing facilities, add waste rock disposal areas and expand existing ones, and upgrade the dewatering systems that keep its mining pits from filling with water. As proposed by Cortez, the Mine Expansion would involve approximately ten years of active mining, followed by up to three years of ore processing, site closure, and reclamation. ER 230 (ROD at 6). Cortez proposed to disturb 6,702 additional acres of land within the 58,058-acre project boundary. *See* Govt. SER 20 (EIS at 2-5); ER 228 (ROD at 4). Aside from small areas that Cortez owns, that disturbed acreage is all on public land managed

by BLM. Govt. SER 25 (EIS at 2-11).

Because approving the Mine Expansion's plan of operations counts as a "major federal action" under NEPA, BLM published a Notice of Intent to Prepare an EIS late in 2005. 70 Fed. Reg. 72,308 (Dec. 2, 2005). After holding public meetings and soliciting input from Plaintiffs, BLM published a Draft EIS that evaluated five alternatives: Cortez's original Mine Expansion proposal, three action alternatives, and a no-action alternative in which Cortez would continue its currently authorized mining activities. Based on its Draft EIS analysis and public commentary, BLM added a fourth action alternative in its Final EIS, which the agency released on October 3, 2008.[1] The new alternative, called the "Revised Cortez Hills Pit Design Alternative," differed from Cortez's original proposal in that it involved smaller expansions to the mining pit and waste rock facilities, a larger underground mining component, and smaller heap leach facilities. Govt. SER 29-38 (EIS at 2-88 to 2-97); ER 231 (ROD at 7). BLM

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[1] The Government has included relevant portions of the Final EIS in its supplemental excerpts of record. Govt. SER 2-196. The full EIS is on the web at www.blm.gov/nv/st/en/fo/battle_mountain_field/blm_information/national_environmental.html.

approved the new alterative, but conditioned its approval on Cortez's implementation of the environmental protection measures described in its proposal, and "all mitigation measures specified in Chapter 3.0 of the Final EIS." ER 231 (ROD at 7). BLM devoted much of its ROD to summarizing these measures, ER 232-239 (ROD at 8-15); the following are just a few examples.

Under the ROD, Cortez must design and operate new ore leaching, mill and mine tailings facilities as "zero-discharge" facilities to minimize impacts to water resources. It must implement an environmental monitoring plan that includes groundwater studies to detect any adverse impacts that mine dewatering activities may cause. ER 233 (ROD at 9). As soon as possible after disturbing soils and vegetation, the ROD requires Cortez to revegetate those areas to avoid damage due to erosion and invasion by non-native species. ER 234 (ROD at 10). Cortez must cover and fence off leaching facilities to avoid the possibility of harm to birds and wildlife, build overpasses to allow mule deer and other animals to cross mine conveyors, build livestock watering troughs to deter livestock from drinking from infiltration

basins, and design electricity transmission lines to reduce the risk of electrocution for raptors. ER 235-236 (ROD at 11-12).

The design alternative BLM approved minimizes the impact to Indian historical and cultural resources as well. ER 236-237 (ROD at 12-13). BLM surveyed all proposed construction areas for archaeological sites, and required Cortez to mitigate or reduce adverse impacts to those sites according to an approved plan. ER 237 (ROD at 13). The ROD also required Cortez to avoid mining activities in the Mount Tenabo/White Cliffs area, which BLM has identified as a property of cultural and religious importance to the Western Shoshone, and to maintain public access to those areas via public roads. ER 236 (ROD at 12). The ROD further states that Cortez must educate its employees about their responsibility to preserve cultural resources and to follow policies designed to protect them. ER 237 (ROD at 13).

BLM concluded that in light of the monitoring and mitigation requirements the ROD imposed, the Cortez Hills Revised Pit Design Alternative "will not cause unnecessary or undue degradation of the

public lands and is consistent with other applicable legal requirements." ER 227 (ROD at 3).

C. Procedural History

On November 20, 2008, Plaintiffs filed a complaint in the District of Nevada alleging that BLM's approval of this Project violates FLPMA, NEPA, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4; and the trust responsibility owed to Indian tribes by the United States government. Cortez intervened as a defendant a few days later.

On November 24, 2008, Plaintiffs moved for a preliminary injunction against the Mine Expansion. After holding a four-day hearing on the motion, Judge Larry R. Hicks denied it from the bench on January 26, 2009. ER 1-20. On February 3, 2009, Judge Hicks filed a written opinion supporting his ruling. ER 22-53.

In his opinion, Judge Hicks concluded that Plaintiffs were unlikely to succeed on their legal claims. With respect to the FLPMA claims, he noted that BLM had gone to "great lengths" to evaluate the Mine Expansion's potential impacts on sacred Western Shoshone areas before

concluding that it would cause no "unnecessary or undue degradation" to them. ER 47. He also found that BLM had done an "extensive analysis" of the project's water resource impacts, and had created a long-term monitoring and mitigation program "to ensure that future impacts on water sources would be controlled." ER 48. As for visual impacts, Judge Hicks similarly concluded that BLM had considered the effects of the Mine Expansion and had ensured that long-term visual impacts would be "minimized through recontouring and revegetation." ER 48.

Turning to the NEPA claims, Judge Hicks held that Plaintiffs were unlikely to succeed on the merits because BLM "adequately provided for and responded to public comments, thoroughly considered the Project's potential impacts, and took a 'hard look' at the environmental consequences of the proposed action." ER 51. He further concluded that the agency "adequately addressed and discussed mitigation measures." ER 51.

Plaintiffs filed a motion for emergency relief in this Court three days after the district court issued its written opinion. This Court

denied Plaintiffs' request for an emergency injunction or stay pending appeal in an order dated February 18, 2009. Govt. SER 1. In a brief very similar to their emergency motion, Plaintiffs now ask this Court to reverse Judge Hicks' written ruling as an abuse of discretion and to enjoin ongoing construction activities at the Mine Expansion.

SUMMARY OF ARGUMENT

BLM has never disputed that the Mine Expansion will cause some significant environmental impacts. But after studying and reporting those impacts in an EIS, the agency concluded that the project will not cause "unnecessary or undue degradation" of the public lands in violation of FLPMA. After holding a four-day hearing on the matter, the district court concluded that the Plaintiffs had little chance of successfully challenging BLM's decision and accordingly refused to preliminarily enjoin the Mine Expansion. On appeal of that ruling, Plaintiffs roll out a laundry list of concerns about the project, but never identify any factual errors or legal mistakes in the district court's decision, let alone an abuse of discretion that would justify reversal.

Plaintiffs' FLPMA challenge to the Mine Expansion depends primarily on nebulous assertions that the Mine Expansion will destroy the "physical and spiritual integrity of Mt. Tenabo's lands and water," and thereby diminish the spiritual experience of some Western Shoshone. But after studying local religious practices and repeatedly consulting tribal representatives, BLM could not identify any specific religious sites or activities within the project boundaries. BLM certainly recognizes that Plaintiffs oppose the Mine Expansion—and existing mining activities—in part because they violate the personal beliefs of some Western Shoshone tribe members. But Plaintiffs do not identify any way in which the project will cause UUD as federal regulations define that term.

Plaintiffs's NEPA claims, meanwhile, depend on "flyspecking" at best and misinformation at worst. Plaintiffs complain, for example, that BLM didn't model ultra-fine particulate emissions from the Mine Expansion, even though the Environmental Protection Agency has told agencies to examine *conventional* particulate emissions instead. Similarly, Plaintiffs' attack on BLM's "monitoring-first" strategy for

addressing groundwater impacts ignores that (1) nobody can be sure what groundwater impacts the Mine Expansion will cause, and (2) BLM has required Cortez to mitigate any groundwater impacts that the monitoring program discovers.

Plaintiffs' scattershot arguments only confirm the district court's conclusion that they are not likely to prevail on the merits. Especially given the standard of review that applies to review of preliminary injunction rulings, this Court should reject Plaintiffs' appeal.

STANDARD OF REVIEW

Preliminary injunctive relief is an "extraordinary remedy," *Winter v. Natural Res. Def. Counsel*, 129 S. Ct. 365, 376 (2008), and the moving party must make a "clear showing" that such relief is necessary. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). A plaintiff "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*, 129 S. Ct. at 374, 375-76.[2]

[2] A district court cannot grant a preliminary injunction on any "lesser" standard. *American Trucking Assoc. v. Los Angeles*, __ F.3d __,

When a district court denies a preliminary injunction, this Court reviews for abuse of discretion. *Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006).

Plaintiffs' suit arises under the APA, which allows courts to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Under the APA, a court cannot "substitute its judgment for that of the agency," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); it only examines whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Selkirk Conservation Alliance v. Forsgren,* 336 F.3d 944, 954 (9th Cir. 2003). When a plaintiff challenges an agency's factual conclusions, the court examines whether those conclusions are supported by substantial evidence. *Dickinson v. Zurko*, 527 U.S. 150, 162-164 (1999). That standard of review is even less strict than the

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2009 WL 723993 at *5 (9th Cir. 2009). In particular, a plaintiff cannot obtain preliminary relief merely by raising serious questions on the merits and showing that the balance of hardships tips sharply in his favor. *See id.* (citing *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007)).

"clearly erroneous" standard, *id.*; a court must uphold the agency's conclusion unless it is one that no reasonable fact-finder could have reached. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs seek injunctive relief from this Court based on claims that BLM violated two statutes: FLPMA and NEPA. Neither of these legal claims is likely to succeed.

A. Plaintiffs Have Not Shown That The Mine Expansion Will Cause Any "Unnecessary Or Undue Degradation."

Plaintiffs' FLPMA claims depend on a mischaracterization of the statute's "unnecessary or undue degradation" standard. Plaintiffs seem to think that the UUD standard prohibits changes to the scenery around the Mine Expansion, lowering of the groundwater table, or any activity that violates the religious beliefs of local Indian Tribes. But FLPMA's prohibition on UUD is a "default management standard" that reflects BLM's obligation to manage lands for multiple uses that often

cannot take place on the same parcel of public land. *Reeves v. United States*, 54 Fed. Cl. 652, 667 (Fed. Cl. 2002). Unless Congress has protected a given public land area through legislation, or BLM has done so administratively, then mining is permissible there. And the fact that mining activity may occasion some alteration of the public lands hardly gives rise to a FLPMA claim; the UUD standard reflects the fact that "[a] parcel of land cannot both be preserved in its natural character and mined." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982) (citation omitted).

To prevail in their FLPMA claim, Plaintiffs have to prove that BLM acted arbitrarily or capriciously in determining that the Mine Expansion will not cause UUD if Cortez follows its plan of operations. To do that, Plaintiffs have to show that the planned mining work will violate some standard stated in, or incorporated by, BLM's definition of UUD—for instance, by proving that the project includes operations that are not "reasonably incident" to mining, 43 C.F.R. § 3809.5, or by demonstrating that it will degrade local air quality in violation of the Clean Air Act, *id.* § 3809.420(b)(4). Plaintiffs never set out a coherent

argument of this sort, let alone one that is likely to succeed on the merits.

1. BLM correctly exercised its FLPMA authority.

Plaintiffs' first FLPMA argument is that BLM has "misinterpreted and misapplied its UUD authority" by authorizing the Mine Expansion despite their concerns about cultural impacts. Br. 25-27. But Plaintiffs' attack is as baseless as it is confusing.

Plaintiffs say that, under FLPMA, BLM cannot approve any project that would violate the National Historic Preservation Act (NHPA). Br. 25-26. That much is true. *See* 43 C.F.R. § 3809.420(a)(6). But as Plaintiffs themselves recognize, the NHPA is a *procedural* statute. It requires federal agencies to "take into account" the effect of their decisions on sites and structures that are eligible for inclusion in the National Register. 16 U.S.C. § 470f; *see also United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993) (NHPA is "similar to NEPA except that it requires consideration of historic sites, rather than the environment"). So when it comes to the NHPA, "substantive" compliance with FLPMA consists of following the "procedures" that the

NHPA mandates. Plaintiffs appear to be arguing that FLPMA somehow converts the procedural requirements of the NHPA into a substantive obligation to protect all historic properties. Br. 25. But they don't list any support for that position, Br. 26, let alone identify any historic site that they think will be disturbed in violation of the NHPA. In failing to articulate a coherent argument on this point—let alone back it up with pertinent authorities—Plaintiffs themselves have shown that they are not likely to succeed on the merits.

2. Plaintiffs cannot establish that the Mine Expansion will cause UUD merely by asserting that it conflicts with their religious beliefs.

Plaintiffs' next argument is that the Mine Expansion will unduly and unnecessarily degrade "the ability of Western Shoshone to exercise and practice their religion." Br. 27. BLM respects the Plaintiffs' religious beliefs, but it reached a contrary conclusion. After careful study, the agency stated that it "knows of no Western Shoshone uses that would be prevented or uses or resources that would be destroyed by the proposed project." Govt. SER 178 (EIS Appx. F at 122).

As the district court explained:

> BLM went to great lengths to evaluate potential impacts on Native American traditional values and culture. The Final EIS includes more than seventy pages discussing the Project's potential disruption of "Native American traditional values," including the effect of the proposed project on Western Shoshone religious sites and practices. As part of its review, BLM (1) consulted several environmental and ethnographic impact studies, which began in the early 1990s, concerning mining and Native American activities in the area; (2) conducted extensive archeological surveys of the Project area; and (3) addressed public comments challenging the Draft and Final EIS.

ER 47. After reviewing this information, BLM found only that the Mine Expansion might affect pine nut gathering activities in certain limited areas. Govt. SER 105, 109 (EIS at 3.9-24, 3.9-48). The agency "did *not* conclude that the Western Shoshone use the project site for religious activities or that the site is a central part of Western Shoshone religious practices." Govt. SER 177 (EIS Appx. F at 121) (emphasis added).

BLM did recognize that the Project would cause some non-physical impacts in areas *outside* the Mine Expansion site that are significant to Western Shoshone religious practices. Those areas include the top of Mount Tenabo, White Cliffs, Horse Canyon, Shoshone Wells, and the historic Cortez townsite. Govt. SER 27, 99-106 (EIS at 2-56, 3.9-18 to 3.9-25). Although the Mine Expansion was expressly designed to avoid

physically disturbing these areas, BLM found that short-term road closures required for the project might limit access to them on occasion. Govt. SER 178 (EIS Appx. F at 122). BLM also recognized that the spiritual and religious experience of tribe members who visited those sites "may be diminished as a result of the increased visual effects on the landscape associated with the [Mine Expansion]." Govt. SER 106 (EIS at 3.9-25). While it was impossible to quantify such impacts, BLM specified mitigation measures, recognizing at the same time that "certain impacts cannot be fully mitigated to the satisfaction of certain Western Shoshone." *Id.*

In their briefs, Plaintiffs reiterate their spiritual opposition to the Mine Expansion. But they never translate that opposition into a legal claim that the Mine Expansion will cause UUD, let alone explain why the district court abused its discretion in concluding that the claim is unlikely to succeed. In fact, their brief consistently misunderstands FLPMA and the UUD standard. The UUD standard protects *public land*, not private religion; FLPMA does not require BLM to prohibit all mining that might conflict with religious practices. Accordingly, a

plaintiff cannot prove that a mine will cause UUD just by stating his spiritual opposition to it, or even by showing that he needs access to the mining area in order to practice his religion.[3] If that were the law, public land use would be subject to "the personalized oversight of millions of citizens," each of whom "would hold an individual veto to prohibit the government action." *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (evaluating a RFRA claim). Plaintiffs must instead show that the project will cause UUD as that term is defined in the agency's regulations.

The closest Plaintiffs come to doing so is by suggesting that BLM violated Executive Order 13007 by approving the Mine Expansion. That Order requires federal agencies, "to the extent practicable," to protect the physical integrity of Indian "sacred sites," and to accommodate access to them. But neither FLPMA nor the UUD

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[3] Here it is worth noting that Plaintiffs' amended complaint includes a claim under the Religious Freedom Restoration Act, but that Plaintiffs do not pursue a RFRA claim in this appeal.

standard requires compliance with Executive Order 13007.[4] Even if they did, Plaintiffs fail to show how BLM violated it.

Executive Order 13007 limits the meaning of "sacred site" to a "specific, discrete, narrowly delineated location on Federal land" that a practitioner has identified to an agency as having "established religious significance." Plaintiffs never cite anything in the record to suggest that they identified any "specific, discrete, narrowly delineated" religious site to BLM during the administrative process, let alone one that the Mine Expansion would physically disrupt or block from access. *See* Govt. SER 106 (EIS at 3.9-25) ("Western Shoshone consultants have not disclosed the number of people who visit the mountain for spiritual or religious use and the frequency and specific locations of their visits to

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[4] Although the district court concluded that Executive Order 13007 applies here, ER 48 n.9, the Executive Order says that "is intended only to improve the internal management of the executive branch" and does not create any right "enforceable at law or equity by any party against the United States, its agencies, officers, or any person." Moreover, while Plaintiffs quote the preamble to BLM's mining regulations to say that BLM "specifically recognizes the binding nature of E.O. 13007," Br. 29, their ellipsis elides the fact that this statement applied only to "unclaimed land open under the mining laws," 65 Fed. Reg. 69998, 70013 (Nov. 21, 2000). The Mine Expansion is located on lands that have been "claimed" under mining laws, and would not disturb any "unclaimed land."

the area are unknown."). Their brief only alleges harm to general regions such as "Mt. Tenabo and its environs," Br. 27, "Mt. Tenabo, the surrounding area and parts of Crescent Valley," Br. 31, or "the area of Tenabo," Br. 32.

Similarly, this Court should dismiss Plaintiffs' attempt to challenge BLM's factual conclusions regarding religious activities on the project site. *See, e.g.*, Br. 20 (asserting that there are "current religious uses" and "traditional religious use areas" at the site). BLM reviewed numerous studies and solicited public and tribal input before concluding that the Mine Expansion will not interfere with Western Shoshone religious activities. Under the APA, this Court must accept that factual conclusion unless Plaintiffs show that no reasonable fact-finder could agree with it. *Elias-Zacarias*, 502 U.S. at 481. But all Plaintiffs offer is conclusory statements and speculations such as "[t]here must be other burials on the [Mt. Tenabo] pediment that would be disturbed or destroyed by mining development." Br. 31. Such allegations do not prove that BLM's factual conclusions lack supporting evidence, let alone

show that the district court abused its discretion by denying preliminary relief.

3. BLM reasonably concluded that monitoring and mitigating the effects of mine dewatering will prevent UUD.

Expanding existing mining operations will require additional dewatering activities beyond those already under way. These activities are necessary because mine pits would otherwise fill with groundwater and become unusable. Dewatering will have the greatest impact on the groundwater table during mine operations and near the mine; as one moves away from mine activities in space and time, groundwater levels will return to normal. Accordingly, while it is true that groundwater levels may drop up to 1,200 feet, Br. 34, that will only be true immediately next to the mine, and immediately after dewatering. *See* Govt. SER 63-65 (EIS at 3.2-86 to 3.2-88).

Plaintiffs cite the EIS to warn that flows in "at least 15 springs or seeps," including Shoshone Wells and Mapped Cortez spring, will reduce as a result of dewatering efforts, and suggest that this constitutes UUD. Br. 34 (citing ER 132). But besides reiterating that "[w]ater is the keystone of Western Shoshone religion," Br. 35, Plaintiffs

fail to explain how those reduced flows would constitute UUD. They also neglect to mention that the flow reductions they cite are just *predictions* BLM made based on numerical modeling, and that after explaining these predictions, BLM concluded that because of "the complexity of the hydrogeologic conditions in the region and the inherent uncertainty in numerical modeling predictions . . . it is not possible to conclusively identify specific springs and seeps that would or would not be impacted by future mine-induced groundwater." Govt. SER 60 (EIS at 3.2-57).

Because of this uncertainty, BLM concluded that the most reasonable way to prevent "unnecessary or undue degradation" to groundwater is to require Cortez to monitor surface water flow at ten seep sites and nineteen monitoring wells in the Mine Expansion area. Govt. SER 73-78 (EIS at 3.2-109 to 3.2-113). If the monitoring shows flow reductions at any of the seeps, BLM and the Nevada Department of Water Resources will determine what further action is required. Govt. SER 75 (EIS at 3.2-111). The ROD and EIS specifically state that Cortez will install water supply pumps, pipe water in from other

sources, or take other measures that BLM requires. ER 242-243 (ROD at 18-19). Plaintiffs are therefore mistaken when they say that BLM's mitigation strategy is "merely a plan for [Cortez] to study the extent of the groundwater loss." Br. 36.

Last, Plaintiffs make a passing reference to concerns about the lake that BLM expects to form in the mining pit after Cortez stops its dewatering efforts. Br. 36; *see generally* Govt. SER 62 (EIS at 3.2-85). They complain vaguely that the lake will be "polluted," but only discuss arsenic contamination, and then only in a parenthetical. In fact, arsenic is the *only* constituent that BLM expects to find in the lake at levels above any regulatory standard, and then only the *drinking water* standard for arsenic, not the ambient water quality standard. Govt. SER 71 (EIS at 3.2-94). Since there are no plans to use the pit lake as a drinking water reservoir, only the ambient standard applies, and BLM reasonably concluded that the arsenic levels in the lake will not constitute UUD.

4. BLM reasonably concluded that expanding the Mine would not unduly degrade scenic resources.

Last, Plaintiffs argue that the BLM has admitted the Mine Expansion will cause UUD by recognizing that certain parts of the project will violate Visual Resource Management (VRM) decisions to which BLM has previously committed. Br. 37-38. But BLM admitted nothing of the sort; Plaintiffs are mischaracterizing the EIS.

Some background explanation is necessary first. BLM classifies public lands as Class I, II, III or IV visual resources according to internal VRM guidelines. Class I areas include places like national wilderness areas, designated wild and scenic rivers, and other areas where Congress mandates the preservation of natural landscapes. At the other end of the spectrum are Class III areas, where BLM tries to "partially retain the existing character of the landscape," and Class IV areas, where BLM allows "major modification of the existing character of the landscape." *See* Govt. SER 151 (EIS at 3.15-1).

BLM uses these VRM categories in two different agency processes. First, the agency continually maintains "an inventory of visual values on all public lands." Govt. SER 198-199 (BLM Manual § 8400.06.1); *see*

also Govt. SER 209 (BLM Manual H-8410-1 at I.A). This internal agency inventory places parcels of public land in one or another visual resource "inventory class." Second, BLM can use the inventory class to assign lands a formal visual resource "*management* class" when it develops a Resource Management Plan (RMP) for a given region.[5]

The textual difference between an "inventory class" and a "management class" may be subtle, but the legal difference is important. First of all, the fact that a particular parcel of land falls in a certain inventory class does not mean that BLM will assign it the same *management* class—or any management class at all—when it prepares an RMP. Govt. SER 212 (BLM Manual H-8410-1 at V.A.2) ("The assignment of visual resource management classes is ultimately based on the management decisions made in RMPs."). Second:

> Inventory classes are informational in nature and provide the basis for considering visual values in the RMP process. They do not establish management direction and should not be used as a basis for constraining or limiting surface disturbing activities.

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[5] RMPs are land use plans as described under section 202 of FLPMA, 43 U.S.C. § 1712. They establish generally how the lands and resources will be managed, but they do not authorize site-specific action. *See* 43 C.F.R. § 1601.0-5(n).

Govt. SER 212 (BLM Manual H-8410-1 at V.A.1). By contrast, when a parcel of land is assigned to a *management* class through the formal RMP process, that management class "provide[s] the visual management standards for the design and development of future projects." Govt. SER 199 (BLM Manual § 8400.06.4).

In the early 1980s, BLM examined the areas around the existing Mine and assigned them to visual resource inventory classes ranging from Class III to IV. But BLM has never assigned those areas to visual resource *management* classes. Plaintiffs suggest otherwise by quoting a line from the EIS in which BLM said: "Current VRM classifications are the result of a visual inventory and adoption of the Shoshone-Eureka Resource Management Plan (RMP) for the area." Govt. SER 191 (EIS Appx. F at 191). But Plaintiffs are misreading this statement: the RMP itself only mentions visual "inventory classes" of the areas it covers. It does *not* approve or assign any visual "management classes." Govt. SER 216 (Shoshone-Eureka RMP at 3-13).

Here is the point: when BLM analyzed the visual effects of the Mine Expansion, it identified a few locations where those effects would

go beyond Class III "objectives." *See, e.g.*, Govt. SER 159-160 (EIS at 3.15-9 to 3.15-10. But the areas at issue are only Class III with respect to *inventory* classification, and BLM's own guidance states that inventory classes "should not be used as a basis for constraining or limiting surface disturbing activities." Govt. SER 212 (BLM Manual H-8410-1 at V.A.1). BLM has not adopted any *management* classifications for the relevant areas, so the fact that it identified some conflicts with Class III VRM objectives does not mean that the agency ignored its own land use plans, let alone that the Mine Expansion will cause UUD.

B. BLM Complied With NEPA.

BLM prepared a three-volume EIS evaluating the impacts of the Mine Expansion. After reviewing that document, the district concluded that BLM had both "thoroughly considered the project's potential impacts" and prepared "a reasonably complete discussion of possible mitigation measures." ER 50-51. In trying to show that the district court's evaluation of the EIS was an abuse of discretion, Plaintiffs resort to precisely the sort of "flyspeck" NEPA review that this Court

repeatedly warns against. *See, e.g.*, *Churchill County v. Norton*, 276 F.3d 1060, 1081 (9th Cir. 2001).

1. BLM carefully evaluated air quality impacts.

BLM discussed air emissions in Section 3.10 of its EIS. SER 114. BLM first explained that it would consider air quality impacts "significant" if the Mine Expansion would lead to violations of state or federal air quality standards. Govt. SER 118 (EIS at 3.10-5). BLM used approved software to model the Expansion's air quality impacts, and reported results showing that the Mine Expansion would not cause any air quality violations. Govt. SER 127 (EIS at 3.10-14).

According to the Plaintiffs, the EIS doesn't satisfy NEPA because BLM did not adequately analyze impacts caused by air emissions of particulate matter smaller than 2.5 micrometers (µm) in diameter, known as "$PM_{2.5}$." Br. at 40-44. Plaintiffs correctly point out that although EPA has promulgated an ambient standard for $PM_{2.5}$,[6] BLM did not list any $PM_{2.5}$ modeling results in the EIS. But BLM explained

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[6] EPA's standard requires that there be no more than 35 micrograms of $PM_{2.5}$ per cubic meter of air ($\mu g/m^3$) when that measurement is averaged over any 24-hour period, and no more than 15 $\mu g/m^3$ when averaged annually. Govt. SER 119 (EIS at 3.10-6).

in the EIS that "$PM_{2.5}$ typically is not modeled for near-field impacts." Govt. SER 124 (EIS at 3.10-11). The Environmental Protection Agency (EPA) has recognized that there are "significant technical difficulties" in modeling $PM_{2.5}$, and has advised regulated entities that predictions of larger particulate emissions (known as "PM_{10}") "may properly be used as a surrogate for $PM_{2.5}$." *See* Govt. SER 217-219 (Memorandum: Interim Implementation of New Source Review Requirements for PM2.5 (Oct. 23, 1997)); *see also id.* at 218 (meeting PM_{10} emission requirements "will serve as a surrogate approach for reducing $PM_{2.5}$ emissions and protecting air quality"). EPA has reaffirmed that guidance as recently as 2005. *See* Govt. SER 223 (Memorandum: Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas (Apr. 5, 2005)).[7] BLM's focus on PM_{10} impacts is therefore anything but a "refusal to analyze" $PM_{2.5}$ impacts, as Plaintiffs

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[7] After seeing this explanation in previous government briefs, Plaintiffs have argued elsewhere that EPA superseded its 1997 $PM_{2.5}$ guidance by promulgating a regulation in 2007. *See, e.g.* Appellants Reply on Emergency Motion For Preliminary Injunction at 10 (citing 70 Fed. Reg. 20,586, 20,660 (Apr. 25, 2007)). But the regulation that Plaintiffs have cited only applies in Clean Air Act "nonattainment" areas, 70 Fed. Reg. 20,586/1, while the project is in an "attainment" area, Govt. SER 118 (EIS at 3.10-5).

allege. Br. 44.

The Plaintiffs' last attack on BLM's treatment of $PM_{2.5}$ concerns a well-intentioned informational statement by the agency. In commenting on the particulate air quality analysis in the Draft EIS, Plaintiffs repeatedly demanded specific information about $PM_{2.5}$ emissions. *See* Govt. SER 172, 189-190 (EIS Appx. F at 53, 133-134). As discussed above, BLM followed EPA guidance by modeling PM_{10} emissions as a surrogate for evaluating $PM_{2.5}$ impacts. But to respond to Plaintiffs' comments, the agency did still more. Citing EPA materials, it noted that for sources like the Mine Expansion, $PM_{2.5}$ emissions are typically 15% of PM_{10} emissions. Govt. SER 173 (EIS Appx. F at 54).[8] BLM applied that ratio to predict that "impacts of $PM_{2.5}$ would be 15.9 µg/m^3 for 24-hour impacts and 5.8 µg/m^3 for annual impacts"—well below federal standards. *Id.*

Instead of accepting BLM's response to their comment for what it was—a proffer of further information—Plaintiffs challenge it as an

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[8] This ratio came from EPA guidance documents. Govt. SER 228-239 (Background Document for Revisions to Fine Fraction Ratios for AP-42 Fugitive Dust Emission Factors (Feb. 1, 2006)).

attempt to bypass notice-and-comment and patch up a deficient EIS. Br. 14-15. But BLM followed regulatory guidance in its $PM_{2.5}$ analysis; the mere fact that it offered up *more* predictions about $PM_{2.5}$ emissions in response to the Tribe's concern does not mean that the agency's original analysis was defective. By attacking BLM's response to a cursory comment as an attempt to "hide" information, Plaintiffs only highlight their misunderstanding of NEPA and administrative law.

2. BLM evaluated off-site impacts.

Plaintiffs go on to allege that the EIS violates NEPA because it does not analyze the air-quality-related impacts of transporting refractory ore from the Mine Expansion to an existing off-site facility and processing the ore there. Br. 44-46. But BLM explained in the EIS that Cortez is already transporting refractory ore to the relevant facility at the very same rate that it proposes to do under the Mine Expansion. Govt. SER 26, 189 (EIS at 2-34, Appx. F at 133). The ROD and EIS for the Mine Expansion therefore did not need to address off-site transport and processing; those activities would happen "under existing

authorizations" because "[n]o increase in shipping rate is proposed." Govt. SER 26 (EIS at 2-34).

Plaintiffs also complain that "the fact that the shipping rate may remain the same does not mean that the impacts from this processing have been analyzed." Br. 45. But the offsite facility the Plaintiffs are concerned about is regulated under the Clean Air Act and permitted by the State of Nevada. *See* Govt. SER 26 (EIS 2-34). Before issuing and renewing that air emissions permit, the State's Division of Environmental Protection informed the public that "[a]dverse ambient air quality impacts are not expected," made the proposed permit available for review, and invited public commentary. *See* SER 240. Plaintiffs are therefore wrong to suggest that the public "never had an opportunity to review" the impacts the facility might cause. Br. 45.

3. BLM's monitoring plan for groundwater and surface water impacts satisfies NEPA requirements.

As discussed above in Part I.A.3, expanding the mine will require additional dewatering, and BLM expects that dewatering to affect local ground- and surface water resources. But even though BLM has developed computer models to predict the potential impacts, geological

and hydrological complexities make it impossible to be sure which resources will be affected, let alone how much. BLM has therefore required Cortez to comprehensively monitor areas around the mine to figure out where dewatering is causing impacts. Where the monitoring reveals dewatering impacts, Cortez must mitigate them—even by piping in replacement water if necessary. ER 242-243 (ROD at 18-19). Cortez must then *monitor* its mitigation; if one approach is not working, BLM can require another. ER 243 (ROD at 19). BLM's detailed impact models, list of mitigation alternatives, and reservation of future authority easily satisfy its obligation to discuss mitigation measures in "a reasonably thorough" manner. *City of Carmel-By- The-Sea v. U.S. DOT*, 123 F.3d 1142, 1154 (9th Cir. 1997).

Plaintiffs challenge BLM's sensible mitigation plan with factual inaccuracies and legal misstatements. On the factual front, Plaintiffs characterize the groundwater impact mitigation program as "just a plan to initially monitor the impact from the dewatering." Br. 46. That is just wrong. Again, monitoring is a necessary *first step*, and the ROD backs it up by requiring Cortez to affirmatively mitigate ground- and

surface water impacts whenever the State of Nevada and BLM determine that dewatering is adversely affecting public water resources. ER 242-243 (ROD at 18-19).

On the legal front, Plaintiffs would have this Court believe that NEPA requires BLM to analyze the effectiveness of specific mitigation measures in advance, even when neither BLM nor the Plaintiffs can predict what the relevant *impacts* will be. Br. 47. In fact, the statute allows agencies to adopt "conceptual" mitigation plans that "remain[] flexible to adapt to future problems." *Carmel-By-The-Sea*, 123 F.3d at 1154. So when the "exact environmental problems that will have to be mitigated are not yet known," an agency can satisfy NEPA by setting out a monitoring program and a procedure for identifying mitigation strategies when impacts are discovered. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 476-477 (9th Cir. 2000) (in such cases, agency can describe mitigating measures "in general terms and rely on general processes, not on specific substantive requirements"). Applying that rule, the *Okanagan Highlands* court upheld an EIS that predicted mining impacts, required monitoring to determine the "actual" impacts,

and specified processes for determining what mitigation would then be required. *Id.*.

Plaintiffs' brief ignores *Okanagan Highlands*,[9] and clings instead to this Court's earlier decision in *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-1381 (9th Cir. 1998). But *Cuddy Mountain* was a case where an agency knew what impacts would occur in advance; the Forest Service had concluded that a certain timber sale "would result in increased sedimentation" to three specific trout streams. *Id.* at 1380. Moreover, the *Cuddy Mountain* EIS "did not even consider" whether mitigating measures could reduce sedimentation; it contained only a two-paragraph discussion stating that alternative mitigation efforts at *other* streams could compensate, without even saying whether those alternatives "would in fact be adopted." *Id.* at 1380-1381. In contrast, Plaintiffs here admit that nobody can predict

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[9] In prior filings to this Court, Plaintiffs have claimed that the *Okanagan Highlands* EIS is distinguishable because it included "detailed computer models of each mitigation measure—and their effectiveness—models that were subject to full public review." Appellants Reply on Emergency Motion For Preliminary Injunction at 12. The Government is not aware that this Court characterized the *Okanagan Highlands* EIS in that way, nor that the Court's decision turned on such a characterization.

where the Mine Expansion's groundwater impacts might occur, and the Mine Expansion EIS and ROD require Cortez to undertake mitigation measures whenever and wherever government authorities deem them necessary. *Cuddy Mountain* is quite inapposite.

Last, Plaintiffs repeatedly suggest that the ground and surface water monitoring that BLM has required Cortez to conduct is "not proper mitigation" for impacts caused by mine dewatering. Br. 47. As authority, Plaintiffs cite a single decision: *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), *withdrawn*, 2009 WL 605896 (Mar. 6, 2009). But *Alaska Wilderness League* did not involve an EIS.[10] Instead, it involved an agency's decision *not to produce an EIS*. *See, e.g. id.* at 818. To support that decision, the agency had to make a finding of no significant impact (FONSI) in a document called an Environmental Assessment (EA). The agency buttressed its FONSI decision by committing to mitigation efforts that, it claimed, would render any potential impacts "so minor as not to warrant an EIS." *Id.*

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[10] The same is true of *National Parks Cons. Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001), which Plaintiffs have previously cited in support of their anti-monitoring arguments. *See* Appellants Reply on Emergency Motion For Preliminary Injunction at 16-17.

at 828. This Court held that monitoring alone could not avoid the predicted impacts, and that the agency's EA therefore did not support the decision not to produce an EIS. *Id.* at 828-829.

Here, by contrast, BLM recognized from the start that the Mine Expansion would have significant environmental impacts, and it produced an EIS—*not* an EA—to explain what those impacts might be. When an agency produces an EIS, the law is clear: NEPA requires a "discussion of steps that can be taken to mitigate adverse environmental consequences," but does *not* demand that "a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-352 (1989). That requirement "would be inconsistent with NEPA's reliance on procedural mechanisms." *Id.* at 353.

II. PLAINTIFFS CANNOT SHOW THAT THE BALANCE OF HARDSHIPS TIPS IN THEIR FAVOR.

In denying Plaintiffs' injunction request, the District Court correctly applied the Supreme Court's recent decision in *Winter v. Natural Resources Defense Council*, which reiterates the preliminary injunction standard:

> A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."

129 S. Ct. at 376-377 (citations omitted). Based on its review of the evidence presented during the four-day hearing, the District Court stated that it "does not question that the implementation of the Project will irreparably harm the environment." ER 52. At the same time, the District Court credited evidence "establishing the substantial monetary losses [to Cortez] which will occur should the court grant a preliminary injunction." *Id.* And as for the public consequences of a preliminary injunction, the District Court also credited evidence "through the testimony of an expert witness, a representative of Lander County, affected contractors and sub-contractors, and Western Shoshone tribal representatives in favor of the Project, which demonstrates a great likelihood of substantial harm to both the local and state economies should the Project be delayed." *Id.*

Plaintiffs' argument that the district court abused its discretion in weighing the equities amounts to an assertion that environmental injuries always outweigh economic concerns. This is not the law. In fact, this Court recently and expressly rejected such a rule, going on to say that injunctions to prevent asserted environmental injury are particularly inappropriate where, as in this case, "the plaintiffs are not likely to succeed on the merits of their claims." *Lands Council v. McNair*, 537 F.3d 981, 1004-05 (9th Cir. 2008) (en banc). Plaintiffs also hint that the Ninth Circuit announced a presumption in favor of preliminary injunctions against *mining* in *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 472 F.3d 1097 (9th Cir. 2006). But while this Court issued an injunction pending appeal in that case, the situation was quite different. Crucially, the plaintiffs there had "persuasively" argued that the mine would violate the Clean Water Act, the district court had failed to make *any* findings on the balance of hardships, and the mining company had conceded that work did not need to begin immediately. *See id.* at 1100-1101. None of those things is true here.

After affording the Plaintiffs a four-day hearing to present their factual claims, the district court sensibly denied the preliminary injunction. Plaintiffs have done nothing to show that the district court abused its discretion in doing so, especially given its conclusion that they had little chance of ultimately prevailing on the merits.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Government is not aware of any related cases.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7) AND CIRCUIT RULE 32-1 FOR CASE NO. 09-15230

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 8,630 words.

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CERTIFICATE OF SERVICE
FOR CASE NO. 09-15230

I certify that I electronically filed the foregoing Brief for the Federal Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 3, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I served a copy of the Government's Supplemental Excerpts of Record on each of the following parties by overnight delivery.

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