No. _____

In The
Supreme Court of the United States

NATIONAL MINING ASSOCIATION,

Petitioner,

v.

RYAN ZINKE,
SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a provision of the Federal Land Policy and Management Act of 1976, Congress delegated to the United States Department of the Interior authority to withdraw, for up to 20 years, large tracts of federal lands from availability for mineral development under the Mining Law of 1872, as amended. Congress included in the same provision a right of legislative veto over any large withdrawal, but all now agree the legislative veto violates the Presentment Clause.

The question presented is:

Can Congress's delegation to the Department of the Interior of withdrawal authority over large tracts of land survive without the legislative veto right that Congress included as a check on the exercise of that authority?

PARTIES TO THE PROCEEDINGS

Petitioner National Mining Association was the Appellant in Ninth Circuit No. 14-17350. The Arizona Utah Local Economic Coalition and Metamin Enterprises USA, Inc. were Appellants in consolidated case No. 14-17351. The American Exploration & Mining Association was Appellant in consolidated case No. 14-17352. Gregory Yount was Appellant in consolidated case No. 14-17374.

Respondents Ryan Zinke, Secretary of the Interior; United States Department of the Interior; Michael Nedd, Acting Director, Bureau of Land Management; Bureau of Land Management; George E. Perdue, Secretary of Agriculture; United States Department of Agriculture; and United States Forest Service were Appellees in the consolidated appeals. Grand Canyon Trust, Sierra Club, National Parks Conservation Association, Center for Biological Diversity, and Havasupai Tribe were Intervenor-Appellees in the consolidated appeals.

RULE 29.6 STATEMENT

The National Mining Association states that it has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

This case presents an important question of law affecting the availability of hundreds of millions of acres of federal land for mineral and other development: whether the Ninth Circuit erred in applying the test in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987), for determining when an unconstitutional legislative veto provision is severable from the remainder of the statutory provision to which it attached, and thus whether the remainder of that provision may stand or must fall. Here, the effect of the lower court's misapplication of *Alaska Airlines* has been to revive an implied, unlimited delegation of withdrawal authority to the Executive flatly contrary to Congress's express rescission of all such implied delegations in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* ("FLPMA"). This Court's review is imperative not only to reaffirm *Alaska Airlines*, but also to effectuate Congress's plain intent in FLPMA to rescind any broad delegations of withdrawal authority to the Executive and replace them with carefully circumscribed withdrawal authorities.

The U.S. Constitution's Property Clause vests Congress with power to dispose of and regulate federal lands. All Executive Branch authority in that regard devolves from Congress. In 1915, this Court acknowledged that much of Congress's Property Clause power had been implicitly delegated to the Executive due to congressional inaction and acquiescence almost since the Nation's founding. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 471 (1915) (recognizing Executive

Branch's implied authority to withdraw federal lands from availability for mineral and nonmineral development, subject to Congress's right to disaffirm). Among those implied delegations was the essentially unlimited authority of the Department of the Interior ("Interior") to withdraw public lands from availability for mineral resource development ("location," in mining parlance) under the Mining Law of 1872.

Sixty-one years later, Congress finally reasserted its Property Clause power in a rather extraordinary manner. In the text of FLPMA, Congress abrogated *Midwest Oil*, expressly rescinded any implied delegations to the Executive of withdrawal authority over federal lands, and enacted three carefully circumscribed delegations of authority to Interior: one for emergency withdrawals for up to three years; another for withdrawals of lands up to 5,000 acres indefinitely; and the third for lands over 5,000 acres for up to 20 years. Unlike the first two, which Interior could exercise unilaterally, Congress subjected the third to strict congressional oversight: within the statutory provision effecting the delegation, FLPMA section 204(c), 43 U.S.C. § 1714(c), Congress required the Secretary to report any large withdrawals to Congress and specifically retained its authority to override any large withdrawal through legislative veto. The era of unlimited Executive authority to withdraw public lands was over.

Then, in *INS v. Chadha*, 462 U.S. 919 (1983), this Court held that legislative veto provisions violate the Constitution's Presentment Clause. All now agree

that, under *Chadha*, the legislative veto in section 204(c) is unconstitutional. What, then, becomes of the remainder of that provision, which but for the legislative veto – Congress's chosen remedy against Executive impingement on Congress's authority over federal lands – seemingly grants Interior essentially unlimited and renewable authority to withdraw from location huge swaths of federal land?

The answer under *Alaska Airlines* is abundantly clear: the delegation of withdrawal authority for lands over 5,000 acres fails along with the legislative veto. *Alaska Airlines* requires courts to "consider the nature of the delegated authority that Congress made subject to a veto," to be attentive to instances where, as here, "the absence of the veto necessarily alters the balance of powers" between the branches of government, and to remember that "[s]ome delegations of power to the Executive . . . may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." 480 U.S. at 685. Given that Congress specifically rescinded any implied delegation of withdrawal authority (expressly abrogating this Court's decision in *Midwest Oil*) and, for lands over 5,000 acres, expressly conditioned its new delegation of authority upon retention of a legislative veto, it is hard to fathom how the delegation language of section 204(c) can survive absent the veto.

The Ninth Circuit went another direction entirely, reasoning that "the ordinary process of legislation" – that is, Congress's power to enact a new law any time

Interior makes a land withdrawal to which Congress objects – is "an obvious substitute for the legislative veto." *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 862 (9th Cir. 2017). Were this true, it would always be true for all laws containing unconstitutional legislative veto provisions, obviating a need for an *Alaska Airlines* inquiry. But the fallacy in the Ninth Circuit's reasoning is evident: the legislative veto contemplated by section 204(c) would have required only a joint resolution of disapproval passed by a majority vote of each house; as the court acknowledged, a new law, on the other hand, would necessarily be subject to the possibility of a presidential veto, which could be overcome only by a two-thirds vote of each house. *Id*. Thus, the "ordinary process of legislation" is by no means an "obvious substitute for the legislative veto." It simply requires *much more* of Congress to set aside an objectionable withdrawal without the veto.

Moreover, the Ninth Circuit's decision "necessarily alters the balance of powers" between the Legislative and Executive Branches, shifting it decisively back toward the Executive notwithstanding Congress's express intent in FLPMA to reclaim its powers under the Property Clause and grant the Executive only limited delegated authority subject to congressional oversight.

This Court should grant *certiorari* to reaffirm the rule in *Alaska Airlines* for determining when a statutory provision may survive without the legislative veto Congress required, to effectuate Congress's clear intent in FLPMA to reclaim its power under the Property Clause, and to ensure the availability of hundreds of

millions of acres of federal lands for valuable mineral development under the laws enacted by Congress.

OPINIONS BELOW

The opinion of the court of appeals is reported at 877 F.3d 845 (9th Cir. 2017), and reprinted in the Appendix ("App.") at 1a. The opinion of the district court is reported at 933 F. Supp. 2d 1215 (D. Ariz. 2013), and reprinted at App. 66a.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, provides in relevant part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

Relevant statutory provisions from the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.*, are reproduced at App. 272a-284a.

STATEMENT

I. STATUTORY BACKGROUND

The Constitution's Property Clause vests Congress with plenary authority over management and regulation of the federal public lands. U.S. Const. art. IV, § 3, cl. 2. Throughout the Nation's early history, though, the Executive Branch carried out "hundreds" of withdrawals under what this Court described as "implied" authority conferred through "the acquiescence of Congress." *Midwest Oil Co.*, 236 U.S. at 462, 478, 482.

Eventually, Congress commissioned a "comprehensive review" of the public land laws and agency implementation practices to "determine whether and to what extent revisions thereof are necessary." Pub. L. No. 88-606, § 2, 78 Stat. 982 (1964); App. 10a-11a. The Public Land Law Review Commission's resulting report observed that the Executive used withdrawals "in an uncontrolled and haphazard manner." *See* Ninth Circuit Excerpts of Record ("ER") 94.[1] The Commission recommended that "Congress should not delegate broad authority" for "withdrawals and reservations"

[1] U.S. Public Land Law Review Comm'n, *One Third of the Nation's Land: A Report to the President and to Congress* (1970).

that "limit[] permissible types of uses on tremendous acreages of public land in order to further administrative land policies." ER93. Instead, as "an agent of Congress," the Executive's "authority should be clearly defined," "limited and exercised only within prescribed statutory guidelines." ER98-99.

Congress took these recommendations to heart in 1976 when passing FLPMA, constraining Executive withdrawal authority in several ways. First, Congress expressly sought to "delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4); App. 272a. FLPMA thus "repeal[ed]" 29 statutes and expressly revoked the "implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459)." Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976); App. 283a. Instead, and "*only* in accordance with the provisions *and limitations*" provided, Congress allowed the Secretary to make "emergency" withdrawals under certain circumstances for no more than three years, and to withdraw lands of less than 5,000 acres without legislative oversight. 43 U.S.C. § 1714(d)-(e); App. 279a-280a. For large withdrawals – those of more than 5,000 acres – Congress required the Secretary to report to Congress, and Congress retained the authority to override the withdrawal through legislative veto. 43 U.S.C. § 1714(c); App. 276a-279a.

This withdrawal authority extends to lands subject to the Mining Law of 1872, as amended (the "general mining laws"), including not only land managed

by Interior's Bureau of Land Management ("BLM") but also the U.S. Forest Service. The general mining laws declare "all valuable mineral deposits in [federal lands] . . . shall be free and open to exploration and purchase. . . ." 30 U.S.C. § 22; *see also* App. 9a-10a (discussing Congress's exercise of its Property Clause authority through the general mining laws).

Mineral withdrawals greatly restrict the permissible uses of federal lands. Given the vast amount of federal land managed by BLM and the Forest Service,[2] these withdrawals significantly reduce domestic mineral production and associated economic activity.

II. FACTUAL BACKGROUND

This case concerns Interior's withdrawal of over one million acres of mineral lands in northern Arizona, ostensibly pursuant to FLPMA section 204(c). *See* App. 8a-9a. Significantly, the withdrawal includes land "expected to be [the] major source of future uranium production within the United States." Warren I. Finch, *Descriptive Model of Solution-Collapse Breccia Pipe Uranium Deposits*, in Developments in Mineral Deposit Modeling 33, 33 (James D. Bliss ed., 1992) (U.S. Geological Survey Bulletin 2004), https://pubs.usgs.gov/bul/2004/report.pdf. The uranium deposit's characteristics allow development with a far smaller environmental footprint than alternatives. Congress has

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[2] See Carol Hardy Vincent, et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data Summary* (Mar. 3, 2017), https://fas.org/sgp/crs/misc/R42346.pdf.

therefore repeatedly left this area open for development, while restricting other potential areas in the vicinity of Grand Canyon National Park. *See, e.g.*, Arizona Wilderness Act of 1984, Pub. L. No. 98-406, 98 Stat. 1485, 1488, 1490, 1494 (1984) (identifying certain lands for Wilderness designation but specifically *releasing* for multiple-use management the federal lands the Secretary withdrew here).

On July 21, 2009, Interior published a notice of intent to withdraw approximately one million acres of federal land near the Grand Canyon from the location and entry of new mining claims under the general mining laws for up to 20 years, subject to valid existing rights. 74 Fed. Reg. 35,887. Interior then prepared an Environmental Impact Statement under the National Environmental Policy Act ("NEPA"). ER17-18. On January 9, 2012, the then-Secretary issued Public Land Order 7787, withdrawing the lands for 20 years. ER69-87; 77 Fed. Reg. 22,563 (Jan. 18, 2012). This withdrawal occurred over the objection of the BLM Advisory Committee established under FLPMA. ER161.

Contemporaneously, Interior provided Congress notices and information intended to comply with FLPMA sections 204(c)(1) and (2), initiating the 90-day period for Congress to terminate the withdrawal through legislative veto. *See* ER19. Lacking legislative veto authority, the Chair of the U.S. House of Representatives Natural Resources Committee expressed strong opposition to the withdrawal. Letter from Rep. Doc Hastings & Rep. Rob Bishop to Kenneth Salazar, Sec'y of the Interior, https://naturalresources.house.gov/

uploadedfiles/05_23_12_hastings_ltr_to_sec_salazar.pdf. The withdrawal remains in effect.

III. PROCEEDINGS BELOW

A. District Court Opinion

Four lawsuits challenged Interior's withdrawal. Relevant here, the U.S. District Court for the District of Arizona agreed with both parties that the FLPMA legislative veto "permitting Congress to terminate a withdrawal by concurrent resolution is unconstitutional" under this Court's decision in *Chadha*. The court ruled, however, that the legislative veto language was severable from the remainder of the statutory provision, leaving the Secretary with unconstrained large-scale withdrawal authority. App. 67a-68a, 70a-71a.

B. Ninth Circuit Opinion

The Ninth Circuit affirmed. It posed the question presented as whether Congress would have preferred "no statute at all" to the provision with the legislative veto excised. App. 32a-33a (quoting *Hamad v. Gates*, 732 F.3d 990, 1001 (9th Cir. 2013)). In finding the answer to that question to be "no," the appellate court relied upon FLPMA's severability clause and what the court perceived as Congress's "recognized desire for executive authority for withdrawals of federal lands from new mining claims." *Id.* Further, the court cited the ability of Congress to pass legislation "vacating the withdrawal, presenting the proposed legislation to the President, and (if necessary) overriding the President's

veto." App. 27a. The Ninth Circuit thus excised from the provision, section 204(c)(1), only the sentence containing the legislative veto language; it left intact the remainder of that provision, including the language delegating large-scale withdrawal authority (now, of course, without the constraint on excess previously provided by the legislative veto).

REASONS FOR GRANTING THE PETITION

The appellate court's decision effectively restores to the Executive the unlimited, large-scale withdrawal authority Congress specifically rescinded in FLPMA. The appellate court accomplished this by misapplying this Court's ruling in *Alaska Airlines* regarding the severability of statutory legislative veto language from the substantive provisions to which that language attaches. This case provides the Court its first opportunity to review the continued validity of the large-scale withdrawal authority in FLPMA in the absence of the undisputedly unconstitutional legislative veto embedded within the delegation, the opportunity to reaffirm the rule of *Alaska Airlines*, and the opportunity to ensure the beneficial public use of hundreds of millions of acres of federal lands in accord with Congress's express intent.

In the decision below, the Ninth Circuit never evaluated whether large-scale withdrawal authority unchecked by the legislative veto would "function in a manner consistent with the intent of Congress" and

never considered both the "importance of the [legislative] veto in the original legislative bargain" and the nature of the "delegated authority" at issue. *Alaska Airlines*, 480 U.S. at 685. Instead, it applied a standard without foundation in this Court's precedent – whether Congress could pass legislation undoing any future objectionable withdrawal – and misapplied this Court's jurisprudence regarding the importance of congressional intent when considering the severability of a legislative veto. First, the rationalization that the existence of a standard legislative remedy supports severability is nonsensical. Under that reasoning, no court would ever find an unconstitutional legislative veto unseverable. More troubling, that observation is akin to stating that because Congress can always override an *ultra vires* Executive action through legislation, the Judiciary need never pass on the legality of that action. Second, the analysis cannot simply turn on whether Congress would have enacted a wide-ranging, multipurpose, foundational statute such as FLPMA without a legislative veto applying only to one subsection; the answer would almost always be "yes." Rather, the relevant question is whether, knowing the legislative veto is unconstitutional, Congress would have delegated the particular large-scale land withdrawal authority subject to it.[3]

[3] Even with this withdrawal authority severed from FLPMA, Interior would retain short-term large-scale withdrawal authority.

As all parties, the District Court, and the Ninth Circuit agree, the legislative veto for large-scale withdrawals in FLPMA section 204(c)(1) is unconstitutional. ER19; App. 25a. The issue presented for the Court's consideration is the appropriate remedy: should the Court strike the integrated text of section 204(c)(1) – which ties the authorization of large-scale withdrawals to the unconstitutional option for congressional override – rather than segmenting that concise provision to fashion a new provision granting the Secretary unfettered discretion over large-scale withdrawals? This Court's jurisprudence and the text, context, legislative history, and policy of FLPMA all point to the former. The entirety of the FLPMA section 204(c)(1) provision must be stricken. There is strong evidence that Congress would never have granted section 204(c)(1) large-scale withdrawal authority without the ability to override withdrawals through legislative veto, because doing so would eviscerate the careful power balance Congress struck in delegating that authority subject to a veto right.[4]

[4] The unconstitutional restriction on Interior's authority is as follows: "The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and 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." App. 276a.

I. THE NINTH CIRCUIT OVERLOOKED A CRITICAL ELEMENT OF THIS COURT'S ANALYTICAL FRAMEWORK FOR DETERMINING THE SEVERABILITY OF A LEGISLATIVE VETO.

When considering whether and how to sever an unconstitutional statutory provision from the remainder of the statute courts ask whether, with the unconstitutional portion severed, "the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (emphasis in original). Statutory language cannot be severed if "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Id*. at 684 (internal quotation marks and citations omitted). Although another element of the analysis typically asks whether the remaining language is "fully operative as a law,"[5] this element carries less weight when the stricken unconstitutional provision is a legislative veto, "which by its very nature is separate from the operative provisions of the

[5] Courts ordinarily apply a presumption of severability in carrying out this analysis when a severability clause (providing for excision of any provision held invalid) is triggered. *Alaska Airlines*, 480 U.S. at 686. This presumption of severability is rebuttable by "strong evidence" that Congress would not have enacted other language in the statute in the absence of the offending provision. *Id.* FLPMA contains a severability clause. *See* App. 284a. However, as discussed below, FLPMA's severability clause does not save the large-scale withdrawal authority from severance. In fact, it supports severance of all of the section 204(c)(1) provision.

substantive provisions of a statute." *Id.* at 684-85 (internal quotation marks and citations omitted).[6]

In *Alaska Airlines*, this Court evinced a particular concern for how a statute would operate without a legislative veto, for "the absence of the veto necessarily alters the balance of powers" between the branches of government. *Id.* at 685.

> Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Some delegations of power to the Executive . . . may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism.

Id. The Ninth Circuit wholly failed to acknowledge and apply this last element when deciding that the words comprising the unconstitutional legislative veto alone could permissibly be severed, leaving in place the very delegation of authority Congress sought to rein in through FLPMA. Instead of taking care to scrutinize the intent behind the delegation of authority and the legislative veto, the Ninth Circuit flipped the analysis, reasoning that its finding "[t]hat the offending portion of FLPMA is a legislative veto provision further strengthens the severability presumption." App. 27a. A

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[6] "The independent operation of a statute in the absence of a legislative-veto provision thus could be said to indicate little about the intent of Congress regarding severability of the veto." *Id.* at 685.

faithful application of the Court's ruling in *Alaska Airlines*, as discussed *infra*, makes plain the error of the Ninth Circuit.

The Ninth Circuit also erred in focusing not on the purpose of and power balance reflected in the legislative veto itself, but rather on the other requirements attendant to the large-scale withdrawal authority. In the Ninth Circuit's estimation, the other procedural requirements for Interior's exercise of large-scale withdrawal authority (primarily notice and reporting), mitigated the excision of the legislative veto. App. 28a-30a. But *only* the legislative veto among those conditions would have the substantive effect of reversing a withdrawal and protecting Congress's Property Clause power. Only the legislative veto among those conditions would have given effect to Congress's abrogation of *Midwest Oil* and its rescission of all implied withdrawal authority. By justifying its decision with reference to other, inapposite statutory language, the Ninth Circuit compounded its error.

II. REVIEW IS WARRANTED TO CLARIFY THE CORRECT SEVERABILITY STANDARD AND REVERSE THE NINTH CIRCUIT'S IMPERMISSIBLE RECRAFTING OF FLPMA.

The Court should grant *certiorari* to correct the Ninth Circuit's mistaken interpretation of FLPMA's text, context, legislative history, and policy, and its application of this wrongheaded interpretation to its

even more wrongheaded articulation of the standard for severability of legislative vetoes.

First, words matter. FLPMA's *text* provides "strong evidence" that the section 204(c)(1) legislative veto was an indispensable element of Congress's design to constrain the Executive's large-scale withdrawal authority. Prior to FLPMA, this Court recognized the implied – and unbounded – authority the Executive Branch had enjoyed in the absence of congressional action. *Midwest Oil*, 236 U.S. at 482-83. FLPMA expressly repealed this unconstrained withdrawal authority, in its place carefully "delineat[ing] the extent to which the Executive may withdraw lands without legislative action." App. 272a. For withdrawals of 5,000 acres or more, Congress reserved to itself veto power. App. 276a-277a. Congress further prohibited any withdrawal not "in accordance with the provisions *and limitations*" of section 204. App. 275a (emphasis added). Severing only the unconstitutional legislative veto sentence from section 204(c)(1) effectively would reinstate the unbounded Executive authority that Congress specifically meant to end.

Second, location matters. The legislative veto language resides in the very same subparagraph that delegates the withdrawal authority the veto was meant to constrain. *See* App. 276a-277a. This identity of location strongly indicates that the legislative veto and large-scale withdrawal authority must "stand or fall as a unit." *Planned Parenthood of Ctr. Mo. v. Danforth*, 428 U.S. 52, 83 (1976).

Notably, Congress subjected neither section 204(d) (small-tract withdrawal authority) nor section 204(e) (emergency withdrawal authority) to a legislative veto. If only the legislative veto power in FLPMA section 204(c) is severed (without the adjoined withdrawal authority), the Secretary would have such broad withdrawal authority under section 204(c) that sections 204(d) and (e) become largely superfluous; there would have been no need for separate provisions. The structural anomalies resulting from severance of only the legislative veto language, together with the consequent evisceration of FLPMA's *Midwest Oil* repeal, demonstrate that Congress would not have enacted section 204(c)(1) authority without the legislative veto. Further, FLPMA as a whole, and section 204(c)(1) in particular, do not function in a "*manner* consistent with the intent of Congress" if only the veto is severed. *Alaska Airlines*, 480 U.S. at 685.

Third, purpose matters. FLPMA's legislative history demonstrates Congress's foremost intent to sharply limit executive withdrawal authority. Members of the House spoke of the legislative veto as "[o]ne of the most important" and "essential" parts of the bill. 122 Cong. Rec. 23,436-37 (1976). Congress's ultimate delegation of FLPMA large-scale withdrawal authority reflects a compromise that turned on the precise limitations and oversight mechanisms embedded in the statute. Congress would not have enacted the broader large-scale withdrawal authority that would exist under section 204(c)(1) without the legislative veto, the heart of the delicate compromise reached.

Fourth, policy matters. FLPMA section 204(c)(1) represents a careful balancing of Executive authority against Congress's plenary power under the Property Clause. FLPMA demonstrates Congress was unwilling to delegate its Property Clause authority over large-scale withdrawals without the strong oversight mechanism embodied in the legislative veto. Recrafting section 204(c) by simply excising the legislative veto would be "incompatible with the plenary power of Congress" to control public-lands legislation under the Property Clause. *Miller v. Albright*, 523 U.S. 420, 456-57 (1998) (Scalia, J., concurring in judgment). Congress's constitutional control over public lands is not respected if the Judiciary severs only the legislative veto and rewrites FLPMA to create broader executive authority to withdraw large expanses of public lands than that delegated, and is only honored if the large-scale withdrawal authority falls with the unconstitutional legislative veto, leaving future legislation on large-scale withdrawals to Congress.

In short, *all* of section 204(c)(1) must be severed.

It may well be that, in some circumstances, the legislative veto is not integral to the authority Congress delegated – after all, Congress drafted over 200 statutes with one.[7] But here, Congress commissioned a report recommending limited delegation of authority; Congress expressly repealed any implied authority of the Executive; and Congress integrated the legislative veto into the very subsection delegating the authority

[7] *Chadha*, 462 U.S. at 968 (White, J., dissenting).

in question. Stronger evidence of intent *not* to delegate absent the veto override would be hard to find.

A. The Ninth Circuit Ignored the Plain Language of FLPMA Reflecting the Careful Balance Congress Struck Between Executive and Legislative Power in Delegating Limited Large-Scale Withdrawal Authority.

The Ninth Circuit committed reversible error by overlooking not only the plain language of FLPMA, but also this Court's instructions as to how the language affects severability of an unconstitutional provision.

1. FLPMA Section 204 Prescribes the Only Conditions Acceptable to Congress for Large-Scale Withdrawal Authority, Including the Strong Congressional Oversight a Legislative Veto Provides.

The Court need look no further than the plain text of FLPMA section 204 to discern that the Ninth Circuit erred in severing only the language comprising the legislative veto from the delegation of large-scale withdrawal authority. Congress specified that "the Secretary is authorized to make . . . withdrawals . . . *only in accordance with the provisions and limitations of this section*." App. 275a (emphasis added). Only means only. *Union Station Assocs., LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1218, 1225 (W.D. Wash. 2002)

(interpreting statute providing "*only* the defenses set forth" in a subsection as not countenancing additional exceptions) (emphasis in original) (internal quotation omitted). The legislative veto is unquestionably a "limitation," which Congress imposed on Interior's authority. As such, Congress intended the Executive's large-scale withdrawal delegation to rise and fall with the legislative veto.

FLPMA does contain a severability clause, which provides: "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." § 707, 90 Stat. at 2794 (codified at notes to 43 U.S.C. § 1701); App. 284a. But even if this clause created any presumption of severability with respect to section 204(c)(1)'s legislative veto language alone – a proposition contrary to the clause's specification of severing a "provision"[8] – section 204(a)'s more specific prohibition against any withdrawal not in accordance with the limitations set forth in section 204 overcomes that presumption. The Ninth Circuit ignored entirely this express restriction on Congress's delegation of authority, reason enough to grant *certiorari* and reverse.

The Supreme Court's precedent in *Nguyen v. INS*, 533 U.S. 53 (2001) – another case the Ninth Circuit ignored – confirms that severing all of section 204(c)(1) from the statute is the only remedy in keeping with Congress's intent under section 204(a). In *Nguyen*, a lawful permanent resident of the U.S. challenged the

[8] *See infra* § II.A.3.

rejection of his claim to citizenship on the grounds that one of the Immigration and Nationality Act's ("INA") naturalization requirements was unconstitutional. 533 U.S. at 57-58. Like FLPMA, the INA contains a general severability clause. Pub. L. No. 414, § 406, 66 Stat. 163, 281 (1952). In language equivalent to that in FLPMA section 204(a), the INA limits naturalization to "the manner and under the conditions prescribed in this subchapter and not otherwise." 8 U.S.C. § 1421(d).

In finding the naturalization requirement constitutional, the Court explained the difficulties inherent in severing any unconstitutional portion of the statute, given the limiting instruction in the INA:

> Petitioners ask [the Court] to invalidate and sever [the allegedly unconstitutional conditions on citizenship], but it must be remembered that severance is based on the assumption that Congress would have intended the result. In this regard, it is significant that, although the [INA] contains a general severability provision, Congress expressly provided . . . that "[a] person may only be naturalized as a citizen of the United States and in the manner and under the conditions prescribed in this subchapter and not otherwise.". . . [Citizenship under s]ection 1409(a), then, *is subject to the limitation imposed* by § 1421(d).

Nguyen, 533 U.S. at 72 (internal citations omitted) (emphasis added); *accord Miller*, 523 U.S. at 457-58 (Scalia,

J., concurring) (explaining the "specific" limiting language governs the "general" severability clause).

FLPMA section 204(a)'s limitation provides a parallel restriction to that in the INA. Section 204(a)'s delegation of withdrawal authority "only in accordance with the provisions and limitations of . . . section [204]" constitutes precisely the sort of restriction that this Court found required broad severance of the authority tethered to an unconstitutional limit on that authority. App. 275a. Thus, *Nguyen* confirms that the Ninth Circuit erred in striking only the legislative veto without the large-scale withdrawal authorization that it purported to limit.

2. Congress Legislated Its Intent in FLPMA's Policy Statement and Abrogation of *Midwest Oil*.

FLPMA's opening declaration of policy expresses Congress's intent to exercise forceful oversight upon Executive land management decisions and to precisely delineate the scope of – and limits on – Executive withdrawal authority. In particular, FLPMA directs that:

> *the Congress* exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress *delineate the extent to which the Executive may withdraw lands without legislative action*.

App. 272a (emphases added). This is the policy set forth in FLPMA for "Congressional oversight of withdrawals,"

H.R. Rep. No. 94-1163 at 4 (1976), meant to constrain executive withdrawal authority, confirming that Congress would not have granted unrestricted 20-year large-scale withdrawal authority to the Secretary absent the now-unconstitutional legislative veto power.

The Ninth Circuit quoted this policy in the "Background" section of its opinion, App. 11a, but apparently forgot about it by the time it analyzed the legislative veto. Instead, the Ninth Circuit adopted the district court's framing of FLPMA as contemplating a "controlled delegation" of withdrawal authority. ER5, ER24. However, Congress's intent in FLPMA was to rein in the Executive, not provide it unrestricted authority. *See* App. 272a-274a. That Congress desired a "controlled delegation" means just that: Congress intended that it retain control over withdrawals implemented by the Executive, and Congress did so by including a legislative veto over large-scale withdrawals. *Compare City of New Haven, Conn. v. United States*, 809 F.2d 900, 908 (D.C. Cir. 1987) (in granting executive authority subject to veto, Congress's intent was "to *control* rather than *authorize*" executive action) (emphases in original). Severing the legislative veto apart from the authority which it was meant to constrain fails to give effect to this congressional intent.

Further, Congress reinforced the conviction expressed in its policy statement in FLPMA section 102 by repealing nearly all of the Executive's prior withdrawal authority. Specifically, section 704(a) "repealed" 29 statutes on withdrawals and "the implied authority

of the President to make withdrawals and reservations resulting from the acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459)." App. 283a. Thus, the Legislative Branch wiped clean the slate such that Congress could expressly "delineate," and set specific conditions on, any new executive withdrawal authority granted – as stated in FLPMA section 102(a)(4).

If only the legislative veto in FLPMA section 204(c) is severed, this would restore, for 20 years at a time (renewable indefinitely), the unfettered large-scale executive withdrawal authority that FLPMA section 704(a) expressly revoked. This would violate Congress's manifest intent and flout Congress's repeal of implied withdrawal authority.

3. FLPMA's Severability Clause Requires That the Entirety of the Relevant "Provision" Be Severed.

The severability clause Congress included in FLPMA does not undermine the foregoing analysis. It instructs that "[i]f any *provision* of this Act . . . is held invalid, the remainder of the Act . . . shall not be affected thereby." App. 284a (emphasis added). The Ninth Circuit erred in ruling that this requirement allows the severance of only the language within FLPMA section 204(c)(1) comprising the legislative veto. App. 34a-35a. The legislative veto language enmeshed within section 204(c) is not in a separate "provision" or subsection; it is part of section 204(c)(1), along with the delegation it constrained. The narrowest "provision" to

which the severability clause might refer, then, is section 204(c)(1) *as a whole*.

Congress acted with purpose when it opted to combine the large-scale withdrawal authority and legislative veto in a single subsection. *Cf. Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 582 (1985) (where scheme for pesticide use, registration, and compensation "is integrated in a single subsection that explicitly ties the follow-on registration to the arbitration," a finding that the arbitration requirement was unconstitutional would support the remedy of enjoining follow-on registration entirely); *see also Planned Parenthood*, 428 U.S. at 83 (sentences intertwined in the same section of a statute "must stand or fall as a unit"). Congress could have placed the legislative veto in a separate subsection (for example, the veto language could have been designated as section 204(c)(2), with the notice provisions following as section 204(c)(3)); it did not. Under the plain language of FLPMA's severability clause, then, the entirety of the section 204(c)(1) "provision" must be severed. The Secretary's large-scale withdrawal authority must fall with the veto.

B. The Ninth Circuit Disregarded the Structural Context of the Legislative Veto That Demonstrates Congress Intended Large-Scale Withdrawal Authority to Stand or Fall with It.

The structural choices Congress made in drafting FLPMA reinforce that section 204(c)(1) large-scale

withdrawal authority cannot survive without the legislative veto.

The first structural choice is Congress's decision to integrate the Secretary's large-scale withdrawal authority and the legislative veto within the very same provision, subsection, and subparagraph. *See* App. 276a. Coupled with section 707's instruction for severance of the entire unconstitutional "provision," *see supra* § II.A.3, this structural choice is a powerful indication that Congress saw the withdrawal authority as "*so interwoven with [the veto] that the section cannot stand alone*." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (emphasis added). Moreover, this choice readily distinguishes the section 204(c)(1) veto from legislative vetoes held severable in other cases. *See Chadha*, 462 U.S. at 959 (severing stand-alone veto provision in section 244(c)(2) of the INA); *Alaska Airlines*, 480 U.S. at 682, 689-90 (unconstitutional veto at subparagraph 43(f)(3) of Airline Deregulation Act held severable from authority subject to veto, separately located at subparagraph 43(f)(1)); *Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300 (11th Cir. 2002) (severing veto language in 43 U.S.C. § 10222(a)(4), concerning the Secretary's adjustment of fees, where the Secretary's ultimate authority to collect fees was contained in separate subparagraphs).

The second is Congress's manifest intent to exert direct oversight and control over large acreage withdrawals in section 204(c), which stands in stark contrast to Congress's delegation of less restricted withdrawal authority under sections 204(d) and 204(e). *See*

supra Statement § I. The contrast between section 204(c)(1)'s legislative-veto limitation on long-term, large-scale withdrawals and the imposition of less severe restrictions on less far-reaching withdrawals compels the conclusion that Congress was unwilling to grant the Secretary unlimited long-term, large-scale withdrawal authority. Except for the mere procedural requirement for notice to Congress, which is no real constraint, without the legislative veto Interior's discretionary large-scale withdrawal authority would be *less* restrictive than that for small-tract and emergency withdrawals. Limiting small-tract withdrawals, while granting unfettered discretion on large-scale withdrawals, thwarts congressional intent.

The Ninth Circuit completely disregarded the context in which the legislative veto appears, *vis-à-vis* other withdrawal authority that Congress delegated. Instead, the Ninth Circuit attributed unwarranted weight to a general severability clause and to other mere procedural requirements, to the exclusion of Congress's careful exercise in power balancing reflected in the legislative veto. Because "the statute created in [the] absence [of the legislative veto] is legislation that Congress would not have enacted," the legislative veto may not be severed alone. *Alaska Airlines*, 480 U.S. at 685. It cannot seriously be argued that the court's task was to evaluate whether Congress would not have enacted the entirety of FLPMA, a statute governing such disparate issues as grazing, rights-of-way, and land acquisition, without the legislative veto over large-scale withdrawals. Rather, in keeping with *Alaska Airlines*'s

focus on legislative intent and the power-shifting inherent in a legislative veto, a court must ask whether Congress would have enacted the *specific statutory text* subject to the veto. Severance of all of section 204(c)(1), leaving intact the Secretary's authority under sections 204(d) and (e), best allows FLPMA to "function in a *manner* consistent with the intent of Congress." *Id*.

C. The Ninth Circuit Misinterpreted FLPMA's Legislative History.

Ultimately, the best evidence of legislative intent is the statutory text. *See Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) ("[A] court should implement the language actually enacted. . . ."); *Cont'l Can Co. v. Chi. Truck Drivers Inc.*, 916 F.2d 1154, 1157 (7th Cir. 1990) ("Only the [statutory] text survived the complex process for proposing, amending, adopting and obtaining the President's signature. . . ."). As described above, FLPMA's plain text and structure instructs that large-scale withdrawal authority exists *only* in conjunction with the legislative veto that accompanied it. Nevertheless, precedent counsels looking to the impetus behind FLPMA's enactment to inform the Court's evaluation of the power balance Congress struck when including the legislative veto, and reveals that Congress's overriding concern with respect to withdrawals was how to rein in the Executive. Yet, the Ninth Circuit turned legislative history on its head, looking to commentary about what did not become the law instead of statements illuminating what did.

1. FLPMA – Including the Legislative Veto – Was Congress's Reaction to an Executive Branch Riding Roughshod over the Property Clause.

Congress enacted FLPMA in response to the chaotic state of affairs that had arisen from Congress's own prior inaction and acquiescence to the Executive's "uncontrolled and haphazard" withdrawals of public lands. App. 74a-75a. In enacting FLPMA, and section 204(c) specifically, Congress responded to the Public Land Law Review Commission's recommendation that Congress "assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public lands . . . and delineating specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action." App. 75a; *see also* Charles F. Wheatley, Jr., *Withdrawals under the Federal Land Policy Management Act of 1976*, 21 Ariz. L. Rev. 311, 319 (1979) ("The delineation by the Act of the specific terms and conditions upon which the Secretary of the Interior can exercise withdrawal power and the persons to whom it may be delegated, make clear that *Congress intended to occupy the entire field permitted under its constitutional authority over the public lands and to control and direct the executive use of withdrawal power*." (emphasis added)).

Congress intended FLPMA to replace "practically all existing executive withdrawal authority" with a design that imposed specific limits and conditions on the Secretary's withdrawal authority – including the

legislative veto. Conf. Rep. at 66; *see also* 122 Cong. Rec. at 23,440 (1976) (Rep. Forsythe) ("[The House bill] repeals [preexisting] withdrawal authority and in its place substitutes a congressional review procedure."). Thus, Congress viewed the legislative veto as a specific replacement for, and safeguard against, the Executive's prior exercise of unlimited withdrawal authority. If only the unconstitutional legislative veto is severed, this would return to the Secretary the sort of unfettered withdrawal authority that the legislative veto was meant to replace.

The legislative history emphasizes Congress's need for strong oversight mechanisms and places special weight on the veto power. At the beginning of the House Report, Congress expressed concern that "[t]he Executive Branch of the Government has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people." H.R. Rep. No. 94-1163 at 1. The report then sets out "major objectives" of the bill in response to this problem, including the need to "[e]stablish procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary of the Interior." *Id*. at 2. Accordingly, the bill included "referral to Congress of withdrawals and extensions of withdrawals of 5,000 acres or more" in the form of a legislative veto. *Id*. at 4.

Congressman Melcher, lead sponsor of the House bill, highlighted how crucial the legislative veto was to Congress's limited delegation to the Secretary to make large-scale withdrawals. For example, he explained

that the provision for Congress to terminate any withdrawal it disapproved of "is congressional oversight responsibility." 122 Cong. Rec. 23,452 (1976). "Since there is now no system of congressional review and congressional oversight of withdrawals, this is the first positive step that Congress has taken to make that responsibility felt and to exercise that responsibility." *Id*. Rep. Skubitz likewise urged that:

> *[o]ne of the most important reasons for adopting this bill is that it provides for Congressional oversight and control over an executive agency* which, at present, is free to act mostly of its own accord. . . . We must end what often has been a historic pattern of casual or even reckless withdrawal of public lands. *It is essential that Congress be informed of, and able to oppose if necessary, withdrawals which it determines not to be in the best interest of all the people.*

Id. at 23,436-37 (emphasis added). Congress rebalanced the scales of power between the Legislative and Executive Branches when delegating large-scale withdrawal authority in FLPMA. The Ninth Circuit ignored Congress's will.

2. The Ninth Circuit Erroneously Attributed Conclusive Weight to Statements Disagreeing with What Ultimately Became the Law.

Instead of crediting the explanations of what eventually became the law, the Ninth Circuit looked to

contrary statements to attempt to prove its point about the irrelevance of the legislative veto – a provision that Congress passed and the President signed. App. 31a-32a. To be sure, some disagreed with the bill's provisions for legislative vetoes over certain withdrawals. ER14, ER37-38. Reps. Udall and Sieberling authored dissenting minority opinions on the bill, collectively writing on behalf of a total of nine representatives. *Id*. But these nine representatives could not persuade Congress even to raise the acreage threshold for veto review, *see* 122 Cong. Reg. 23,436, 23,451, much less to delegate withdrawal authority in the absence of the veto.

FLPMA's legislative history is most aptly compared to that in *City of New Haven*. There, the appellate court considered an unconstitutional legislative veto on proposed deferrals of budgetary appropriations. The court found the legislative history "incontrovertible" as to unseverability:

> When the numerous statements of individual legislators urging the passage of legislation to control presidential impoundments are . . . considered, the evidence is incontrovertible that the "basic purpose" of [the provision] was to provide each House of Congress with a veto power over deferrals. . . . As difficult (and precarious) as it may be at times to reconstruct what a particular Congress might have done had it been apprised of a particular set of facts, we refuse to entertain th[e] remarkable proposition [that Congress would have enacted the provision without the legislative

> veto]. . . . [T]he "*raison d'etre*" of the entire legislative effort was to assert *control* over presidential impoundments.

City of New Haven, 809 F.2d at 907 (emphasis in original). As in *City of New Haven*, here we have a Congress legislating to constrain the Executive Branch, and as in *City of New Haven*, it was "remarkable" for the Ninth Circuit to conclude that Congress would have wanted the large-scale withdrawal authority delegation to remain absent the legislative veto that provided the constraint.

D. The Separation of Powers and Property Clause Concerns Implicated Here Reinforce the Importance of Removing Large-Scale Withdrawal Authority Along with the Veto.

Given that the Property Clause assigns to Congress, not the Executive, the exclusive control over public-land withdrawals, the Judicial Branch cannot and should not rewrite FLPMA section 204(c) to grant the Secretary broader withdrawal authority than Congress was willing to expressly delegate in FLPMA. As the Court explained in construing other FLPMA provisions, "the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). "Nor is the Judiciary licensed to attempt to soften the clear

import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Id.*

That the large-scale withdrawal authority subject to legislative veto under section 204(c)(1) was delegated pursuant to Congress's plenary power under the Property Clause is no mere historical footnote. *See*, *e.g.*, Wheatley, 21 Ariz. L. Rev. at 319. The Property Clause textually commits control over federal lands to Congress, not to the Executive or Judicial Branches. U.S. Const. art. IV, § 3, cl. 2; *see United States v. California*, 332 U.S. 19, 27 (1947) (regarding the Property Clause, "neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power"); *Kidd v. U.S. Dep't of Interior*, 756 F.2d 1410, 1412 (9th Cir. 1985) ("Once Congress has acted in . . . regard [to the public lands], both the courts and the executive agencies have no choice but to follow strictly the dictates of such statutes."). The only corrective result for the unconstitutional legislative veto that honors the Constitution's vesting in Congress of all authority over management of public lands is to sever the large-scale withdrawal authority integrated with and conditioned on the veto. Notably, leading public land law scholars agree that the FLPMA section 204(c) legislative veto is integral to Congress's desire to exercise control under the Property Clause.

> *One of the principal legislative goals in enacting FLPMA was to limit the executive discretionary authority over the public lands.* At the same time, Congress felt a need to delegate

> some of its own authority over the public lands, to avoid being overly burdened with making routine administrative decisions. Congress reconciled these potentially conflicting objectives by delegating to the executive authority subject to various substantive and procedural constraints. *The legislative veto provisions of the Act are the most significant of those constraints.*

Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Land Management Act*, 36 Hastings L.J. 1, 66 (1984) (emphasis added); *see also* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Resources J. 279, 329 (1982) ("[W]hen [withdrawals] are used the FLPMA surrounds the process with new procedures and ultimate congressional checks that can undo executive actions swiftly in egregious cases.").

Recognizing the importance of the legislative veto's constraint on executive withdrawal authority, the leading treatise on public land law agrees that the legislative intent in FLPMA is carried out only if the entirety of FLPMA section 204(c)(1) is stricken:

> It will be difficult to argue that the basic congressional intent underlying FLPMA can be carried out simply by excising the legislative vetoes, because Congress preeminently intended to reassert control over federal land use and classification. Invalidation of the vetoes only would return unfettered and unsupervised discretion to the executive branch,

> the very result that FLPMA was enacted to prevent.

George Coggins & Robert Glicksman, *The legislative veto in public natural resources law – Severance*, 1 Pub. Nat. Resources L. § 4:3 (2d ed. 2011). Consistent with these views, FLPMA's text, structure, legislative history, and policy support severing all of section 204(c)(1) from the remainder of FLPMA, not undermining Congress's intent, the outcome resulting from the Ninth Circuit's decision.

III. THE NINTH CIRCUIT'S ERROR HAS FAR-REACHING IMPLICATIONS FOR THE MANAGEMENT OF FEDERAL LAND IN THE UNITED STATES, WARRANTING THE COURT'S REVIEW.

The policy expressed by Congress in the general mining laws that "the finder of valuable minerals on government land is entitled to exclusive possession of the land for mining and to all the minerals he extracts, has been a powerful engine driving exploration and extraction of valuable minerals, and has been the law of the United States since 1866." *United States v. Shumway*, 199 F.3d 1093, 1098-99 (9th Cir. 1999). A mining claimant "is not a mere social guest of the Department of the Interior to be shooed out the door when the Department chooses." *Id.* at 1103. And yet, with the Ninth Circuit's decision, mining claimants are relegated to "social guest" status by virtue of Interior's now-unchecked withdrawal authority. Indeed, unconstrained large-scale withdrawals are no mere threat. Although

ultimately unconsummated due to a change in presidential administration, BLM had proposed to withdraw approximately ten million acres across six States from location and entry, ostensibly for Greater Sage-Grouse habitat protection. 80 Fed. Reg. 57,635 (Sept. 24, 2015). The Court should take up this case and clarify the importance of Legislative control over large-scale withdrawal authority, consistent with the Property Clause and this Court's jurisprudence.

Under FLPMA section 202(e), "public lands shall be removed from or restored to the operation of the Mining Law of 1872 . . . only by withdrawal action pursuant to" section 204 or pursuant to another Act of Congress. 43 U.S.C. § 1712(e)(3). This text further supports not allowing the withdrawal from the mining laws of over one million acres of public lands, as this action cannot lawfully be taken pursuant to all of FLPMA's section 204's limitations (namely, the opportunity for legislative veto). Moreover, this provision highlights the continuing importance of the general mining laws and the availability of public land for multiple-use purposes, spanning the century until Congress's enactment of FLPMA and beyond.

Interior's withdrawal impermissibly interfered with the general mining laws in a way Congress would not have intended. It cut off the rights to work on and to perfect previously located, but unperfected, mining claims to important uranium deposits in the acres withdrawn. Mining will be allowed only if the examination demonstrates that a valuable mining claim was perfected before the date of this withdrawal and the

predecessor withdrawals (all of which are subject to "valid existing rights"). Even then, mining is subject to a suite of environmental protections and maintenance fees.[9] Accordingly, development of mining claims on federal land occurs only after intensive environmental review and under rigorous mitigation conditions. *See, e.g.*, *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1094 (9th Cir. 2013) (affirming ability of operator to resume uranium mining pursuant to previously approved operations plan).

As the district court found below in recognizing the standing of NMA and other plaintiffs, the "withdrawal has . . . imposed on NMA . . . members an expensive and years-long examination process that rarely occurred before the withdrawal." App. 212a; *see also Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1250 (9th Cir. 2017) (upholding Forest Service Mineral Report required to determine valid existing rights before restarting mine in withdrawn area). The district court also credited plaintiffs' well-supported allegations that "the withdrawal and the complications it presents for location and development of mining claims has significantly reduced the value of existing [mining] claims and the value of claim investments made to date." App. 212a. BLM's own estimate of the economic value of the

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[9] *See*, *e.g.*, the Surface Resources Act of 1955, 30 U.S.C. § 612; the National Environmental Policy Act, 42 U.S.C. § 4332 *et seq*.; the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the National Historic Preservation Act, 54 U.S.C. § 300101 *et seq*.

uranium production that is largely precluded by the one-million-acre withdrawal at issue here is "approximately $3.16 billion." Appellees' Supplemental Excerpts of Record ("SER") 358; *see* SER376, 378. To the rural communities of northern Arizona, $3.16 billion of lost economic activity means a great deal. Moreover, the Nation loses the value of domestic uranium production. *See generally* Brief of the States of Utah, Arizona, Montana, and Nevada as *Amici Curiae*, No. 14-17350, Dkt. 29 at 5 (9th Cir. Apr. 17, 2015).

The withdrawal at issue here is particularly striking for its brazen refutation of congressional intent to leave these lands open for mineral exploration and development under the general mining laws. Arizona Wilderness Act of 1984, *supra* Statement § II; *see also* Letter from Hastings & Bishop to Sec'y Salazar, *supra* 9, at 1 (noting that the withdrawal "voided a bipartisan agreement partially codified in law that has been respected for nearly three decades"); Press Release, H. Comm. On Nat. Resources, Government Scientist Believed Impacts from Arizona Uranium Mining "Grossly Overestimated" in Obama Administration Document (May 23, 2012), https://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=296638 (noting National Park Service staff's acknowledgment of lack of scientific rationale for withdrawal). With the Ninth Circuit's blessing of Interior's abuse of FLPMA's withdrawal authority unchecked by legislative veto, similar Executive actions are sure to recur.

CONCLUSION

Congress would not have delegated the Executive Branch large-scale withdrawal authority absent the legislative veto and would not have intended the authority to stand without it. Severing the Secretary's authority to withdraw broad swaths of public lands along with the legislative veto that was an integral part of Congress's delegation of that authority, and accordingly setting aside the million-acre withdrawal at issue here, is the only remedy that would respect the balance of power Congress struck in FLPMA and leave that statute functioning in a manner consistent with Congress's plain intent to reclaim its Property Clause powers and constrain the Executive Branch's future exercises of those powers.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL MINING ASSOCIATION, *Plaintiff-Appellant*, v. RYAN ZINKE, Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; GEORGE E. PERDUE, Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; BUREAU OF LAND MANAGEMENT; MICHAEL NEDD, acting director, Bureau of Land Management; UNITED STATES FOREST SERVICE, *Defendants-Appellees*, GRAND CANYON TRUST; SIERRA CLUB; NATIONAL PARKS CONSERVATION ASSOCIATION; CENTER FOR BIOLOGICAL DIVERSITY; HAVASUPAI TRIBE, *Intervenor-Defendants-Appellees*.	No. 14-17350 D.C. Nos. 3:11-cv-08171-DGC 3:12-cv-08038-DGC 3:12-cv-08042-DGC 3:12-cv-08075-DGC

ARIZONA UTAH LOCAL ECONOMIC COALITION, on behalf of member the Board of Supervisors, Mohave County, Arizona; METAMIN ENTERPRISES USA, INC., *Plaintiffs-Appellants*, v. RYAN ZINKE, Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; GEORGE E. PERDUE, Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; BUREAU OF LAND MANAGEMENT; MICHAEL NEDD, acting director, Bureau of Land Management; UNITED STATES FOREST SERVICE, *Defendants-Appellees*, GRAND CANYON TRUST; SIERRA CLUB; NATIONAL PARKS CONSERVATION ASSOCIATION; CENTER FOR BIOLOGICAL DIVERSITY; HAVASUPAI TRIBE, *Intervenor-Defendants-Appellees*.	No. 14-17351 D.C. Nos. 3:11-cv-08171-DGC 3:12-cv-08038-DGC 3:12-cv-08042-DGC 3:12-cv-08075-DGC

AMERICAN EXPLORATION & MINING ASSOCIATION, *Plaintiff-Appellant*, v. RYAN ZINKE, Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; GEORGE E. PERDUE, Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; BUREAU OF LAND MANAGEMENT; MICHAEL NEDD, acting director, Bureau of Land Management; UNITED STATES FOREST SERVICE, *Defendants-Appellees*, GRAND CANYON TRUST; SIERRA CLUB; NATIONAL PARKS CONSERVATION ASSOCIATION; CENTER FOR BIOLOGICAL DIVERSITY; HAVASUPAI TRIBE, *Intervenor-Defendants-Appellees*	No. 14-17352 D.C. Nos. 3:11-cv-08171-DGC 3:12-cv-08038-DGC 3:12-cv-08042-DGC 3:12-cv-08075-DGC

GREGORY YOUNT,
Plaintiff-Appellant,

v.

RYAN ZINKE, Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; GEORGE E. PERDUE, Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; BUREAU OF LAND MANAGEMENT; MICHAEL NEDD, acting director, Bureau of Land Management; UNITED STATES FOREST SERVICE,
Defendants-Appellees,

GRAND CANYON TRUST; SIERRA CLUB; NATIONAL PARKS CONSERVATION ASSOCIATION; CENTER FOR BIOLOGICAL DIVERSITY; HAVASUPAI TRIBE,
Intervenor-Defendants-Appellees.

No. 14-17374

D.C. Nos.
3:11-cv-08171-DGC
3:12-cv-08038-DGC
3:12-cv-08042-DGC
3:12-cv-08075-DGC

OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted December 15, 2016*
San Francisco, California.

Filed December 12, 2017

* Case No. 14-17351 was submitted on the briefs without oral argument on the motion of the appellants in that case.

Before: Marsha S. Berzon and Mary H. Murguia, Circuit Judges, and Frederic Block, District Judge.**

Opinion by Judge Berzon

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** The Honorable Frederic Block, United States District Judge for the Eastern District of New York, sitting by designation.

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Katherine Belzowski, Attorney; Ethel B. Branch, Attorney General; Navajo Nation Department of Justice, Window Rock, Arizona; for Amicus Curiae Navajo Nation.

OPINION

BERZON, Circuit Judge:

We consider challenges to the decision of the Secretary of the Interior to withdraw from new uranium mining claims, for up to twenty years, over one million acres of land near Grand Canyon National Park. Determining the appropriate balance between safeguarding an iconic American natural wonder and permitting extraction of a critically important mineral is at the heart of the present dispute.

The fission of uranium atoms into smaller component parts releases a huge amount of energy – enough to sustain a nuclear chain reaction, as scientists discovered in the first half of the last century. The design and construction of nuclear reactors and weaponry followed. In the ensuing years, uranium became, at times, highly valuable, though prices rose and fell dramatically in response to swings in demand. Uranium also entered the cultural lexicon.[1]

In 1947, large quantities of uranium were discovered in Arizona near Grand Canyon National Park, a

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[1] For example, in the heyday of uranium mining, "Moab changed the name of its annual rodeo from Red Rock Roundup to Uranium Days Rodeo." Stephanie A. Malin, *The Price of Nuclear Power: Uranium Communities and Environmental Justice* 37 (1981). "In the 1950s, young women were crowned as Uranium Queen and Miss Atomic Energy." *Id.* Even now, uranium is the subject of its own film festival – the International Uranium Film Festival – featuring several films set in and around the American Southwest. *See* Int'l Uranium Film Festival, http://www.uraniumfilmfestival.org.

treasured natural wonder and World Heritage Site – called, by John Wesley Powell, "the most sublime spectacle in nature." John Wesley Powell, *Canyons of the Colorado* 394 (1895). Northern Arizona saw limited uranium mining until a spike in uranium prices in the late 1970s led to a uranium mining surge in the 1980s and 1990s, when six new mines opened. But the mining boom did not last. With the collapse of the Soviet Union and consequent decommissioning of large numbers of nuclear warheads, demand for uranium dropped dramatically in the 1990s. Uranium production in much of northern Arizona stopped.

Prices spiked again in 2007, and renewed interest in mining operations in the region followed. With that resurgence came concerns about the environmental impact of the extraction of radioactive materials such as uranium.

Reflecting those concerns, then-United States Secretary of the Interior ("the Secretary")[2] Kenneth L. Salazar published a Notice of Intent in the Federal Register to withdraw from new uranium mining claims, for a period of up to twenty years, a tract of nearly one million acres of federally owned public land. *See* Federal Land Policy and Management Act of 1976 ("FLPMA")[3] § 204(c), 43 U.S.C. § 1714 (authorizing the

[2] Although it is the Secretary who has ultimate authority to make a withdrawal, we occasionally refer to the Secretary as "the Interior" to better reflect that the Secretary's withdrawal decision was informed by extensive analysis within the Department of the Interior and its constituent agencies.

[3] See Appendix A for a list of acronyms used in this opinion.

Secretary to make, revoke, or modify such withdrawals subject to certain conditions).[4] After an extended study period, the Secretary issued a Record of Decision ("ROD") in January 2012 announcing the withdrawal of 1,006,545 acres.

Several entities and one private individual opposed to the withdrawal challenged the Secretary's decision in four separate actions filed in the District of Arizona. Parties interested in supporting the withdrawal moved to intervene, including four environmental groups and the Havasupai Tribe. The district court, in two well-crafted opinions, rejected the various challenges to the withdrawal.

I. Background

We begin with a brief history of the political and legislative backdrop against which FLPMA was enacted in 1976.

The Property Clause of the U.S. Constitution vests in Congress the "power to dispose of and make all needful rules and regulations respecting . . . property belonging to the United States," including federally owned public lands. U.S. Const., Art. IV, § 3, cl. 2. Congress has long used its authority under the Property

[4] A "withdrawal" means "withholding [of] an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. § 1702(j).

Clause to permit the purchase of mining rights and exploration on federal lands, most notably in the General Mining Act of 1872, 30 U.S.C. §§ 22-54. Under that Act, "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase." 30 U.S.C. § 22.

From early on, the executive branch has asserted and exercised the authority to withdraw federally owned lands from claims for mineral extraction. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 469-72 (1915). As *Midwest Oil* recognized, although Congress had delegated no "express statutory authority" to withdraw previously available land from mineral exploitation, the executive branch had made a "multitude" of temporary such withdrawals, and Congress had "uniformly and repeatedly acquiesced in the practice." *Id.* at 469-71. That acquiescence, *Midwest Oil* held, constituted an "implied grant of power" from Congress to the executive permitting withdrawal of public lands from mineral extraction claims. *Id.* at 475. For decades after *Midwest Oil*, Congress did little to restrain the executive's withdrawal authority, and the executive branch made liberal use of it.

After World War II, however, demand for the commercial use of public land increased considerably. To address that increased demand, Congress in 1964 established the Public Land Law Review Commission ("PLLRC"), composed of several members of Congress and presidential appointees, to conduct a comprehensive review of federal land law and policy and propose

suggestions for more efficient administration of public lands. After several years of study the PLLRC issued a report making 137 specific recommendations to Congress concerning the use and governance of public lands. PLLRC, *One Third of the Nation's Land* ix-x, 9 (1970) (hereinafter "PLLRC Report").

The PLLRC Report observed that the roles of Congress and the executive branch with respect to public land use had "never been carefully defined," and recommended that Congress pass new legislation specifying the precise authorities delegated to the executive for land management, including withdrawals. *Id.* at 43, 44, 54-55. The Report also recommended that "large scale limited or single use withdrawals *of a permanent or indefinite term*" should be within Congress's exclusive control, while "[a]ll other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive action." *Id.* at 54 (emphasis added). The Report did not recommend a legislative veto over any withdrawal authority delegated to the executive.

In response to the PLLRC's recommendations, Congress in 1976 enacted FLPMA. FLPMA declares as the policy of the United States that "Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action," 43 U.S.C. § 1701(a)(4); that "in administering

public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public[,] and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking," 43 U.S.C. § 1701(a)(5); that "goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law," 43 U.S.C. § 1701(a)(7)[5]; and that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; [in a manner] that, where

[5] "Multiple use" is defined in the statute 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).

appropriate, will preserve and protect certain public lands in their natural condition; [in a manner] that will provide food and habitat for fish and wildlife and domestic animals; and [in a manner] that will provide for outdoor recreation and human occupancy and use," 43 U.S.C. § 1701(a)(8).

As relevant here, FLPMA eliminates the implied executive branch withdrawal authority recognized in *Midwest Oil*, and substitutes express, limited authority. *See* Pub. L. 94-579, § 704, Oct. 21, 1976, 90 Stat. 2743, 2792. It reserves to Congress the power to take certain land management actions, such as making or revoking permanent withdrawals of tracts of 5,000 acres or more ("large-tract" withdrawals) from mineral extraction. 43 U.S.C. § 1714(c), (j). And it delegates to the Secretary of the Interior the power to make withdrawals of tracts smaller than 5,000 acres ("small-tract" withdrawals), whether temporary or permanent, 43 U.S.C. § 1714(d), and to make temporary withdrawals of large-tract parcels of 5,000 acres or more, 43 U.S.C. § 1714(c).

For all withdrawals, whether small- or large-tract, FLPMA requires that the Secretary publish notice of the proposed withdrawal in the Federal Register; afford an opportunity for public hearing and comment; and obtain consent to the withdrawal from any other department or agency involved in the administration of the lands proposed for withdrawal. 43 U.S.C. § 1714(b), (h), (i). The statute also bars the Secretary from further delegating his or her withdrawal authority to any individual outside the Department of the

Interior, or to any individual within the Department who was not appointed by the President and confirmed by the Senate. 43 U.S.C. § 1714(a).

FLPMA circumscribes the Secretary's temporary largetract withdrawal authority in three ways relevant here. First, the Secretary may make large-tract withdrawals lasting no longer than twenty years. Second, no later than the effective date of any withdrawal, the Secretary must furnish a detailed report to Congress addressing twelve specific reporting requirements.[6] 43 U.S.C. § 1714(c)(2). Third, FLPMA provides that Congress retains legislative veto power over any large-tract withdrawal.[7] 43 U.S.C. § 1714(c)(1). FLPMA also

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[6] These reporting requirements include (1) a "clear explanation" of the proposed use of the land involved; (2) an inventory and evaluation of the current natural resource uses of the site and the impact of the proposed use, including potential environmental degradation and anticipated economic impact; (3) a list of present users of the land and the anticipated impact upon those users; (4) an analysis of potential conflicts between current users and the proposed use; (5) an analysis of the requirements for the proposed use; (6) an analysis of suitable alternative sites; (7) a statement of any consultation with other federal, state, and local regulators; (8) a statement of the impact of proposed uses on state and local government and the regional economy; (9) the time needed for the withdrawal; (10) the time and place of public hearings; (11) the location of publicly accessible records; and (12) the report of a qualified mining engineer. 43 U.S.C. § 1714(c)(2).

[7] Specifically, "a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such

contains a severability clause: "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." FLPMA § 707, 90 Stat. at 2794 (codified at notes to 43 U.S.C. § 1701).

Congress has never exercised its authority under FLPMA to veto a large-tract withdrawal. In 1983, the Supreme Court in *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983), declared one variety of legislative veto provision unconstitutional.[8] Since *Chadha*, Congress has not amended FLPMA to limit the Secretary's withdrawal authority further.

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a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation." 43 U.S.C. § 1714(c)(1).

[8] *Chadha* dealt with a one-house veto of the Attorney General's discretionary decision to suspend deportation. *Chadha*, 462 U.S. at 927. FLPMA provides for a legislative veto by "concurrent resolution" of both houses. 43 U.S.C. § 1714(c)(1).

A. The Northern Arizona Withdrawal

Uranium, often found within "breccia pipes" – cylinder-shaped deposits of broken sedimentary rock stretching thousands of feet underground – was first discovered near Grand Canyon National Park in 1947. Only limited uranium mining occurred in Northern Arizona until uranium prices increased in the late 1970s. After that, in the 1980s and 1990s, miners extracted 1,471,942 tons of uranium from six new mines. A second spike in the price of uranium in 2007 generated renewed interest in mining operations near the Grand Canyon, manifested in the submission of thousands of new claims.[9]

The large volume of new claims sparked concerns about the potential environmental impact of increased uranium mining on the Grand Canyon watershed. Uranium mining has been associated with uranium and arsenic contamination in water supplies, which may affect plant and animal growth, survival, and reproduction, and which may increase the incidence of kidney damage and cancer in humans. *See, e.g.*, National Primary Drinking Water Regulations, Radionuclides, 65 Fed. Reg. 76,708 (Dec. 7, 2000). In response to local concerns, Arizona Congressman Raúl Grijalva introduced legislation in March 2008 seeking permanently to withdraw over one million acres of federal land abutting Grand Canyon National Park, on the northern side (North Parcel), northeastern side (East

[9] Within a few years, the price of uranium dropped sharply once more, from $130 per pound to $40 per pound.

Parcel), and southern side (South Parcel) of the Park. Rep. Grijalva's proposed legislation was not enacted.

In 2009, Secretary Salazar published a Notice of Intent in the Federal Register declaring that he proposed to withdraw from new uranium mining claims an area nearly identical to that covered by the Grijalva bill. Notice of Proposed Withdrawal and Opportunity for Public Meeting, 74 Fed. Reg. 35,887 (July 21, 2009). In compliance with FLPMA's command, the Secretary stipulated that any agency action would be "subject to valid existing rights." *Id.*; FLPMA § 701(h), 90 Stat. at 2786 (codified at notes to 43 U.S.C. § 1701). The Notice of Intent had the immediate effect of withdrawing the land from new uranium mining claims for two years while the agency studied the anticipated impact of the proposed withdrawal. 74 Fed. Reg. at 35,887.

In fulfillment of the Interior's obligation under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, the Bureau of Land Management ("BLM"), an agency within the Department of the Interior, prepared an Environmental Impact Statement ("EIS") examining the potential environmental impact of the withdrawal. The EIS declared that the underlying purpose of the withdrawal was protecting the "Grand Canyon watershed from adverse effects of . . . mineral exploration and mining" other than those "stemming from valid existing rights." 74 Fed. Reg. at 43,152-53. To inform the EIS, BLM requested a full report from the United States Geological Survey ("USGS") analyzing soil, sediment, and water samples in the proposed withdrawal area.

In response, USGS prepared Scientific Investigations Report 2010-5025 (the "USGS Report"). To prepare its report, USGS examined 1,014 water samples from 428 different sites. It found that 70 samples "exceeded the primary or secondary maximum containment levels" for certain ions and trace elements, including uranium and other heavy metals. The agency also analyzed soil and sediment samples from six sites north of the Grand Canyon, including reclaimed uranium mines, approved mining sites where mining had been suspended, and exploratory sites (sites where there had been drilling but not mining). Consistently high concentrations of uranium and arsenic were discovered at these sites. Water samples from fifteen springs and five wells contained dissolved uranium levels beyond the maximum allowed by the Environmental Protection Agency ("EPA") for drinking water. The USGS Report observed that fractures, faults, sinkholes, and breccia pipes occurred throughout the region and were potential pathways for contaminants, including uranium and arsenic, to migrate through groundwater. The Report acknowledged, however, that the available data on these pathways was "sparse . . . and often limited," and that more investigation would be required fully to understand groundwater flow paths and the potential impact of uranium mining.

BLM relied heavily on the USGS Report in preparing its EIS. It used the findings of the USGS Report, as well as additional data gathered during its own two-year study, to assess the risk to five different water

resources. These resources included springs and wells connected to perched aquifers; springs and wells connected to the Redwall-Muav aquifer ("R-aquifer"), the main deep aquifer within the Grand Canyon watershed[10]; and surface waters.

BLM issued a draft EIS in February of 2011; the draft EIS remained open for public comment for 75 days. Interior received over 296,339 comment submittals, from which it extracted over 1,400 substantively distinct comments. *See* Notice of Availability of the Northern Arizona Proposed Withdrawal Final Environmental Impact Statement, 76 Fed. Reg. 66,747, 66,748 (Oct. 27, 2011). After reviewing these comments, Interior submitted its final EIS on October 27, 2011.

In addition to its public comment process, Interior designated several affected counties in Arizona and Utah ("the Counties") as cooperating agencies,[11] and solicited their input.[12] Based in part on the Counties'

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[10] The R-aquifer is the major source of groundwater within the region. It is located roughly 2,000 feet below the surface. Perched aquifers are generally much smaller and occur at much shallower levels.

[11] The Counties comprised Garfield, Kane, San Juan, and Washington Counties in Utah, and Mohave and Coconino Counties in Arizona.

[12] Most of the Counties opposed the withdrawal because of its anticipated economic consequences. Coconino County did not; its economy depends more on tourism than mining. Although the area proposed for withdrawal was contained entirely within Arizona, the Utah counties' residents have an economic interest in

public comments on the draft EIS, Interior requested further analysis of the anticipated economic effect of the withdrawal and consulted with county representatives. Interior also organized five meetings with cooperating agencies, including the Counties, as well as two public meetings in the region.

The final EIS and ROD discussed four different withdrawal alternatives. Alternative A was to take no action at all, allowing new mining claims and development to proceed unhindered. Alternative B was to withdraw the full tract of roughly one million acres from new mining claims. Alternative C was to withdraw a substantially smaller tract of roughly 650,000 acres, which would have excluded 120,000 acres in the North Parcel outside the Grand Canyon watershed, as well as 80,000 additional acres in the North Parcel where groundwater is believed to flow away from Grand Canyon National Park. Alternative D was to withdraw an even smaller area, roughly 300,000 acres.

The USGS Report, final EIS, and ROD all acknowledged substantial uncertainty regarding water quality and quantity in the area, the possible impact of additional mining on perched and deep aquifers (including the R-aquifer), and the effect of radionuclide exposure on plants, animals, and humans. The USGS Report, for example, recognized that "[a] more thorough investigation of water chemistry in the Grand Canyon region is required to better understand

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the decision, as they stand to derive some income from uranium mining and ore processing.

groundwater flow paths, travel times, and contributions from mining activities, particularly on the north side of the Colorado River. The hydrologic processes that control the distribution and mobilization of natural uranium in this hydrogeologic setting are poorly understood." The ROD concluded, however, that there was sufficient data regarding dissolved uranium concentrations in the USGS Report to "inform a reasoned choice," so the missing information was not essential to its decision.

After weighing the data available, the ROD took a measured approach. It observed 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." Because of the uncertainty regarding the movement of groundwater in the region, the ROD explained, Interior could not risk contamination of springs feeding into the Colorado River.[13] The ROD went on to explain 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. The EIS indicates that the likelihood of a serious impact may be low, but should such an event occur, significant."

The final EIS and ROD also stated justifications for the withdrawal other than the risk of groundwater

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[13] The Colorado River is the primary source of drinking water for over 26 million people.

contamination. The ROD noted that "mining within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them," that certain tribes believe "repeated wounding of the earth can kill their deities," and that "damage to traditional cultural and sacred places is irreversible." The ROD also observed that even if the proposed area were withdrawn in its entirety, eleven new mines could be developed during the twenty-year withdrawal period under valid existing rights. Given this potential for development of new mines, the expected rate of mining development over the ensuing twenty years would roughly match the rate of development at the time of the withdrawal. Any economic impact on local communities would thus not be severe. While recognizing that the level of mining that would go forward in the area during the withdrawal period itself posed a risk of harm, the ROD concluded that additional mining presented a significant added threat to environmental safety and could endanger wildlife and human health.

Finally, the agency stated that the "unique resources" within Northern Arizona, including the Colorado River, the Grand Canyon, and the "unique landscapes" of the region, support a "cautious and careful approach." The ROD observed that "[w]hile the lands are withdrawn, studies can be initiated to help shed light on many of the uncertainties identified by USGS in [the USGS Report] and by BLM in the EIS."

B. This Litigation

After the ROD issued, mining companies and local governments concerned about the economic impact of the withdrawal filed suit challenging the Secretary's action. These parties (collectively "Plaintiffs" or "Appellants")[14] filed four separate suits, one or more of which maintained (1) that section 204(c)(1) of FLPMA, 43 U.S.C. § 1714, which confers on the Secretary of the Interior the authority to make temporary large-tract withdrawals, contains an unconstitutional legislative veto provision not severable from the remainder of the subsection; (2) that the Secretary's withdrawal was arbitrary and capricious, inconsistent with the administrative record, or otherwise not in accordance with FLPMA; (3) that the Secretary failed to comply with NEPA in approving the withdrawal; (4) that the withdrawal violated the Establishment Clause of the First Amendment; and (5) that the United States Forest Service acted arbitrarily and capriciously, or contrary to law, in granting its consent to the withdrawal.

After the four cases were consolidated into a single action, Plaintiffs moved for summary judgment on the ground that the legislative veto provision within FLPMA was both unconstitutional and not severable.

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[14] Appellants American Exploration & Mining Association ("AEMA") and National Mining Association are organizations representing mining interests. Appellant Metamin Enterprises, USA, is a mining company. Appellant Gregory Yount is an individual who owns mining claims in the withdrawal area. Appellant Arizona Utah Local Economic Coalition is an organization representing several local governments.

As a result, Plaintiffs argued, there was no longer any statutory basis for the Secretary's twenty-year large-tract withdrawal authority. Denying the motion, the district court held the legislative veto provision unconstitutional, but severable, leaving the Secretary's challenged withdrawal authority intact. *Yount v. Salazar*, 933 F. Supp. 2d 1215, 1243 (D. Ariz. 2013).

After discovery, the parties all cross-moved for summary judgment. The district court granted summary judgment to Interior and Grand Canyon Trust, upholding the withdrawal against each of the plaintiffs' challenges. The evidence in the record, particularly the USGS Report, final EIS, and ROD, supported the agency's withdrawal decision, the district court concluded, and the agency did not exceed its statutory authority under FLPMA or NEPA. The district court also rejected the plaintiffs' Establishment Clause challenge and their claim that Interior's consultation with local counties and treatment of information gaps were inadequate under NEPA. This appeal followed.

II. FLPMA's Legislative Veto Provision

The Supreme Court ruled definitively in *Chadha* that Congress may invalidate an agency's exercise of lawfully delegated power in one way only: through bicameral passage of legislation followed by presentment to the President. 462 U.S. at 953-55. FLPMA provides that Congress may invalidate a large-tract withdrawal announced by the Secretary by passing a concurrent resolution disapproving of the withdrawal

within 90 days of the withdrawal's effective date; the statute does not require presentment to the President. 43 U.S.C. § 1714(c)(1). We have little difficulty concluding that the legislative veto provision violates the presentment requirement, a conclusion with which all parties agree.

Unlike in *Chadha*, the statutory legislative veto was not exercised by Congress in this case. Appellants maintain – and the government does not disavow – that the severability issue is nonetheless properly before us, as the Secretary's withdrawal authority *is* at issue, and that authority would fall if the legislative veto were not severable from Congress's broader delegation of power to the executive.

Although not raised by the parties, there is an argument that because Congress did not invoke the legislative veto, the provision did not injure Appellants even if constitutionally invalid, and so the Appellants lack standing to challenge either it or the withdrawal provision's continuing validity. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see, e.g.*, *United States v. City of Yonkers*, 592 F. Supp. 570, 576 (S.D.N.Y. 1984). That is, once the veto deadline passed, one could view the situation as if there were no veto available, in which case severability would not matter.

Nonetheless, we conclude that Appellants do have standing to raise the severability issue. We are presented here with an unresolvable ambiguity as to whether Congress declined to exercise its veto based on the merits of the Secretary's withdrawal or based

on the veto's constitutional infirmity. Appellants' merits argument is that the withdrawal authority would not exist at all without the veto provision in place, exercised or not. Appellants' alleged injury – primarily, the inability to perfect new mining claims – is traceable to the exercise of that authority, and if their merits argument succeeded, could be redressed by invalidating the Secretary's withdrawal authority. *Chadha*, 462 U.S. at 936. We therefore turn to that merits argument.

Invalid portions of a federal statute are to be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " *Chadha*, 462 U.S. at 931-32 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation and internal quotation marks omitted). We must retain any portion of a statute which is (1) "constitutionally valid," (2) "capable of functioning independently" from any unconstitutional provision, and (3) "consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (citation and internal quotation marks omitted).

This general principle applies with greater force when, as here, the statute in question contains a

severability clause.[15] "[T]he inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). That presumption can be overcome only by "strong evidence" that Congress intended the entire relevant portion of the statute to depend upon the unconstitutional provision. *Id.*

That the offending portion of FLPMA is a legislative veto provision further strengthens the severability presumption. There is an obvious substitute for the legislative veto: the ordinary process of legislation. Nothing (except the need to muster sufficient votes) prevents Congress from revoking a large-tract withdrawal by passing legislation vacating the withdrawal, presenting the proposed legislation to the President, and (if necessary) overriding the President's veto. Notably, none of the Appellants have cited any case holding that a legislative veto provision could not be severed where the statute in question contained a severability clause, nor have we found one.[16]

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[15] Again, FLPMA provides that "[i]f 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." FLPMA § 707, 90 Stat. at 2794.

[16] *Western States Medical Center v. Shalala*, 238 F.3d 1090 (9th Cir. 2001) is not a contrary example. We noted in *Western States Medical Center* that the inclusion of a severability clause in the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301-397, did not suggest that an unconstitutional provision of a *subsequent* amendment to that statute, the Food and Drug

Moreover, the language and structure of FLPMA and the legislative history underlying the statute do not provide the requisite "strong evidence" that the Secretary's authority to make large-tract withdrawals rises and falls with Congress's veto power over those withdrawals. To the contrary, the limited delegation of large-tract withdrawal authority is fully "consistent with Congress' basic objectives" in enacting FLPMA even if there is no legislative veto option. *Booker*, 543 U.S. at 259.

First, Congress in FLPMA imposed significant limitations on the Secretary's withdrawal authority and provided for congressional oversight over executive withdrawals by means other than the legislative veto. For example, Congress reserved to itself the exclusive authority to make *permanent* large-tract withdrawals, limiting the Secretary's large-tract withdrawals to no more than twenty years. 43 U.S.C. § 1714(c)(1). Although large-tract withdrawals can be renewed after the twenty-year term expires, the twenty-year term ensures that the renewal decision would necessarily have to be made by a different

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Administration Modernization Act of 1997 ("FDAMA"), 21 U.S.C. § 353a, was severable from the remainder of the FDAMA. "Because Congress approved this severability clause *before* FDAMA's passage," we held, "it is less compelling evidence of legislative intent than a clause enacted simultaneously with FDAMA. Congress may have intended the original provisions of the FDCA to be severable, but meant for FDAMA's provisions to stand or fall together." *W. States Med. Ctr.*, 238 F.3d at 1097-98. Here, the relevant provisions of FLPMA were enacted simultaneously with the severability clause.

presidential administration and, almost surely, a different Secretary of the Interior.

Congress in FLPMA also limited the Secretary's power to delegate withdrawal authority to subordinates, restricting that delegation to officers appointed by the President and confirmed by the Senate. 43 U.S.C. § 1714(a). And for large-tract withdrawals, FLPMA requires not only that the Secretary provide timely notice to Congress (enabling Congress to address the proposed withdrawal legislatively if it so chooses), but mandates that the Secretary issue a detailed report addressing twelve specific issues of concern. 43 U.S.C. § 1714(c)(2).[17] The statute also delineates specific requirements for public hearings concerning proposed withdrawals and requires publication in the Federal Register of such proposals. 43 U.S.C. § 1714(b), (h).[18] The plethora of constraints on the Secretary's large-tract withdrawal authority – all of which remain

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[17] *See supra* note 6.

[18] Regarding public hearings, FLPMA provides that "[a]ll new withdrawals made by the Secretary under this section (except an emergency withdrawal . . .) shall be promulgated after an opportunity for a public hearing." 43 U.S.C. § 1714(h). Regarding publication, FLPMA provides that "[w]ithin thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. . . . The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice." 43 U.S.C. § 1714(b)(1).

in place – confirms that the legislative veto provision was only one of many provisions enacted to advance Congress's broad oversight of the Secretary's withdrawal decisions. Severing the legislative veto provision would leave the remaining limitations, and opportunity for congressional oversight and involvement, in place.

The legislative history underlying FLPMA confirms this conclusion. As the district court observed, the PLLRC Report, on which Congress relied in passing FLPMA, was "equally concerned with enabling the Executive to act through controlled delegation as it was with preserving Congress's reserved powers." *Yount*, 933 F. Supp. 2d at 1223. For example, the Report recommended, without mention of a legislative veto, that Congress "delineat[e] specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action." PLLRC Report, at 2. And the Report recommended that all withdrawal authority other than "large scale limited or single use withdrawals of a permanent or indefinite term" be "expressly delegated." *Id.* at 55.

Similarly, the House Report identified among the primary objectives of the legislation both establishing "procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary of the Interior," and endowing BLM with "sufficient authority to enable it to carry out the goals and objectives established by law for the public lands under its jurisdiction." H.R. Rep. 94-1163, at 2 (1976). The House Report discussed the legislative veto only in the context

of several other mechanisms for congressional oversight and limitations on the Secretary's authority: the notice and reporting requirements, the limits on delegation, the consent requirement, the hearing requirement, and the temporal limitation. *Id.* at 9-10.

Nor does the Conference Report suggest that the legislative veto was an essential component of the legislation. That Report referenced the legislative veto only in the context of delineating where the House bill (ultimately adopted) diverged from the Senate bill.[19] And although several Members of Congress emphasized in their floor statements the importance of the bill's oversight provisions during the floor debates,[20]

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[19] The Senate bill did not include a legislative veto. *See* H.R. Rep. No. 94-1724, at 57 (1976) (Conf. Rep.), 1976 U.S.C.C.A.N. 6227, 6229.

[20] Rep. Samuel Steiger stated that "[t]here were those of us – and I include myself – who felt that the Secretary should have the opportunity of making no withdrawals without the review of Congress," and that granting small-tract withdrawal authority "already represent[s] a very strong compromise." 122 Cong. Rec. 23,451 (1976). Rep. Joe Skubitz stated that it was essential that Congress "be . . . able to oppose[,] if necessary, withdrawals which it determines not to be in the best interests of all the people." *Id.* at 23,437. Rep. John Melcher, the chief sponsor of the legislation in the House, stated that the veto was a component of the bill's general objective of adding "congressional oversight responsibility" to land management. *Id.* at 23,452. He stated that "[s]ince there is now no system of congressional review and congressional oversight of withdrawals, [the legislative veto provision] is the first positive step that Congress has taken to . . . exercise that responsibility." *Id.* But Rep. Melcher also opined on the House floor, somewhat in contradiction, that the bill would "not in any way limit or interfere with" the Secretary's authority to make withdrawals. *Id.* at 23,453.

many other members, including several who voted *for* the legislation, expected the legislative veto to prove overly burdensome for Congress.[21]

At best, the legislative history of FLPMA is inconclusive as to whether a majority of the House would have opposed delegating large-tract withdrawal authority without the legislative veto. As with most legislation, FLPMA's legislative veto provision represented a compromise between groups of lawmakers with divergent and sometimes competing interests. It is possible – perhaps even likely – that had Congress known in 1976 that the legislative veto provision was unconstitutional, a somewhat different legislative bargain would have been struck. Congress might, for example, have shortened the twenty-year term for temporary withdrawals, or decreased the acreage required to trigger FLPMA's large-tract withdrawal provisions.

But the question before us is not whether Congress would have drafted the statute differently in the absence of the unconstitutional provision. The question is whether "the statute's text or historical context makes it evident that Congress . . . would have

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[21] Rep. John Seiberling called the congressional oversight provisions "[some] of the most objectionable provisions in the legislation." 122 Cong. Rec. 23,436. Rep. Patsy Mink opposed several of the limitations on the Secretary's withdrawal discretion, believing, as Rep. Seiberling did, that the legislation would place an unworkable burden on both Congress and the Department of the Interior. *Id.* at 23,438. The Conference Report adopted the House's version of the bill with respect to the Secretary's withdrawal authority but barely discussed the legislative veto. H.R. Rep. No. 94-1724.

preferred no statute at all." *Hamad. v. Gates*, 732 F.3d 990, 1001 (9th Cir. 2013) (internal quotation marks omitted); *see Free Enter. Fund*, 561 U.S. at 481; *Alaska Airlines*, 480 U.S. at 685-86. Given the recognized desire for executive authority over withdrawals of federal lands from new mining claims – and given Congress's preference regarding survival of that authority, as expressed in the severability clause – there is no indication, let alone "strong evidence," *Alaska Airlines*, 480 U.S. at 686, that Congress would have preferred "no statute at all" to a version with the legislative veto provision severed. As in *Chadha*, "[a]lthough it may be that Congress was reluctant to delegate final authority . . . , such reluctance is not sufficient to overcome the presumption of severability raised by [a severability clause]." 462 U.S. at 932.

Notably, given FLPMA's notice and report provision, Congress has the opportunity to pass timely and informed legislation reversing any withdrawal – legislation that would then be submitted for presidential approval (or veto, followed by a potential override). Since the passage of FLPMA, the Secretary has exercised large-tract withdrawal authority 82 times without Congress ever attempting to override that authority.[22]

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[22] *See, e.g.*, California: Withdrawal for New Melones Dam and Reservoir Project, 44 Fed. Reg. 70,467 (Dec. 7, 1979); Certain Lands in Alaska: Public Land Order Withdrawals, 45 Fed. Reg. 9,562 (Feb. 12, 1980); New Mexico: Withdrawal of Lands, 45 Fed. Reg. 29,295 (May 2, 1980); Idaho: Withdrawal of Snake River Birds of Prey Area, 45 Fed. Reg. 78,688 (Nov. 26, 1980); Oregon: Withdrawal of Lands for Diamond Craters Geologic Area, 46 Fed. Reg. 6,947 (Jan. 22, 1981).

See Interior-SER 637-38. Nor, since *Chadha* was decided more than three decades ago, has Congress amended the relevant section of the statute to enhance congressional oversight or limit the Secretary's withdrawal authority. That history further undermines the Appellants' contention that the legislative veto was an essential and indispensable component of FLPMA without which Congress would never have delegated large-tract withdrawal authority.

Appellants make one final, technical argument in support of severability: They observe that the legislative veto provision is contained entirely within the subsection of the statute delegating large-tract withdrawal authority to the Secretary, section 204(c)(1) of FLPMA. Appellants propose that the legislative veto and the delegation of large-tract withdrawal authority are therefore part of the same "provision." As the statute's severability clause mandates severance of any unconstitutional "provision," Appellants contend, the entirety of section 204(c)(1) must be severed. Not so.

There is no support for the proposition that a statutory subsection, like section 204(c)(1), is the smallest unit that can be characterized as a "provision" subject to a severability clause. And no reason occurs to us why a sentence within a subsection is not a "provision" of the statute. *See* Black's Law Dictionary 1420 (10th ed. 2014) (defining "provision" as "clause"). Indeed, courts have severed legislative vetoes within single sentences. *See Alabama Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1306-08 (11th Cir. 2002) (severing a dependent clause containing a legislative veto from a

statutory subsection because that clause was an unconstitutional "provision"). Were we to accept Appellants' argument, the result would be to require courts to sever *more* of a statute that contains a severability clause referring to a "provision" than one that does not. Absent a clear command, we cannot imagine that Congress intended such a peculiar result.

We therefore hold that the unconstitutional legislative veto embedded in section 204(c)(1) of FLPMA is severable from the large-tract withdrawal authority delegated to the Secretary in that same subsection. Invalidating the legislative veto provision does not affect the Secretary's withdrawal authority.

III. FLPMA

A. Appellants' FLPMA Claims

We turn next to the merits of the FLPMA claims. We review challenges to agency actions such as those here under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Under the APA, a reviewing court may set aside only agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotation marks omitted). A court may not "substitute its judgment for that of the agency," *Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977), and an agency's interpretation of its organic statute, as well as of its own regulations, is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997).

The ROD listed four rationales for the withdrawal: (1) It would protect water resources in the Grand Canyon watershed and the Colorado River from possible contamination; (2) it would preserve cultural and tribal resources throughout the withdrawn area; (3) it would protect natural resources, including wildlife and wilderness areas; and (4) because existing claims could still be mined, the economic benefits of uranium mining could still be realized by local communities. Appellants challenge each of the Secretary's rationales for the withdrawal,[23] but focus on the first. Appellants contend that the final EIS and ROD exaggerated the risk

[23] AEMA maintains that the Secretary was precluded from proposing any additional rationales for the withdrawal in the ROD beyond the primary justification stated in BLM's 2009 application for the withdrawal – the potential threat to groundwater in the Grand Canyon watershed. AEMA contends that the additional justifications rendered the Secretary's decision arbitrary and capricious because they allegedly violated regulations "requir[ing] the Secretary to make a determination based on the application for withdrawal." But nothing in FLPMA or its implementing regulations requires that the scope of the ROD be limited to the purposes stated in the initial application for the withdrawal. Indeed, it would defeat the very purpose of allowing public comment on a proposed withdrawal if the Secretary were unable to incorporate new evidence or concerns raised by commenters into his decisionmaking.

of water contamination from uranium mining in the affected area, and that the administrative record suggests that existing laws and regulations were sufficient to achieve the aim of water protection.

1. Potential Impact on Water Resources

The crux of Appellants' FLPMA argument is that the scientific evidence in the record does not justify the Secretary's decision to withdraw this large tract of land to protect water resources. In support, Appellants characterize several segments of the final EIS, ROD, and administrative record as indicating that the risk of groundwater contamination from uranium mining was low and the scientific rationale for the withdrawal weak.

Congress defined the Secretary's "withdrawal" power as the power to withhold federal lands from mining or settlement, "in order to maintain other public values in the area or reserv[e] the area for a particular public purpose or program." 43 U.S.C. § 1702(j). The terms "public values" and "public purpose" are not defined in the statute.

Congress's stated objectives in enacting FLPMA provide clues to the meaning of those words. Congress's objectives included ensuring that "the public lands [would] be managed in a manner that [would] protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, [would] preserve and protect certain public lands in

their natural condition; that [would] provide food and habitat for fish and wildlife and domestic animals; and that [would] provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8). That broad language encompasses the Secretary's justifications for the withdrawal here challenged.[24]

The USGS Report and the final EIS establish that Interior did have evidence that additional uranium mining could present a risk of contamination. The USGS Report analyzed over 1,000 water samples from 428 different locations within the region, and found that 70 sites exceeded the EPA's primary or secondary heavy metal contaminant levels. Samples from fifteen springs and five wells indicated uranium concentrations exceeding the EPA's maximum contaminant levels. The USGS Report acknowledged that the evidence was "inconclusive" regarding a connection between

[24] Metamin contends that "FLPMA limits the Secretary's authority to withdraw lands to instances when the proposed use *will* cause environmental degradation or where existing and potential uses *are* incompatible with or [in] conflict with the proposed use" (emphases added). The section of the statute Metamin cites concerns the requirements for the Secretary's report to Congress, not the basis of the Secretary's authority to make a withdrawal. *See* 43 U.S.C. § 1714(c)(2). The contents of the Secretary's report to Congress are not subject to judicial review. *See* FLPMA § 701(i), 90 Stat. at 2786 (codified at notes to 43 U.S.C. § 1701). Moreover, the section says "might" cause environmental degradation, not "will." 43 U.S.C. § 1714(c)(2)(2). Metamin's argument thus rests on a misapplication, a misreading, and, in part, an erroneous paraphrasing of the statute. Uses can undoubtedly be incompatible based on *risk* of harm rather than the certainty of it.

those findings and mining activity, but could not rule out such a connection.

The final EIS and ROD further indicate that the full-withdrawal alternative was expected to reduce substantially the potential environmental impact from continued mining operations. The final EIS concluded that under Alternative A ("no action") the projected water quality impact to R-aquifer springs was "none to moderate" in the entirety of the North Parcel and East Parcel, and "none to major" for part of the South Parcel; the anticipated impact was "none to negligible" only for two springs in the South Parcel. The potential impact on surface water quality was assessed as at least "negligible to moderate" in all three parcels under Alternative A. Under Alternative B (the full withdrawal), the final EIS assessed the risk to water quality as "negligible to moderate" *only* for surface waters in the North Parcel, and "none to major" *only* for R-aquifer wells in the South Parcel.

The final EIS, the USGS Report, and the ROD acknowledge considerable uncertainty regarding whether and how mining contributes to groundwater contamination in the Grand Canyon watershed. The USGS Report, for example, found that "[t]he hydrologic processes that control the distribution and mobilization of natural uranium in this hydrogeologic setting are poorly understood," and that available information regarding any correlation between mining and groundwater contamination was "limited and inconclusive." Both the final EIS and the ROD recognized that the risk to water quality in the R-aquifer was likely low,

but that significant uncertainty existed regarding travel times and hydrogeologic conditions within particular breccia pipes. In both documents, Interior observed that the Bureau would benefit from continued study, which a temporary withdrawal would allow.

But after acknowledging the uncertainties and need for further study, the ROD concluded that unfettered mining presented a small but significant risk of dangerous groundwater contamination – a risk that would be substantially mitigated by the withdrawal. The final EIS supports this conclusion.

Some analysts within the Department of the Interior disagreed. They believed the scientific data presented in the EIS insufficient to justify the withdrawal.[25] But the existence of internal disagreements regarding the potential risk of contamination does not render the agency's ultimate decision arbitrary and capricious. Scientific conclusions reached by the agency need not reflect the unanimous opinion of its experts. "[A] diversity of opinion by local or lower-level agency representatives will not preclude the agency from reaching a contrary decision, so long as the decision is not arbitrary and capricious and is otherwise supported by the record." *WildEarth Guardians v. Nat'l Park Serv.*, 703

[25] In particular, some BLM employees expressed skepticism about withdrawal of the 120,000 acres outside the Grand Canyon watershed. One analyst stated via email that he "ha[d] not seen any written criteria which justif[y] the withdrawal" for that portion of the tract. Another observed that large areas within the North Parcel "have low resource value" and recommended that the agency consider excepting them from the withdrawal.

F.3d 1178, 1186-87 (10th Cir. 2013); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658-59 (2007).

Again, we must uphold the agency's choice so long as it is "supported by reasoned analysis." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 665 (9th Cir. 2009). The record demonstrates that the Secretary conducted a carefully reasoned analysis, considered the available scientific data, weighed diverse opinions from Interior experts and public commenters, recognized the limitations of the available scientific evidence, and concluded that a cautious approach was necessary to forestall even a low probability of contamination in excess of EPA thresholds – thresholds developed in response to serious concerns about human health. *See* 65 Fed. Reg. 76,708. The Secretary stressed that the withdrawal was not permanent, affording the opportunity to collect additional data about the hydraulic patterns in the area and the impact of uranium mines on water resources. We cannot say that the withdrawal decision was arbitrary, capricious, or not in accordance with the law.

2. Cultural and Tribal Resources

Appellants next contend that the Secretary lacked the authority to withdraw such a large tract of land for the purpose of protecting cultural or tribal resources, and that even if it had the authority, it acted arbitrarily and capriciously in exercising it. We do not agree with either proposition.

FLPMA permits the Secretary to premise a withdrawal of public lands from new mining claims on the protection of cultural and tribal resources. The congressional policy statement included in FLPMA contemplates that Interior will manage public lands in part for the protection of "historical" and "archaeological" values. 43 U.S.C. § 1701(a)(8). Consistent with that mandate, Interior's regulations require that an EIS, prepared in compliance with NEPA, include a full report on "the identification of cultural resources" possibly impacted by agency action. 43 C.F.R. § 2310.3-2(b)(3)(I).

Appellants argue that the withdrawal was overbroad because it was not "based on particular sites or sacred areas," but rather covers a large tract of federal land that includes multiple sites. But the final EIS explained that the withdrawn area as a whole is of profound significance and importance to Native American tribes. The entirety of the North and East Parcels falls within the traditional territory of the Southern Paiute, while the Southern Parcel is a traditional use area for the Navajo, the Hopi, the Hualapai and the Havasupai tribes. Many tribes, including the Hopi, view the whole territory as sacred and regard any drilling and mining as inflicting irreparable harm. Moreover, the final EIS also identified a host of specific sites, trails, hunting areas, springs, and camps which are of traditional importance to several tribes and are cultural and archeological treasures in their own right.

Nothing in FLPMA or our case law indicates that the Secretary may not withdraw large tracts of land in

the interest of preserving cultural and tribal resources. Nor is there any reason to believe that a withdrawal must be restricted to narrow carveouts tracing the perimeter of discrete cultural and historical sites, as opposed to a larger area containing multiple such sites.[26] Courts have previously upheld large-tract withdrawals justified in part by the protection of tribal resources and "areas of traditional religious importance to Native Americans." *See, e.g.*, *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 752 (D.C. Cir. 2007).

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[26] Metamin and AEMA contend that the Secretary's independent decision to withdraw large tracts of federal lands from mining based in part on the protection of tribal resources essentially grants the tribes veto power over mining on traditional tribal lands. That argument rests on an erroneous reading of our case law. Metamin cites a line of cases in which we have held that Native American tribes could not block a federal agency's approval of mining or other commercial activities on large tracts of particular cultural or religious value to the tribes. *See S. Fork Band Council of W. Shoshone Indians of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 724 (9th Cir. 2009); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070-74 (9th Cir. 2008) (en banc); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1484-86 (D. Ariz. 1990), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991). Those cases hold that federal agencies are not *compelled* to withdraw large tracts of public land from particular uses because of the potential impact on tribal resources. Nothing in our case law suggests that an agency is barred from doing so based on its own judgment. To the contrary, those cases reaffirm the federal government's right to make what it deems to be appropriate use of its land. *See Navajo Nation*, 535 F.3d at 1072 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-53 (1988)).

3. Other Resources

Appellants also challenge the Secretary's third reason for the withdrawal: to protect "other resources," including visual resources and wildlife. This challenge fails as well.

The record supports the conclusion that there would be a significant impact on visual resources and a risk of significant harm to wildlife absent the withdrawal. The final EIS concluded that if new mining claims proliferated, the impact on visual resources would range from minor to major, depending on the area, but would likely be "moderate" overall. The ROD found that mining-related emissions, dust, and haze would be dramatically higher absent the withdrawal, with a consequent risk to air quality and visibility. Although some of the effects of increased uranium mining – such as the effects of increased levels of radionuclides on wildlife – were unknown or difficult to project, the final EIS concluded that the relative impact of mining on wildlife would be "significantly less" if the proposed area were withdrawn. Fewer roads and power lines would be built, and trucking would be significantly decreased. And the final EIS explained that even a minimal degree of water contamination could have considerable impact on aquatic species.

4. Economic Benefits

Appellants propose that Interior violated both FLPMA and NEPA by miscalculating the amount of uranium in the withdrawn area and thus failed

accurately to weigh the economic impact of the withdrawal. Specifically, Appellants argue that the USGS Report used outdated information from a 1990 USGS study, and that BLM failed to account for "hidden" breccia pipes (pipes not exposed above ground) in its analysis of the economic impact of precluding new mining claims. Appellants proffer their own analyses of the quantity of uranium in the withdrawn area, which they project to be five times larger than the USGS Report's estimate of 162,964 tons. These challenges fail for several reasons.

First, Appellants offer no basis for concluding that the methodology of the 1990 Report was unsound. Further, the 2010 USGS Report did not in fact incorporate the 1990 Report wholesale. It incorporated some of the findings of the 1990 Report, but made several adjustments and recalculations in a peer-reviewed update. The 2010 Report also relied on several peer-reviewed papers published before and after the 1990 Report, including one authored by an expert, Karen Wenrich, who opposed the withdrawal.

Additionally, BLM reviewed and reasonably responded to Appellants' proposed alternative calculations, made in comments on the proposed withdrawal. The agency concluded that the alternative proposals had not been sufficiently developed or peer-reviewed and so declined to accord them significant weight. With regard to Appellants' contention that BLM failed to account for "hidden" breccia pipes in its economic analysis, BLM stated in response to NMA's public comments

that those pipes were in fact incorporated into BLM's numerical estimates.

In sum, the agency's findings regarding the quantity of uranium in the withdrawn area were not arbitrary or capricious, as the agency relied on peer-reviewed data and reasonably explained why it did not adopt Appellants' alternative version.

B. Boundaries

Opening up another front, Appellants maintain that two subsections of the withdrawn area – roughly 120,000 acres in the western section of the North Parcel, which are part of the Virgin River watershed rather than the Grand Canyon watershed, and an additional 80,000 acres in the northeast section of the North Parcel, where groundwater is believed to flow away from the Colorado River and Grand Canyon National Park – should not have been included even if the withdrawal was otherwise proper (which, of course, they dispute). Observing that the withdrawn area has essentially the same boundaries included in Rep. Grijalva's unsuccessful legislation, Appellants contend that the Secretary did not make an independent determination that withdrawal of those discrete areas was merited. Inclusion of those 200,000 acres, Appellants maintain, is inconsistent with both (1) the stated purpose of the withdrawal as expressed in the BLM's 2009 application for the withdrawal (to protect "the Grand Canyon watershed"), and (2) the guidance of Interior manuals directing that withdrawals "be kept to a

minimum consistent with the demonstrated needs of the applicants."[27] Department of the Interior, 603 DM 1.1(A) (Aug. 1, 2005).

The principal flaw in this partial challenge is that protection of the Grand Canyon watershed was not the only basis for the withdrawal. As the district court noted, the three other bases for the withdrawal are fully applicable to the disputed 200,000 acres. In particular, in including the North Parcel in the withdrawal area, Interior relied not just on water or air contamination, but also on the anticipated impact mining would have on wildlife, cultural, tribal, and visual resources.

For example, BLM observed in the final EIS that the "no action" alternative could increase wildlife mortality and reduce viability – particularly across the North Parcel – due to "noise and visual intrusions," the development of new roads and power lines, and "chemical and radiation hazards." The final EIS also observed that several tribes considered some or all of the North Parcel an ancestral homeland with significant cultural value. The entire North Parcel overlaps with Southern Paiute band territories, which, according to a University of Arizona ethnographic report commissioned by Grand Canyon National Park and cited in the final EIS, "remain important in the cultural life and history of Southern Paiute tribes."

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[27] We note that Interior's manuals do not carry the force of law and are not binding. *McMaster v. United States*, 731 F.3d 881, 888-89 (9th Cir. 2013).

Alternative C would not have withdrawn areas "with isolated or low concentrations of [biological] resources" that could be adversely affected by mineral exploration and development, such as the area outside the Grand Canyon watershed. But the final EIS considered and rejected Alternative C because it still risked a number of adverse consequences. Interior anticipated a harmful impact to wildlife under Alternative C – though of a lesser magnitude – as well as a "very high" potential for disturbance "of places of cultural importance to American Indians within the North Parcel."[28] Full withdrawal had "the greatest potential of all alternatives . . . to not change the existing wilderness characteristics."

The upshot is that arguments concerning the disputed 200,000 acres (and Alternative C) are myopically – and, so, incorrectly – focused solely on an asserted disconnect between that area and the Grand Canyon watershed. The Department of the Interior's assigned role is administering public lands in a manner "that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). That responsibility goes well beyond particular groundwater areas or watersheds. The Secretary appropriately included the full North Parcel in the withdrawal area after considering all relevant environmental and

[28] The northeast and west portions of the North Parcel include several specific sites of cultural significance identified in the final EIS, albeit fewer than the rest of the North Parcel.

cultural impacts. The decision to do so was not arbitrary and capricious.

Importantly, we note also that although Interior's analysts concluded that the hydrological basis for withdrawing the disputed 200,000 acres was not especially strong, they also observed that, within that acreage, underground fault zones conveyed some groundwater "south toward the Grand Canyon."[29] Interior's cautious assessment of the possible impact of any groundwater contamination in the North Parcel reflected the agency's recognition that the hydrology of the North Parcel was not particularly well studied or understood.

C. Multiple-Use Mandates

Somewhat opaquely, Appellants raise yet another challenge to the Secretary's withdrawal decision – that it contravened the principle that land management under FLPMA "be on the basis of multiple use and sustained yield." 43 U.S.C. § 1701(a)(7). This argument lacks merit.

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[29] For example, a National Parks Service hydrologist, Larry Martin, stated in an internal email that "[t]he [draft EIS] goes to great lengths in an attempt to establish impacts to water resources from uranium mining. It fails to do so, but instead creates enough confusion and obfuscation of hydrogeologic principles to create the illusion that there could be adverse impacts if uranium mining occurred." Martin's manager, Bill Jackson, observed that "the hard science doesn't strongly support a policy position," but also observed that the prevailing uncertainty as to the risk of contamination was itself a possible reason for withdrawal.

FLPMA defines "multiple use" 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," and specifically contemplates "the use of some land for less than all of the resources" and the long-term preservation of "natural scenic, scientific and historical values." 43 U.S.C. § 1702(c). Accordingly, FLPMA cautions the Secretary to give consideration 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." *Id.*

As the Supreme Court has observed, "multiple use" is a "deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). It does not, as Appellants suggest, require the agency to promote one use above others. Nor does it preclude the agency from taking a cautious approach to assure preservation of natural and cultural resources. The agency must weigh competing interests and, where necessary, make judgments about incompatible uses; a particular parcel need not be put to all feasible uses or to any particular use. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710 (10th Cir. 2009). Consequently, the principle of multiple use confers broad discretion on an implementing agency to evaluate the potential economic

benefits of mining against the long-term preservation of valuable natural, cultural, or scenic resources.

Here, Interior engaged in a careful and reasoned balancing of the potential economic benefits of additional mining against the possible risks to environmental and cultural resources. This approach was fully consonant with the multiple-use principle.

D. Sufficiency of Existing Laws and Regulations

Launching yet another line of attack, Metamin and AEMA maintain that the Interior did not adequately consider whether existing laws and regulations were sufficient to protect the resources identified in the ROD, undermining the justification for the withdrawal. Alternatively, and to some degree in contraiction, Metamin and AEMA represent that Interior found existing laws and regulations sufficient but did not draw the proper conclusion – that withdrawal was unjustified. Neither argument is persuasive.

The final EIS repeatedly acknowledged that some applicable laws and regulations mitigate the impact of uranium mining on environmental, cultural, and visual resources, as well as wildlife and human health. But the final EIS does not suggest that simply enforcing existing laws and regulations would suffice to meet the purposes of the withdrawal.

For example, the final EIS examined the relative impacts of Alternative A (wherein the agency would

take no action and existing laws and regulations would be left in place) and Alternative B (the full withdrawal) at great length. The final EIS concluded that the potential negative impact on water resources would be significantly greater under Alternative A, a comparison that expressly accounted for the applicable regulatory schemes. With respect to cultural and tribal resources, the final EIS concluded that (1) under the existing regulatory regimes, "it may not be possible to reduce all such adverse effects in the long term, especially impacts to the character, association and feeling of the setting"; (2) mitigation of the expected damage to tribal resources, in particular, "may be difficult or impossible in many cases"; and (3) "the preferred mitigation method is avoidance." Limiting the withdrawal to 600,000 acres – still a sizeable area – would, the final EIS concluded, have resulted in a "very high" impact on cultural and tribal resources. With respect to wildlife and visual resources, the final EIS's comparison of Alternatives A and B demonstrated that the existing regulatory scheme would be "significantly" less effective without the withdrawal, and that taking no action would result in a moderate impact on those resources.

In short, the final EIS did take existing legal regimes into account but reasonably concluded that they were inadequate to meet the purposes of the withdrawal.

IV. The Establishment Clause

Appellant Gregory Yount alone challenges the Secretary's withdrawal as violating the Establishment Clause of the First Amendment.

The Secretary observed in the ROD that uranium mining "within the sacred and traditional places of tribal peoples may degrade the values of those lands to the tribes that use them." According to Yount, precluding new mining claims on federal land out of concern that the area has sacred meaning to Indian tribes violates the Establishment Clause.

In general, state action does not violate the Establishment Clause if it (1) has a secular purpose, (2) does not have a principal or primary effect of advancing or inhibiting religion, and (3) does not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The withdrawal easily satisfies this test.

Preservation of "cultural and tribal resources" was one of four rationales for the withdrawal identified in the ROD. And although some of the tribal resources in question had sacred meaning and uses for tribe members, many did not. The final EIS identified "sacred sites" as just one of several varieties of important tribal resources: others included "tribal homelands, places of traditional importance, traditional use areas, trails, springs and waterways." Accordingly, as just part of four reasons for action, preserving tribes' religious use of disputed lands was neither a motivating purpose for nor a principal or primary effect of the withdrawal.

Furthermore, preservation of areas of cultural or historic value area may constitute a "secular purpose" justifying state action even if the area's significance has, in part, a religious connection. *See Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043-44 (9th Cir. 2007). California's missions, Alaska's Russian-era Orthodox churches, and Ancient Hawaii's heiau carried religious significance to those who built them, and may carry religious connotations to some of those who visit today. So, too, "the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and [the] numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004). "[B]ecause of the central role of religion in human societies, many historical treasures are or were sites of religious worship." *Id.* But that does not negate the value of these sites as a part of our secular cultural inheritance. The American Indian sacred land at issue here is no different.[30] *Access Fund*, 499 F.3d at 1044-45;

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[30] Yount's reliance on *Lyng v. Northwest Indian Cemetery Protective Association* is misplaced for much the same reason as Metamin's and AEMA's reliance on the *Lyng* line of cases. *See supra* note 26. *Lyng* held that the Free Exercise Clause did not compel the government to defer to tribal religious interests when managing public land. 485 U.S. at 453-54. It in no way held that the Establishment Clause compelled the government to *disregard* tribes' interests in their sacred sites. *See, e.g.*, *id.* at 454 ("The Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.").

Cholla Ready Mix, 382 F.3d at 976. For that reason as well, the withdrawal had a secular purpose and did not have as a primary effect advancing religion.

Finally, there is no colorable contention that the Secretary's withdrawal fosters "excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. Yount has suggested that a withdrawal premised on the protection of areas associated with "archaic religious dogma" that "few currently follow" somehow inserts the federal government into a debate over American Indian religious life. But again, even with respect to tribal resources, the reasons for and effect of the Secretary's withdrawal were primarily secular. The withdrawal in no way "involves comprehensive, discriminating, and continuing state surveillance of religion." *Nurre v. Whitehead*, 580 F.3d 1087, 1097 (9th Cir. 2009) (citation omitted). Nor is there any evidence that it "divides citizens along political lines" for reasons related specifically to American Indian religious practice. *Id.* at 1097 (citation omitted); *see Lemon*, 403 U.S. at 622. Thus, the Establishment Clause challenge fails under *Lemon*.

V. NEPA

A. Essential Information

Appellants also contend that the final EIS regarding the withdrawal violated NEPA. Appellants propose, first, that by ignoring missing data essential to its analysis, BLM failed to consider an important aspect of the problem facing the agency. We do not agree.

The EIS is "[t]he centerpiece of environmental review . . . , in which the responsible federal agency describes the proposed project and its impacts, alternatives to the project, and possible mitigation for any impacts." *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016). NEPA's implementing regulations require that "[w]hen 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. When that information is deemed "essential to a reasoned choice among alternatives," the agency must either obtain it or, if the information is not obtainable, include in the EIS (1) a statement identifying relevant unavailable or incomplete information; (2) a discussion of the relevance of that information to potential environmental impacts; (3) a summary of the available credible scientific evidence which is relevant to evaluating foreseeable environmental impacts; and (4) the agency's evaluation of those impacts based upon generally accepted scientific approaches. 40 C.F.R. § 1502.22(a), (b); *see Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 497 (9th Cir. 2014) (holding that the steps specified by § 1502.22(b) are required if the agency finds "`essential' information to be unobtainable").

Here, the final EIS fully abided by these regulatory requirements. The final EIS consistently acknowledged that information was incomplete with respect to a critical aspect of the withdrawal – namely, the

connection between uranium mining and increased uranium concentrations in groundwater in the withdrawn area. The document included several subsections titled "Incomplete or Unavailable Information," which discussed the relevance of that missing information to its analysis. For example, BLM acknowledged in the final EIS that "more precise information on the locations of exploration sites, mine sites, and roads would be useful to better understand the . . . impacts to wildlife and fish species," and that "[a] more thorough quantitative data investigation of water chemistry in the Grand Canyon region would be helpful to better understand groundwater flow paths, travel times, and contributions from mining activities." As required, the EIS then summarized the scientific evidence that *was* available and discussed foreseeable environmental impacts.

Furthermore, the ROD concluded that the missing information was not "essential to making a reasoned choice among alternatives." 40 C.F.R. 1502.22. The ROD observed that there was data regarding dissolved uranium concentrations near six previously mined sites, and that a reasoned choice could be made using that data. The ROD stated that collecting additional data would be "helpful for *future* decisionmaking in the area" (emphasis added). But as the withdrawal was not permanent and would apply only to new mining claims, the ROD noted, additional data could be collected during the withdrawal period and used to determine whether additional mines should be allowed in the future.

Interior expressly stated that the missing information was non-essential only in the ROD, not in the final EIS. We agree with the Seventh and Tenth Circuits that an agency is not required to state specifically in the final EIS that relevant missing information was non-essential. "[NEPA's implementing] regulations do not prescribe the precise manner through which an agency must make clear that information is lacking." *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 532 (7th Cir. 2012); *see also Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172-73 (10th Cir. 1999). As the final EIS complied with the requirements for *essential* information, thereby ensuring that interested parties had notice that the agency's information was incomplete, the delay in determining that the missing data was not essential is of no moment.

In short, the ROD concluded that any missing information was non-essential, and the final EIS identified that missing information, discussed its relevance, weighed the available scientific evidence, and presented its conclusions regarding potential environmental impact based on the available data – exactly what 40 C.F.R. § 1502.22(b) would have required if the missing information *had* been essential information.[31] "We will defer to the agency's judgment about the appropriate level of analysis so long as the EIS provides

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[31] Metamin's citation to *Montana Wilderness Association v. McAllister*, 666 F.3d 549 (9th Cir. 2011), is unavailing. We held in *Montana Wilderness Association* that the Forest Service erred in failing to account for the relevance of missing information *at all*. 666 F.3d at 560-61.

as much environmental analysis as is reasonably possible under the circumstances, thereby providing sufficient detail to foster informed decision-making at the stage in question." *Point Hope*, 740 F.3d at 498 (citations and alterations omitted). Such deference is due here.

B. Coordination with Counties

A second front of the NEPA challenge concerns requirements in FLPMA and NEPA regarding consultation with local government. As relevant here, FLPMA requires that the Secretary shall, "to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs" of the "local governments within which the lands are located" and shall "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands." 43 U.S.C. § 1712(c)(9). NEPA's implementing regulations also require that federal agencies "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements." 40 C.F.R. § 1506.2(b). Metamin and the Counties contend

that the Secretary did not fulfill these overlapping obligations. They are wrong.[32]

Interior held public meetings, designated the Counties as cooperating agencies, and met separately with representatives from the Counties. It also considered public comments submitted by the Counties regarding the withdrawal.

Based in part on the comments it received from the Counties, BLM ordered an expanded economic impact analysis for the region and consulted county representatives to determine what, if any, additional data to include in its modeling. The final EIS contained extensive analysis (spanning more than fifty pages) of the potential impact of withdrawal on the Counties and other affected communities, including economic impact, and observed that Mohave County passed a resolution opposing the withdrawal. The record thus demonstrates that Interior fully acknowledged and considered the Counties' concerns regarding the withdrawal, even though it chose in the end to proceed. FLPMA and NEPA require no more. In particular, the *consent* of state and local governments to a withdrawal is in no way required – and with good reason, as regional environmental threats must always be balanced against the economic gains the local governments

[32] Interior notes that FLPMA's local government coordination requirement applies to "land use plans," 43 U.S.C. § 1712(c), and that a withdrawal from mining claims is not a "land use plan" within the meaning of the statute. We need not address this issue, as we conclude that the agency complied with the consultation requirements, assuming they apply.

could reap if no federal action were taken. NEPA does not confer veto power on potentially affected state or local governments, each with its own economic interests.

Finally, Appellants propose that Interior did not comply with 40 C.F.R. § 1506.2(d), which requires agencies to "discuss any inconsistency of a proposed action with any approved State or local plan and laws" and, "[w]here an inconsistency exists . . . describe the extent to which the agency would reconcile its proposed action with the plan or law." Appellants maintain that the withdrawal is inconsistent with county resolutions opposing the withdrawal. Those resolutions, however, are not "approved State or local plans or laws." The final EIS and ROD did consider approved county plans and found no inconsistencies or conflicts.

IV. Forest Service Consent

The final arrow in Appellants' very large quiver is the contention that the Forest Service's consent to the withdrawal was arbitrary, capricious, or otherwise not in accordance with law, because it did not comply with the National Forest Management Act ("NFMA") multiple-use mandate, 16 U.S.C. § 1604(e), or the terms and conditions of the Kaibab National Forest Plan established under the NFMA. The area withdrawn included approximately 355,874 acres in the South and East Parcel managed by the Forest Service. Including that land in the withdrawal area required the consent of the Forest Service, which the Forest Service provided.

AEMA argues that the Kaibab Forest Plan, as of the effective date of the withdrawal, expressly contemplated the withdrawal from mining only of four specific areas within the forest, making the Forest Service's consent to a larger withdrawal area inoperative.

Neither the Forest Service nor the Department of Agriculture (of which the Forest Service is a part) has the authority to open or close public lands for mining. That authority is delegated only to the Secretary of the Interior. Section 202 of FLPMA specifies that public lands "shall be removed from or restored to the operation of the Mining Law of 1872 . . . or transferred to another department, bureau, or agency *only* by withdrawal action pursuant to [43 U.S.C. § 1714] or other action pursuant to applicable law." 43 U.S.C. § 1712(e)(3) (emphasis added). The specified section of FLPMA, in turn, delegates withdrawal authority to the Secretary of the Interior and states that the Secretary may further delegate that authority only to other presidential appointees within the Department of the Interior. 43 U.S.C. § 1714(a).

The NFMA does not confer withdrawal authority on the Forest Service either. That statute concerns the management of forests and their "renewable resources." 16 U.S.C. § 1600(2). Minerals are not renewable resources and are not directly within the Forest Service's purview.

FLPMA does require that "[i]n the case of lands under the administration of any department or agency other than the Department of the Interior," including

the Forest Service, "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. § 1714(I). Congress may have included the consent requirement within FLPMA in part to ensure that Interior would account for significant aboveground impacts on lands managed by the Forest Service, or to forestall interagency squabbling concerning jurisdiction over withdrawn lands. But it decidedly did not confer on the Forest Service (or the Department of Agriculture) the power independently to open or close federal lands to mining.

Further, the Forest Service's consent to the Secretary's withdrawal was not inconsistent with the governing forest plan. AEMA's argument rests on a faulty premise: that the Forest Plan's recommendation that certain discrete areas under its purview be withdrawn from mining, so as to protect renewable *above-ground* resources, impliedly *granted* mining rights throughout the remainder of the Kaibab National Forest. Again, the Forest Service has no authority to open or close public lands to mining claims. And even if it did possess such authority, the Kaibab National Forest Plan did not preclude withdrawals beyond the four discrete areas recommended. No guidance or directives within the Kaibab Forest Plan suggest that the Forest Service meant to block all withdrawals within the Kaibab National Forest beyond the four identified sites.[33]

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[33] AEMA also suggests that even if the Forest Service could have consented to the proposed withdrawal consistently with the

CONCLUSION

At its core, the merits question in this case is whether the Secretary was allowed to adopt a cautious approach in the face of some risk, difficult to quantify based on current knowledge, to what he called "America's greatest national wonder." Appellants raise a myriad of challenges but in the end identify no legal principle invalidating the Secretary's risk-averse approach. As Interior concluded, withdrawal of the area from new mining claims for a limited period will permit more careful, longer-term study of the uncertain effects of uranium mining in the area and better-informed decisionmaking in the future.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

Kaibab National Forest Plan, the Forest Service failed to provide adequate justification for its consent. This argument is without merit. The Forest Service's joint statement of consent with BLM, though brief, referenced the potential environmental impacts to the Kaibab National Forest detailed at greater length in the final EIS. The Forest Service also noted that it had been a cooperating agency throughout the withdrawal process.

APPENDIX A:
ACRONYMS USED IN THIS OPINION

AEMA American Exploration & Mining Association

APA Administrative Procedure Act

BLM	Bureau of Land Management
EIS	environmental impact study
FDAMA	Food and Drug Administration Modernization Act
FDCA	Federal Food, Drug, and Cosmetic Act
FLPMA	Federal Land Policy and Management Act
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
PLLRC	Public Land Law Review Commission
R-aquifer	Redwall-Muav aquifer
ROD	Record of Decision
SER	Supplemental Excerpts of Record
USGS	United States Geological Survey

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gregory Yount, Plaintiff, v. Ken Salazar, et al., Defendants.	No. CV11-8171-PCT DGC (Lead case)
National Mining Association, Plaintiff v. Ken Salazar, et al., Defendants	No. CV12-8038 PCT DGC
Northwest Mining Association, Plaintiff v. Ken Salazar, et al., Defendants.	No. CV12-8042 PCT DGC
Quaterra Alaska Incorporated, et al., Plaintiff v. Ken Salazar, et al., Defendants.	No. CV12-8075 PCT DGC

(Filed Mar. 20, 2013)

Plaintiffs National Mining Association and Nuclear Energy Institute ("NMA/NEI") and Plaintiff Northwest Mining Association ("NWMA") have filed motions for partial summary judgment in this consolidated action. Docs. 73,[1] 90. Plaintiffs assert in counts one and seven of their respective complaints that the Secretary of the Department of the Interior's withdrawal of more than one million acres from mining location and entry in Northern Arizona should be vacated because § 204(c) of the Federal Land Policy Management Act ("FLPMA") is unconstitutional.

Defendants Kenneth L. Salazar, Secretary of the Department of the Interior; the Department of the Interior ("DOI"); the Bureau of Land Management ("BLM"); the Forest Service; and the Department of Agriculture (collectively, "Federal Defendants"), and Defendant-Interveners Grand Canyon Trust et al. ("the Trust") have filed cross motions for partial summary judgment on these counts. Docs. 101, 102.

The motions and cross motions have been fully briefed (Docs. 101, 102, 110, 113, 115, 117), and the Court held oral argument on March 1, 2013. For the reasons stated below, the Court finds that § 204(c)'s legislative veto, which provides that Congress can block withdrawals in excess of 5,000 acres through a resolution of both houses, is unconstitutional. The

[1] Document 73 is docketed under case number 3:12-cv-08038-DGC because it was filed before the separate cases in this action were consolidated. Unless specifically noted, all other documents have been docketed under the lead case number, 3:11-cv-08171-DGC.

Court also finds, however, that this provision is severable from the grant of authority relied on by the Secretary in this case. The Court therefore will deny Plaintiffs' motions for partial summary judgment and grant Federal Defendants' and Defendant-interveners' cross motions.

I. Background.

On July 21, 2009, Secretary Salazar published notice of his intent "to withdraw approximately 633,547 acres of public lands and 360,002 acres of National Forest System lands for up to 20 years from location and entry under the Mining Law of 1872." Notice of Proposed Withdrawal, 74 Fed. Reg. 35,887, (July 21, 2009). The 2009 Notice had the effect of withdrawing the land from location and entry for up to two years to allow time for analysis, including environmental analysis under the National Environmental Protection Act ("NEPA"). *Id.*

On August 26, 2009, the BLM, an agency within DOI, published notice of its intent to prepare an Environmental Impact Statement ("EIS") addressing the proposed withdrawal, as required by NEPA. 74 Fed. Reg. 43,152 (Aug. 26, 2009). The purpose of the withdrawal as explained in the notice was "to protect the Grand Canyon watershed from adverse effects of locatable mineral exploration and mining, except for those effects stemming from valid existing rights." *Id.* at 43, 152-53.

After soliciting public comments, the BLM issued a notice of availability of a Draft EIS on February 18, 2011. 76 Fed. Reg. 9,594 (Feb. 18, 2011). The Draft EIS considered four alternatives: a "No Action" alternative; the withdrawal of approximately 1,010,776 acres for 20 years; the withdrawal of approximately 652,986 acres for 20 years; and the withdrawal of 300,681 acres for 20 years. *Id.* at 9,595. After an extended opportunity for public comment, the BLM published a notice of availability of the Final EIS on October 27, 2011. 76 Fed. Reg. 66,747 (Oct. 27, 2011). The Secretary issued a Record of Decision on January 9, 2012, choosing to withdraw "approximately 1,006,545 acres of federal land in Northern Arizona for a 20-year period." *See* No. 3:12-cv-08042, Doc. 27-1 at 3.

The Secretary made this withdrawal under the authority granted in § 204 of FLPMA. 77 Fed. Reg. 2,563-01, 2,563 (Jan. 18, 2012). Section 204(c) authorizes the Secretary to make withdrawals "aggregating five thousand acres or more . . . only for a period not more than 20 years."[2] 43 U.S.C. § 1714(c)(1). It further provides that "[t]he Secretary shall notify both houses of Congress of such a withdrawal no later than its effective date[,] and the withdrawal shall terminate and become ineffective at the end of ninety days . . . if the Congress has adopted a concurrent resolution stating

[2] FLPMA defines a "withdrawal" as "withholding an area of Federal land from settlement sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program[.]" 43 U.S.C. § 1702(j).

that such House does not approve the withdrawal." *Id.* The Secretary submitted its notice and reports to Congress on January 9, 2012, and Congress did not pass a concurrent action within 90 days to block the withdrawal. *See* Doc. 101 at 72-88. The withdrawal therefore remains in effect.

II. Discussion.

Plaintiffs argue that even though Congress did not exercise its authority to void the withdrawal, the legislative veto provision enabling it to do so is unconstitutional and so interwoven with the withdrawal authority given the Secretary in § 204(c) that the entire grant of authority must be struck down. *See generally* Docs. 73 & 90.[3]

A. The Legislative Veto.

Plaintiffs contend, and Defendants do not dispute, that the provision permitting Congress to terminate a withdrawal by concurrent resolution is unconstitutional because it allows Congress to act without adhering to normal constitutional requirements. The Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983), found that where Congress delegates authority to an

[3] Because NMA/NEI and NWMA have joined in each other's motions, the Court will not separately identify which party asserts which arguments, but will instead refer to these parties collectively as "Plaintiffs." The Court will take this same approach with Federal Defendants and Defendant-Intervenors, referring to them only as "Defendants."

agency to make policy decisions that alter legal rights, thus enabling the agency to engage in "legislative action," Congress must "abide by that delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955. Congress cannot alter a decision of such an agency merely through a resolution of one or both houses because Congress must act "in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." *Id.* at 958. Section 204(c), which allows Congress to void the Secretary's decisions without presentment to the President, is clearly unconstitutional under *Chadha*.

B. Severability.

Plaintiffs argue that the legislative veto is not severable from the rest of § 204(c) and that the Court must therefore invalidate the entire section. The touchstone for determining whether a challenged statutory provision is severable from other provisions is the intent of Congress. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) (explaining that the test for severability is "What was the intent of the lawmakers?"); *Chadha*, 462 U.S. at 931-932 (noting that invalid portions of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.") (internal quotation marks and citations omitted); *City of New Haven v. U.S.*, 809 F.2d 900, 903 (D.C. Cir. 1987) ("[T]he question whether the

unconstitutional legislative veto provision in section 1012 is severable from the remainder of that section . . . [i]s purely one of congressional intent."). Thus, the key question for the Court to decide is whether Congress would have conferred § 204(c) withdrawal authority on the Secretary in the absence of a legislative veto.

Plaintiffs argue that Congress would have discarded all of § 204(c) rather than enact a grant of authority to make withdrawals of 5,000 acres or more ("large-tract withdrawals") without a legislative veto. Plaintiffs point to the historical and political events leading up to the FLPMA, the language, structure, and context of § 204(c), and the legislative history of the FLPMA, all as showing that Congress would not have granted the Secretary large-tract withdrawal authority had it known it could not rely on the legislative veto to control that authority. Docs. 73 at 8-13; 90 at 17-21. The Court will address these arguments separately.

Before doing so, however, the Court notes two legal principles that will bear on the decision in this case. First, a statute that contains an unconstitutional provision is presumed to be severable if Congress has included a severability clause in the statute. *Chadha*, 462 U.S. at 932. "A provision is further presumed severable if what remains after severance 'is fully operative as a law.'" *Id.* at 934 (internal citation omitted). Second, when a presumption of severability arises, the party asking the Court to strike down a portion of the statute must present "strong evidence" that Congress would not have enacted the challenged portion of the

statute in the unconstitutional provision. *Alaska Airlines v. Brock*, 480 U.S. 678, 686 (1987).

The FLPMA includes a severability clause. Congress specifically stated that "[i]f any provision of the Act or the application thereof is held invalid, the remainder of the Act and application thereof shall not be affected thereby." Act of Oct. 21, 1976, Pub. L. No. 94-579, § 707, 90 Stat. 2743; 43 U.S.C. § 1701, historical and statutory notes. This clause is similar in material respects to the severability clause in *Chadha*, where the Court emphasized that the clause applied to "'*any* particular provision of [the] Act.'" 462 U.S. at 932 (emphasis added by *Chadha*). The Court thus begins its analysis with a presumption that the legislative veto provision can be severed from the rest of § 204(c), leaving intact the Secretary's authority to make the withdrawal at issue in this case. Plaintiffs can prevail in their quest to invalidate all of § 204(c) and the Secretary's withdrawal only if they present "strong evidence" that Congress would not have granted the Secretary large-tract withdrawal authority in the absence of a legislative veto.

B. The Historical and Political Events Preceding the FLPMA.

The authority to manage and regulate the use of public lands originates in the Property Clause of the U.S. Constitution, which vests in Congress the "power to dispose of and make all needful rules and regulations respecting . . . property belonging to the United

States." U.S. Const., Art. IV, § 3, cl. 2. The parties agree, however, that the Executive Branch historically exercised its own authority to withdraw public lands. In 1915, the Supreme Court affirmed this authority in *United States v. Midwest Oil Company*, 236 U.S. 459 (1915), finding that Congress's "acquiescence" in a multitude of executive land withdrawals over a long period of time had "readily operated as an implied grant of power." *Id.* at 479. At various times Congress actually enacted statutes enabling the Executive to withdraw public lands for specific purposes. As the Supreme Court later summarized in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), management of public lands under these many laws "became chaotic." *Id.* at 876.

Congress responded in 1964 by forming the bipartisan Public Land Law Review Commission ("the Commission") "to study existing laws and procedures relating to the administration of the public lands." Act of Sept. 19, 1964, Pub. L. No. 88-606, 78 Stat. 982. After study, the Commission found that "[t]he lack of clear statutory direction for the use of the public lands has been the cause of problems ever since Congress started to provide for the retention of some of the public domain in permanent Federal ownership." Pub. Land Law Review Comm'n, *One Third of the Nation's Land* 43 (1970) (hereinafter Commission Report); *see* Doc. 102 at 36. The Commission found that "[t]he relative roles of the Congress and the Executive in giving needed direction to public land policy have never been carefully defined[,]" and that the Executive used its

withdrawal authority in "an uncontrolled and haphazard manner." *Id.* The Commission recommended that Congress "establish national policy in all public land laws by prescribing the controlling standards, guidelines, and criteria for the exercise of authority delegated to executive agencies." *Id.* at 2; *see* Doc. 102 at 35. The Commission further suggested that

> Congress assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public lands for specified limited purpose uses and delineating specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action.

Id.; *see* Doc. 102 at 35.

Congress enacted the FLPMA in response to the Commission's findings and recommendations. Plaintiffs rely on the first part of the Commission's language quoted above – that "Congress assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public lands" – as evidence that Congress's intent in passing the FLPMA was to reign in executive authority over public land withdrawals. Doc. 90 at 10-11. As Defendants point out, however, the full-text of the quoted language contains a two-part recommendation: First, that Congress spell out its own reserved authority "to withdraw or otherwise set aside public land for specified limited-purpose uses," and second, that Congress make a "specific delegation of authority to the

Executive as to the types of withdrawals and set asides that may be effected without legislative action." Doc. 102 at 15. This two-part suggestion can also be seen in the Commission's recommendation that "large scale limited or single use withdrawals of a permanent nature" should only be effectuated by an Act of Congress, while "[a]ll other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive action." Commission Report at 54, Recommendation 8; *see* Doc. 102 at 40.

The FLPMA adopted this two-part approach to managing public lands. The statute specifically states that "it is the policy of the United States that . . . Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes *and* that Congress delineate the extent to which the Executive may withdraw lands without legislative action[.]" 43 U.S.C. § 1701(a)(4) (emphasis added).

To accomplish the first part of this purpose, several sections of the FLPMA reserve to Congress exclusive authority over public land actions, including preventing the Executive from modifying Congressional withdrawals for national monuments and wildlife refuges and reserving to itself the authority to designate wilderness areas. *See* 43 U.S.C. §§ 1714(j), 1782. To ensure that Congress alone could initiate action in these areas, the FLPMA expressly repealed all grants of authority to the Executive recognized in

Midwest Oil and 29 prior statutory grants of authority. Act of Oct. 21, 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792.

To accomplish the second part of the Commission's recommendation, the FLPMA includes express grants of withdrawal authority to the Executive. Section 204(a) provides that "the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section." 43 U.S.C. § 1714(a). Section 204(b) sets forth the procedures the Secretary must follow, and the next three subsections set forth, respectively, the procedures applicable to executive withdrawals over 5,000 acres, withdrawals less than 5,000 acres, and emergency withdrawals. *Id.* at § 1714(c)-(e). Thus, the FLPMA did what the Commission recommended – it reserved certain land actions for Congress alone (national monuments, wildlife refuges, and wilderness areas), and it also expressly delegated authority to the Executive to take other land actions through specified procedures.

Plaintiffs repeatedly emphasize that the FLPMA sought to reign in executive authority over public lands and to place limits and statutory protections around executive withdrawal authority. That certainly is correct. But the question to be decided in this case is not whether Congress sought to reign in executive authority, but whether there is "strong evidence" that Congress would have chosen to give the Executive no large-tract withdrawal authority under § 204(c) if it was unable to limit that authority with a legislative

veto. The recommendations of the Commission do not provide that strong evidence. Significantly, the Commission did not recommended a legislative veto. Nor did it suggest that Congress reserve large-tract withdrawal authority to itself.

As discussed above, the Commission was equally concerned with enabling the Executive to act through controlled delegation as it was with preserving Congress's reserved powers. Even while noting the "increasing controversy" caused by the Executive's use of its implied withdrawal authority, the Commission recognized that such executive action stemmed from a need to manage public lands for which Congress had provided inadequate statutory guidance. Commission Report at 44; *see* Doc. 102 at 37. The Commission accordingly recommended that Congress "delineat[e] specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action." *Id.* at 2; *see* Doc. 102 at 35. In short, the Commission recommended that Congress grant withdrawal authority to the Executive without a legislative veto. This does not constitute "strong evidence" that Congress would have withheld the authority absent such a veto.[4]

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[4] Plaintiffs argue that the fact that Congress enacted the veto provision even though the Commission had not recommended it suggests that Congress must have found the Commission's recommendations insufficient to reign in executive power. Doc. 110 at 13, n.12. Given the key role the Commission Report played in the enactment of the FLPMA, however, it is equally plausible that because the primary source guiding the enactment of the FLPMA did not suggest a veto provision, Congress would

C. The Language, Structure, and Context of § 204(c).

1. Policy Language.

Plaintiffs note that the language of the FLPMA repeatedly asserts legislative control over executive authority to withdraw public lands. Doc. 73 at 8. They point to the FLPMA's statement in § 102 declaring that it is "the policy of the United States that . . . Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action." 43 U.S.C. § 1701(a)(4). They also point to the FLPMA's repeal of all implied authority to the Executive and argue that this provision "bluntly expresses Congress's desire to reign in the withdrawal authority of the Executive Branch." Doc. 73 at 8-9. As noted above, however, such provisions simply mirror the Commission's two-part recommendation that Congress reserve for itself withdrawal authority in specified areas (an action that required eliminating any competing executive authority in those areas) and grant specific authority to the Executive in other areas. They say little about the importance of § 204(c)'s veto provision in achieving these overall purposes.

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have forgone such a provision had it known the provision was unconstitutional.

2. "Only."

Plaintiffs further point to § 204(a), which states that the "Secretary is authorized to make . . . withdrawals, but *only* in accordance with the provisions and limitations of this section." 43 U.S.C. § 1714(a), cited in Doc. 73 at 9 (emphasis added). Plaintiffs argue that this language shows that Congress could not have intended the grant of authority in § 204(c) to exist without all the provisions and limitations that pertain to it, including the legislative veto. Doc. 73 at 9. This language is repeated in § 202(e): "public lands shall be removed from or restored to the operation of the Mining Law of 1872 . . . only by withdrawal action pursuant to [§ 204] or other action pursuant to applicable law." 43 U.S.C. § 1712(e)(3) (quoted in Doc. 110 at 7-8). Plaintiffs maintain that this requirement, seen in tandem with the limiting language of § 204(a) and the veto provision in § 204(c)(1), shows that "Congress was willing to allow Interior to make long-term withdrawals of large acreage *only* if Congress could override that withdrawal itself, without presentment to the President." Doc. 110 at 8 (emphasis in Pl. brief).

Plaintiffs rely on Justice Scalia's concurrence in *Miller v. Albright*, 523 U.S. 420, 457-58 (1998). In *Miller*, an alien plaintiff had argued that two requirements for demonstrating one's citizenship under the Immigration and Nationality Act ("INA") violated the equal protection clause of the Constitution because they required proofs of parentage from those born of U.S. citizen fathers that were not required from those born of U.S. citizen mothers. 523 U.S. at 424. Justice

Scalia opined that the Court could not sever the unconstitutional provisions and leave the rest of the statute intact because "the INA itself contains a clear statement of congressional intent: 'A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise.*'" *Id.* at 457 (emphasis added by Scalia). He found that "reliance upon the INA's general severability clause . . . is misplaced because the specific governs the general." *Id.* In other words, Justice Scalia found that Congress's direct statement that citizenship could be acquired in the manner specified in the statute "and not otherwise" overrode the severability clause's suggestion that invalid provisions could be eliminated, leaving the rest of the statute's requirements in place.

Plaintiffs argue that the same analysis applies here – that because Congress stated that the Secretary could exercise his withdrawal authority "only" in compliance with the relevant subsections of § 204, none of the provisions can be severed without violating Congress's intent. For several reasons, the Court is not persuaded.

First, *Miller* did not find the challenged provisions unconstitutional, so the Court never ruled on severability. Justice Scalia's comments are not only in a concurrence, they are dicta.

Second, the INA provision in question included the word "only" as well as the words "and not otherwise." *Id.* at 457 ("'A person may *only* be naturalized as a

citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise.*'" (emphasis added)). Justice Scalia relied on the latter phrase – "and not otherwise" – for his conclusion. Section 204(a) of the FLPMA does not include that phrase, and the presence of the single word "only" is an insufficient basis, in the Court's view, to disregard Congress's clear statement that "[i]f *any* provision of the [FLPMA] or the application thereof is held invalid, the remainder of the [FLPMA] and application thereof shall not be affected thereby." Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. § 707; 43 U.S.C. § 1701, historical and statutory notes (emphasis added).

Third, Justice Scalia reaffirmed that courts have "judicial power to sever the unconstitutional portion from the remainder [of an Act], and to apply the remainder unencumbered." *Id.* The operative question, he maintained, is "whether Congress would have enacted the remainder of the law without the invalidated provision." *Id.* That is precisely the question addressed in this order.

Finally, Justice Scalia's concurrence does not in any way eliminate the presumption of severability raised by the severability clause or the requirement that "strong evidence" must be presented to overcome that presumption. *Chadha*, 462 U.S. at 932; *Alaska Airlines*, 480 U.S. at 686.

3. Structure.

Plaintiffs argue that "the structure of 204(c) further highlights the impossibility of severing the veto alone." Doc. 73 at 11. They first argue that the Secretary's large-tract withdrawal authority and the legislative veto are integrated into the same provision, showing that Congress intended them to remain linked. Subsection 204(c)(1) states, in relevant part:

> [A] withdrawal aggregating five thousand acres or more may be made . . . only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date *and 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) (emphasis added). The remainder of the subsection specifies the precise legislative procedures for exercising the veto. *Id.*

It is undisputed that Congress intended the veto to apply to large-tract withdrawals and not to other grants of authority. Thus, it is unremarkable that the veto provision and the delegation of large-tract withdrawal authority appear in the same subsection. As Defendants point out, "it only makes sense from the standpoint of clarity that a veto relating solely to the withdrawal authority appear in close textual

proximity to that authority." Doc. 101 at 14. The relevant question, however, is not whether Congress intended the veto to serve as a potential check on large-tract withdrawals – it clearly did – but whether there is "strong evidence" that Congress would have withheld the large-tract withdrawal authority had it known the veto was unconstitutional. As *Chadha* instructs, mere "reluctance" to delegate authority in the absence of a legislative veto is not enough to rebut the presumption of severability that attaches when Congress includes a severability clause. 462 U.S. at 932 ("Although it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by [the severability clause]."). Plaintiffs' textual proximity argument therefore does little to advance the view that Congress would not have wanted the Court to sever the unconstitutional veto provision, leaving the remainder of § 204(c) intact, particularly where the severability clause permits that Court to do just that and "it is the duty of th[e] court . . . to maintain the act in so far as it is valid." *Alaska Airlines*, 480 U.S. at 686; *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (the court tries "not to nullify more of a legislature's work than is necessary," lest it "frustrate[ ] the intent of the elected representatives of the people") (internal quotation marks and citations omitted).

4. Notice and Reporting Requirements.

Plaintiffs next argue that severing the legislative veto would leave the notice and reporting requirements in § 204(c)(1) and § 204(c)(2) with no purpose. Doc. 73 at 11-12. As shown above, § 204(c)(1) requires that the Secretary notify both houses of Congress of a large-tract withdrawal on or before the date that that withdrawal goes into effect. 43 U.S.C. § 1714(c)(1). Section 204(c)(2) further requires that "[w]ith the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees" a detailed report containing twelve specific elements, collectively detailing the rationale for the withdrawal and documenting the procedures used for public consultation, data collection, and evaluation. *See* 43 U.S.C. § 1714(c)(2).

Subsection 204(c)(2)'s explicit reference to the notice requirement in (c)(1), and the fact that the required reports are to go to the committees who may, within 30 days, either make a motion to veto that action or be discharged from further consideration (*see* § 204(c)(1)), shows that Congress envisioned the reports as aiding the committees in deciding whether to recommend a veto. This does not resolve the question, however, of whether the reporting requirements have value without a legislative veto provision.

The Court concludes that the reporting requirements provide a meaningful limitation on executive action even if no legislative veto may be exercised. They

require the Secretary to explain the reasons for the withdrawal (§ 204(c)(2)(1)); evaluate the environmental impact of the current uses and the economic impact of the change (*id.* at (2)); identify present uses and users of the land, including how these will be affected (*id.* at (3)); explain what provisions will be made for continuation or termination of existing uses (*id.* at (4)); consult with local governments and other impacted individuals and groups, and report on the impact of the withdrawal on these parties (*id.* at (7)-(8)); state the time and location of public hearings or other public involvement (*id.* at (10)); state where the records of the withdrawal can be examined by interested parties (*id.* at (11)); and submit a report prepared by a qualified mining engineer, engineering geologist, or geologist concerning general geology, known mineral deposits, past and present mineral production, and present and future market demands (*id.* at (12)). As Defendants argue, such requirements "not only impose a duty to present certain information to Congress; they also force the Secretary to incorporate such considerations into his decision-making process prior to making a large-tract withdrawal." Doc. 101 at 16. Defendants equate the value of these requirements to that of preparing an EIS under NEPA. *Id.*, n. 11.

Beginning with *Chadha*, legislative veto cases have recognized the value of reporting requirements separate from the veto provisions to which they pertain. In *Chadha*, Congress gave the Attorney General authority under the INA to suspend an alien's deportation. 462 U.S. at 923. The Act required the Attorney

General to provide Congress with a detailed statement of the facts, relevant law, and reasons for suspension, and it allowed for one house of Congress to block the suspension. *Id.* at 924-25. The Court struck down the one-house veto as unconstitutional, but found it severable from the grant of authority. *Id.* at 959. The Court reasoned, in part, that "Congress' oversight of the exercise of this delegated authority is preserved" under the Act's reporting requirements. *Id.* at 935. The Supreme Court found it significant that Congress would still maintain the ability to block any unwanted suspensions by means of the regular legislative process. *Id.*, n. 8.

In *Alaska Airlines*, Congress enacted an employee protection program as part of the Airline Deregulation Act of 1978 and granted the Secretary of Labor authority to write implementing regulations. 480 U.S. at 678. Similar to the statute at issue in *Chadha*, the Act included a "report and wait" provision under which the Secretary was required to submit the proposed regulations to committees of both houses of Congress, with the regulations to become effective in 60 days unless blocked by a resolution of either house. *Id.* at 682. The Supreme Court recognized that eliminating the veto would alter the Act's balance of power between Congress and the Executive Branch (*id.* at 685), but found that Congress retained significant oversight even without the veto because it would receive reports of the Secretary's action, could attempt to influence the Secretary during the waiting period, and could enact

proper legislation to block the Secretary's regulations from going into effect. *Id.* at 689-90.

In *Alabama Power Company v. United States Department of Energy*, 307 F.3d 1300, 1307, n. 5 (11th Cir. 2002), Congress authorized the Secretary of Energy to make fee adjustments under the Nuclear Waste Policy Act of 1982. The Act required the Secretary to conduct annual reviews and evaluations of existing fees and to transmit any proposed changes to Congress. *Id.* These changes would go into effect in 90 days unless blocked by resolution of either house of Congress. *Id.* The Eleventh Circuit found the reporting requirements significant even absent a veto because they would give Congress the ability to "keep tabs on the Secretary's use of administrative discretion." *Id.* at 1308.

These cases recognize that reporting requirements have oversight value even when severed from the legislative veto to which they originally were attached. The detailed reporting requirements in § 204(c)(2) have similar value. They not only inform Congress of the Secretary's large-tract withdrawals so that Congress can respond through the normal legislative process if warranted, they also ensure that the Secretary will consider environmental and economic impacts of the withdrawal, consider current uses of the withdrawn land, consult with local governments and other impacted individuals, hold public hearings, and consult qualified experts about the known mineral deposits, past and present mineral production, and present and future market demands. *See* 43 U.S.C. § 1714(c)(2). These requirements will continue to have

significant meaning even after the legislative veto is invalidated.

Plaintiffs argue that *City of New Haven*, 809 F.2d 900, is more applicable here. Doc. 110 at 8-9. In that case, Congress granted the President authority to defer congressional appropriations to the end of the fiscal year by sending a "special message" to Congress including the rationale for the deferral, its amount and intended duration, and its probable fiscal consequences. 809 F.2d at 901. The presidential deferral was to take effect automatically, but Congress could override it with a resolution of either house. *Id.*, n. 1. The D.C. Circuit acknowledged that Congress touched on the need for effective notices during congressional debate, but agreed with the District Court's findings based on "overwhelming evidence of congressional intent" that "Congress – had it known that it could not disapprove unwanted impoundments by means of a legislative veto – would never have enacted a statute that *conceded* impoundment authority to the President." *Id.* at 903 (emphasis in original), 907, n. 19. As the Court will discuss more fully below with respect to legislative history, such "overwhelming evidence" is not present here.

Plaintiffs further argue that cases that contain a "report and wait" requirement are inapplicable because the FLPMA permits Executive Branch withdrawals to go into effect without a waiting period, so that "without the veto, the notices contribute nothing." Doc. 73 at 12, n. 10. Plaintiffs are correct that the absence of a waiting period gives Congress less

opportunity to influence an executive decision before it takes effect, but this point does not help Plaintiffs. If anything, the fact that the FLPMA allows executive withdrawals to go into effect immediately suggests that influencing executive action or attempting to block it through a legislative veto was less important to Congress in the FLPMA than in the "report and wait" statutes.

5. Distinctions between Grants of Authority.

Plaintiffs argue that excising only the veto would nullify the distinction Congress intended to make between small-tract withdrawals (less than 5,000 acres) and large-tract withdrawals, as clearly evidenced by the fact that Congress provided for this authority in separate sections. Doc. 110 at 10-11. It is true that removal of the veto provision negates a key distinction between § 204(c) and § 204(d), but the veto provision is not the only important distinction between these sections. As discussed above, the reporting requirements that attach to § 204(c) withdrawals remain and have utility independent of the veto. Additionally, § 204(d) allows for three separate kinds of withdrawals: one for a "desirable resource use" that can be of unlimited duration, one for "any other use" that is limited to 20 years, and one for "a specific use then under consideration by the Congress" that is limited to 5 years. 43 U.S.C. § 1714(d)(1)-(3). Withdrawals under § 204(c), by contrast, can be made only up to 20 years. Although a large-tract withdrawal can be extended for the same

period as the original withdrawal, such extensions require review by the Secretary, a repeat of the notice and reporting procedures for the original withdrawal, and a determination that the extension is necessary to achieve the original purposes. *Id.* at § 1714(f). There is no provision, as there is in § 204(d), for unlimited withdrawals. Nor does it appear that Congress intended the Secretary to make large-tract withdrawals as a way to effectuate uses under consideration by Congress as it envisioned the Secretary doing with smaller withdrawals in § 204(d)(3). These distinctions remain even without the veto provision. Thus, severing only that provision would not collapse Congress's separate intentions with respect to § 204(c) and § 204(d).

6. Emergency Withdrawals.

Plaintiffs argue that elimination of the veto provision would effectively eliminate the need for § 204(e), which permits emergency withdrawals for up to three years, because the Secretary could use § 204(c) to withdraw the same land for up to 20 years. Doc. 110 at 11. This overstates the case. Section 204(c)(2) imposes the detailed reporting requirements described above for large-tract withdrawals. 43 U.S.C. § 1714(c)(2). Although the same notice and reports are required for emergency withdrawals, the Secretary may make emergency withdrawals before preparing the reports. *Id.* The fact that large-tract withdrawals made under § 204(c) become effective only after the Secretary furnishes detailed reports to Congress means that § 204(c) could not be used to make withdrawals on the

same expedited basis as § 204(e) permits. Additionally, public hearings, which are required for all other withdrawals, are not required under § 204(e). 43 U.S.C. § 1714(h). Thus, § 204(e) retains separate significance even if the veto provision is severed from § 204(c).

Plaintiffs make a converse argument that elimination of only the veto provision in § 204(c) would render the rest of that section superfluous because the Secretary could make large-tract withdrawals for up to 3 years in an emergency situation pursuant to § 204(e), giving Congress time to enact proper legislation to extend those withdrawals for longer periods. Doc. 110 at 11. This argument is unpersuasive because § 204(e) applies only "if an emergency situation exists and . . . extraordinary measures must be taken to preserve values that would otherwise be lost." 43 U.S.C. § 1741(e). Absent § 204(c)'s delegation of authority, all non-emergency withdrawals of more than 5,000 acres would require an affirmative act of Congress. This is inconsistent with Congress's express delineation of "the extent to which the Executive may withdraw lands without legislative action," particularly in light of the dual purposes of the FLPMA as expressed in § 204(a) and embodied in the Commission Report. *See* 43 U.S.C. § 1701(a)(4); Doc. 102 at 35.

7. Other Arguments.

Plaintiffs' remaining textual arguments are that neither the 20-year limitation in § 204(c) nor Congress's purported ability to reverse the Secretary's

actions through the normal legislative process provides meaningful restraint on executive action absent the veto. Doc. 110 at 8-9. Plaintiffs argue that the 20-year limitation is "infinitely renewable," and, even if not renewed, is essentially a lifetime to those with current investments in the withdrawn area. Doc. 110 at 8. Plaintiffs also argue that the possibility of reversing the withdrawal through full legislative action is not a viable alternative to a legislative veto because doing so would require the President to agree to override actions of his own Secretary of the Interior. *Id.* at 9.

The Secretary's ability under § 204(c) to withdraw public lands for up to 20 years is, undeniably, a significant grant of power that would be made more pronounced absent an immediate mechanism for legislative restraint. Any textual arguments that Congress would not have enacted this grant of authority absent the legislative veto, however, are tempered by the fact that Congress gave the Secretary unfettered authority to make 20-year and other unlimited withdrawals under § 204(d) where public uses of smaller, but still significant, acreage was at stake.[5] The ability

[5] The legislative history also shows that Congress increased the duration of large-tract withdrawals from 5 to 20 years. House members who commented in floor debates indicated that they did not want Interior to be constantly saddled with paperwork or Congress to have the burden of frequent reviews. *See, e.g.*, 122 Cong. Rec. 23,438 (1976) (statement of Rep. Mink) ("[I]f withdrawals are restricted to a maximum duration of 5 years, the Secretary will be overwhelmed with almost endless paperwork and field studies to justify, and continually rejustify, land management decisions."); *id.* at 23,436 (statement of Rep. Seiberling) ("This provision [requiring review of large-tract withdrawals subject to a veto every

to extend withdrawals made under § 204(c) is also not unlimited. As noted above, the procedures required for such an extension are substantial.

The argument that Congress would lack a viable means to reverse a large-tract Executive Branch withdrawal through proper legislation requiring presentment to the President, and therefore would not have granted the Secretary this authority absent the legislative veto, is also unpersuasive. The fact that Congress clearly wanted the ability to take legislative action without presentment does not mean that, faced with the unconstitutionality of that approach, Congress would have withheld its delegation of power even when a proper legislative check on that power would still be available.[6] Withholding large-tract withdrawal authority from the Executive would have saddled Congress with the responsibility for managing and

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five years] is burdensome, time consuming, and counterproductive.").

[6] As noted in the legislative history section below, the House Committee that reviewed and approved the House version of the FLPMA contemplated that Congress could reverse large-tract executive withdrawals through the normal legislative process in cases where the veto had not been utilized. The Committee noted "each House will have, for a period of 90 days, the opportunity to terminate all such withdrawals," and, "[a]bsent such timely action, it will take an Act of Congress to terminate the withdrawal if the Secretary does not do so." H.R. Rep. No. 94-1163, at 6,183 (1976). At least one Representative also recognized in floor debate that for certain, irrevocable decisions, a veto may be more essential, but "if land is set aside by the Secretary and exempt from the Mining Act . . . the land will still be there and Congress at any time can open them up." 122 Cong. Rec. at 23,454 (statement of Rep. Seiberling).

enacting – through the full legislative process – all withdrawals of land over 5,000 acres. The legislative history discussed below suggests that Congress was not eager to assume such a burden.

Moreover, provisions of the FLPMA other than the legislative veto provide meaningful checks on executive authority. These include § 204(a), which restricts large-tract withdrawals to the Secretary or other Senate-approved appointees, § 204(c)(1), which limits large-tract withdrawals to 20 years, and § 204(c)(2), which establishes the detailed notice and reporting requirements discussed above. The Court cannot conclude that Congress would have viewed these restrictions as so lacking in substance that it would have reserved all large-tract withdrawal authority to itself if it could not impose the one additional restriction of a legislative veto.

D. Legislative History.

Congress enacted the FLPMA as Public Law 94-579 on October 21, 1976. 43 U.S.C. § 1714, historical and statutory notes. The legislation came about as a result of bills passed in both the House (H.R. 13777) and the Senate (S. 507) that were brought together by the Committee of Conference. H.R. Rep. No. 94-1724, at 6228 (Conf. Rep.) (1976). The Senate bill was put forward and enacted in lieu of the House bill, but its language was amended to contain most of the text of the House bill. *Id.* Significantly, only the House bill contained a legislative veto. *Id.* at 6,229, sec. 4(d).

Additionally, only the House bill provided for repeal of all existing executive withdrawal authority. *Id.* at 6,237. The conferees adopted both of these provisions, but revised the House's one-house legislative veto to require a concurrent resolution of both houses. *Id., id.* at 6,229, sec. 4(d).

In support of their argument that Congress would not have enacted § 204(c) without the veto provision, Plaintiffs point to the House Report endorsing the original House Bill, the Conference Report, and the statements of various House members during floor debates. *See* Docs. 73 at 9; 110 at 14-16; 113 at 20-23. The Court will address each of these sources of legislative history.

1. House Report.

Plaintiffs argue that the House Report indicates that "providing for control over large-tract withdrawals was a 'major objective' of FLPMA." Doc. 113 at 20. The House Report was issued on May 15, 1976, by the House Committee on Interior and Insular Affairs to which the original House bill had been referred. H.R. Rep. No. 94-1163, at 6175 (1976). The House Committee stated that one of the "major objectives" of the bill was to "[e]stablish procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary of Interior." *Id.* at 6,176, sec. (4). It also noted that "[p]ublic concern over the possibility of excessive disposals of public lands on the one hand and excessive restrictions on the other is reflected in the inclusion of requirements for referral of certain types

of actions to the Congress for review," including "withdrawals and extensions of withdrawals of 5,000 acres or more." *Id.* at 6,177. Commenting on the veto provision, the Committee noted that upon receiving notice from the Secretary of withdrawals or extensions totaling 5,000 acres or more, "each House will have, for a period of 90 days, the opportunity to terminate all such withdrawals," and "[a]bsent such timely action, it will take an Act of Congress to terminate the withdrawal if the Secretary does not do so." *Id.* at 6,183.

Defendants argue, and the Court agrees, that the House Report does not provide "strong evidence" that the veto was a major objective of the FLPMA. Doc. 115 at 13. The Report provides some evidence that the House would have been averse to a final version of the FLPMA that did not include the veto provision approved in its own bill, but the strength of this evidence is reduced by the fact that the Report does not state that the veto is a major objective of the bill, only that "[e]stablish[ing] procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary" is such an objective. H.R. Rep. No. 94-1163 at 6,176. Where the Report discusses the veto provision specifically, it does so in the context of a number of other "procedural controls," including that the Secretary must provide notice to Congress, must include with this notice other information as specified in the bill, must promulgate the withdrawal on the record and provide an opportunity for hearings, may segregate lands only for one year before taking definitive action, and may act only through the Secretary and

"policy officers in the Office of the Secretary appointed by the President with the advice and consent of the Senate." *Id.* at 6,183-84. As noted above, these provisions, independent of the veto, provide strong congressional control on large-tract withdrawals. Taken as a whole, the House Report does not provide "strong evidence" that the veto provision alone was essential to the House's approval of the delegation of authority in § 204(c).

The separate and dissenting views of House Committee members Udall and Seiberling cast further doubt on the centrality of the veto. Representative Udall expressed general approval of the bill's "long overdue" statutory guidelines for federal land management, but opined that the bill contained "serious flaws." H.R. Rep. No. 94-1163, at 221, *reprinted in* Legis. Hist. of the Fed. Land Policy and Mgmt. Act of 1976, at 650 (1978) [hereinafter FLPMA Legis. Hist.]; *see* Doc. 117-3 at 2. "Most specifically," he stated,

> I disagree with those sections of the bill which set forth new procedures for Congressional review of Executive withdrawals of public lands. While I have always been strongly in favor of additional oversight of the Department of Interior by the Congress and this Committee, the simple fact is that the mechanism of "withdrawal" of public lands from mineral entry is currently the only defense we have against mining activity on the public domain.

Id. Representative Seiberling, dissenting on behalf of himself and five other House members, similarly took

issue with the bill's limitations on executive withdrawals which he favorably cited as providing needed protection of public lands. *Id.* at 231, *reprinted in* FLPMA Legis. Hist., 658; *see* Doc. 117-3 at 5. He stated "[w]e do not suggest that Congress should not exercise oversight over this withdrawal authority[,]" but that the veto provision and the requirement imposed on the Committee "to examine every proposed new withdrawal over 5,000 acres" would be overly burdensome to Congress and the Interior. *Id.*

2. Conference Report.

Plaintiffs argue that the sentiments of the House Committee are echoed in the Conference Report, but this Report contains even less evidence from which to infer that the veto was an absolute prerequisite to Congress's delegation of large-tract withdrawal authority. The only mention the Report makes of the veto is to note that the conferees adopted it as part of the House amendments to the Senate Bill and that they revised it to require action from both houses. H.R. Rep. No. 94-1724, at 6,229 (Conf. Rep.). There is no further discussion of the veto from which to conclude that Congress would not have passed § 204(c) without it.

The Staff Recommendations of both houses, prepared at the request of the Committee of Conference, shed slightly more light on the analysis surrounding the inclusion of the veto in the revised Senate bill that ultimately became the FLPMA. Staff of Comm. on Conf. of S. 507, 94th Cong., Fed. Land Policy and Mgmt.

Act & Natural Res. Lands Mgmt. Act (Comm. Print 1976), *reprinted in* FLPMA Legis. Hist., at 747-869; *see* Doc. 117-2 at 2-14. The Staff identified provisions it found consistent with both the House and Senate bills in roman text, provisions it found consistent with the objectives of both houses in italics, and provisions of one house for which it had no clear recommendation in bold. *Id.*, Explanatory Note, *reprinted in* FLPMA Legis. Hist., at 748; *see* Doc. 117-2 at 3. With the exception of the nine lines containing the veto, the Staff placed all of proposed § 204 in italics, denoting that it was consistent with the objectives of both houses. *Id.* at 19-22, *reprinted in* FLPMA Legis. Hist., at 767-770; *see* Doc. 117-2 at 6-14. The veto provision was printed in bold type, showing that the Staff found § 204(c)'s grant of authority and its various procedural limitations, including the notice and reporting requirements, consistent with the objectives of both houses, but did not reach the same conclusion with respect to the veto. Thus, while the Committee of Conference adopted the House version of § 204(c) that subsequently passed into law, there is no evidence of a strong consensus of both houses that the veto was inextricable from the grant of large-tract withdrawal authority.

3. House Floor Debates.

Plaintiffs rely heavily on statements of House members during floor debates held on July 22, 1976, to show that Congress would not have granted the Secretary large-tract withdrawal authority apart from the veto. Representative Melcher, chief sponsor of the

House bill, described the veto as "congressional oversight responsibility" and stated that "[s]ince there is now no system of congressional review and congressional oversight of withdrawals, this is the first positive step that Congress has taken to . . . exercise that responsibility." 122 Cong. Rec. 23,452 (1976); *see* Doc. 73 at 9. When debating an amendment to raise the acreage for withdrawals triggering congressional review from 5,000 to 50,000 acres, and the duration from 5 to 25 years (*id.* at 23,440), Representative Steiger stated even more strongly that "there were those of us – and I include myself – who felt that the Secretary should have the opportunity of making no withdrawals without the review of Congress" and that "5,000 acres already represents a strong compromise." *Id.* at 23,452. These sentiments were echoed by Representative Santini: "I think it is a fair and rational compromise to set a 5,000-acre ceiling. . . . I think it is imperative that the position of the [drafting] committee be maintained." *Id.* at 23,453. Similarly, Representative Skubitz stated that "[o]ne of the most important reasons for adopting this bill is that it provides for congressional oversight and control over an executive agency which, at present, is free to act mostly of its own accord," and that "[i]t is essential that Congress be informed of, and able to oppose if necessary, withdrawals which it determines not to be in the best interests of all the people." *Id.* at 23,437.

Other House members were less supportive of placing constraints on executive withdrawals, in general. Representative Forsythe expressed the view that

the House bill "bends too far" and would result in reluctance on the part of Interior to make withdrawals as well as open up the possibility that "the mining industry will descend on Congress every time a withdrawal is proposed to urge that it be disapproved." *Id.* at 23,440. Representative Fenwick expressed the view that "[s]ince the purpose of withdrawals is to protect the lands that belong to the people of this country, it would seem to me that the granting of permission to use the land ought to be the area where Congress raises questions, and that the protection and preservation of those lands should be encouraged . . . and not made difficult." *Id.* at 23,452. Representative Seiberling similarly recognized that "a withdrawal is basically a protective mechanism" and called the review provisions in § 204 one of the "most objectionable provisions in the legislation." *Id.* at 23,436. Representative Mink, who proposed the above-cited amendment, opposed both the 5,000 acre limit and the then-proposed time duration of five years because she believed these would place an unworkable burden both on the Secretary and on the House and Senate Interior Committees. *Id.* at 23,438.

Plaintiffs point out that Representative Mink and the supporters of her amendment who generally espoused less oversight never directly opposed the veto provision or recommended removing it. Doc. 113 at 23, n. 15. They quote Representative Mink as saying "I most certainly do not object to congressional oversight in withdrawal matters," and to Representative Seiberling as saying that, under the proposed amendment,

"withdrawals would still be subject to disapproval by a resolution of either House." *Id.* (citing 122 Cong. Rec. 23,436, 23,438). This does not mean, however, that these members would have opposed the delegation of large-tract withdrawal authority had they foreseen the need to remove the veto as constitutionally impermissible. It appears, instead, that they were attempting to appease those who would disfavor any less restricted delegation of authority while still trying to raise their own objections. This is clear from Representative Mink's statement that "[i]f Congress absolutely deems it necessary to exercise control over the withdrawal system, I suggest that we limit review to withdrawals involving 25,000 acres or more, and establish a duration period of 15 years." 122 Cong. Rec. 23,438. Ultimately the House adopted a compromise in which it kept the 5,000 acre limit, but extended the permissible withdrawal period to 20 years.

The floor debates clearly show that some members of the House were unwilling to consider allowing the Secretary to make withdrawals of more than 5,000 acres without some form of meaningful oversight and, presumably, would not have consented to a delegation of such authority absent the veto provision, while other members, such as Representative Seiberling, expressed the value of allowing the Secretary to make such withdrawals for the protection of public lands and saw this as a more efficient and effective means of federal land management than relying on Congress to enact full legislation. *See, e.g.*, 122 Cong. Rec. at 23,453 (statement of Rep. Seiberling) ("The purpose of

withdrawal by the Secretary, without waiting for the lengthy process of legislation, is to be able to act promptly to set aside lands."). Whether these members, or, more accurately, whether a majority of the House, would have found this delegation too important to eliminate cannot be answered from these isolated comments.

The statements of individual representatives ultimately carry less weight than Committee Reports in analyzing Congress's intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'") (internal citations omitted). Here, however, the House Report is not particularly helpful in isolating the significance of the veto provision in relation to the other limitations contained in the FLPMA and in § 204 in particular. The Conference Report merely reflects that the conferees adopted the House amendments that included the legislative veto, but provides no discussion from which to conclude that elimination of the veto alone would have caused Congress to withhold large-tract withdrawal authority. *See Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (Temp. Emer. Ct. App. 1984) (stating that the mere reference to and description of vetoes in legislative reports is "not helpful in determining what Congress would have intended had it known the legislative vetoes were invalid.").

Plaintiffs argue that this case is like *City of New Haven* in which the D.C. Circuit took into account the "numerous statements of individual legislators urging the passage of legislation to control presidential impoundments" and agreed with the lower court that the "'*raison d'etere*' of the entire legislative effort was to assert *control* over presidential impoundments." 809 F.2d at 907 (emphasis in original). Here, however, the evidence from the pre-FLPMA Commission Report, the text and structure of the FLPMA, the statements of House members, and the Committee Reports all reflect that the FLPMA was equally concerned with granting withdrawal authority to the Executive as it was with setting proper limits and procedural safeguards on the exercise of that authority. Additionally, unlike *City of New Haven*, in which the court noted that "[n]owhere in the legislative history is there the slightest suggestion that the President be given statutory authority to defer funds without the possible check of at least a one-House veto" (*id.* at 908), several House members addressing the FLPMA spoke of the need to support rather than limit the Executive's ability to withdraw public lands, and the Senate put forth its own bill that neither repealed the Executive's existing authority nor included a legislative veto. Upon this evidence, the Court cannot conclude, as the court did with respect to the veto in *City of New Haven*, that the veto in § 204(c) of FLPMA is inseparable from the remainder of that section.

E. Whether § 204(c) is Fully Operative without the Veto.

As stated in *Chadha*, the presumption of severability attaches not only where there is a severability clause, but also where "what remains after severance 'is fully operative as a law.'" 462 U.S. at 932 (internal citation omitted). Plaintiffs argue that § 204(c) would not function in the manner Congress intended but for the veto. *See, e.g.*, Doc. 73 at 10. Plaintiffs argue that allowing the Secretary to make large-tract withdrawals without the legislative veto would fundamentally conflict with Congress's intent by eliminating the FLPMA's "most significant" constraint on executive withdrawals. *See, e.g.*, Doc. 73 at 8 (quoting Prof. Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act*, 36 Hastings L.J. 1, 36 (1984)). The Court does not agree.

The FLPMA will remain fully operative absent the legislative veto. As courts have found in other severability cases, the notice and reporting requirements of the FLPMA will continue to function and provide both substantive and procedural restraints on executive action. As discussed above, the various provisions of the FLPMA will continue to have distinct meaning after the veto is invalidated. Indeed, as Defendants note, the Secretary has exercised large-tract withdrawal authority at least 82 times in the 35 years since the FLPMA was enacted and Congress has never exercised the veto once, confirming that the FLPMA functions effectively

with no veto. Doc. 101 at 25; *see* Decl. of Jeffrey O. Holdren, Doc. 101 at 90-92, ¶¶ 4, 6.

III. Summary and Conclusion.

Given the FLPMA's severability clause and the fact that the statute remains fully operative without the legislative veto, the Court presumes that the veto is severable from the remainder of § 204(c). *Chadha*, 462 U.S. at 932. Plaintiffs have not presented the "strong evidence" required to overcome this presumption. *Alaska Airlines*, 480 U.S. at 686. The Court therefore holds that the veto is severable, and that the Secretary's large-tract withdrawal authority remains in place even after invalidation of the legislative veto. "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem . . . [and] to enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte*, 546 U.S. at 328-29.

The Court invalidates only the lines of § 204(c)(1) beginning with the statement: "and 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. . . ." The preceding part of that section, which grants the Secretary large-tract withdrawal authority, and all of § 204(c)(2), setting forth detailed reporting requirements, remain in effect.

IT IS ORDERED:

1. Plaintiffs' motions for partial summary judgment (Doc. 73 (3:12-cv-08038 DGC) and Doc. 90) are **denied**.

2. Defendants' cross motions for summary judgment (Docs. 101 and 102) are **granted**.

3. Defendants' motion for leave to file supplemental citations (Doc. 128) is **granted.** The Clerk is directed to file the document lodged as Doc. 129.

Dated this 20th day of March, 2013.

/s/ David G. Campbell
David G. Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gregory Yount, et. al., Plaintiffs, v. Kenneth Lee Salazar, Secretary of the Interior, et al., Defendant.	No. CV11-08171-PCT-DGC **ORDER** (Filed May 16, 2013)

Plaintiffs National Mining Institute ("NMI") and Nuclear Energy Institute ("NEI") have filed a motion for reconsideration of the Court's order of March 20, 2013. Doc. 135. In that order, the Court found, as Plaintiffs had argued, that the legislative veto provision in § 204(c) of the Federal Land Policy Management Act ("FLPMA") was unconstitutional, but also found, contrary to Plaintiffs' arguments, that the legislative veto was severable from that section's grant of authority to the Secretary of the Department of Interior to make large-tract land withdrawals. Doc. 130. Northwest Mining Association ("NWMA") has joined the motion. Doc. 136. For the reasons that follow, the Court will deny the motion.

I. Legal Standard.

Motions for reconsideration "are 'disfavored' and will be granted only upon a showing of 'manifest error' or 'new facts or legal authority that could not have

been raised earlier with reasonable diligence.'" *In re Rosson*, 545 F.3d 764, 769 (9th Cir.2008) (citation and brackets omitted); *see S.E.C. v. Kuipers*, No. 09-36016, 2010 WL 3735788, at *3 (9th Cir. Sept.21, 2010); LRCiv 7.2(g)(1). Mere disagreement with an order is an insufficient basis for reconsideration. *See Ross v. Arpaio*, No. CV 05-4177-PHX-MHM, 2008 WL 1776502, at *2 (D. Ariz. 2008). Nor should reconsideration be used to ask the Court to rethink its analysis. *Id.; see N. W. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir.1988).

II. Discussion.

Plaintiffs argue that the Court's severability finding was clear error because (1) the Court overlooked or misapprehended matters showing that Congress' intent in the FLPMA was to constrain executive-branch withdrawal authority, (2) *Miller v. Albright* weighs against severability, (3) severing the veto overlooks Congress' plenary Property Clause authority over land withdrawals, (4) the structure of the FLPMA confirms the inseverability of the veto, and (5) the legislative history of the FLPMA supports Plaintiffs' position.

A. Congress' Intent.

Plaintiffs note that the Court correctly cited to Congress' dual intent in enacting the FLPMA as reflected in the recommendations of the Public Land Law Review Commission (the "Commission") and stated in the FLPMA's declaration of policy, that Congress "(1)

exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes" and (2) "that Congress delineate the extent to which the Executive may withdraw lands without legislative action[.]" Doc. 135 at 6; quoting 43 U.S.C. § 1701(a)(4); *see* Doc. 130 at 8. Plaintiffs argue, however, that the Court overlooked the FLPMA's singular intent to reign in executive authority and erroneously concluded that Congress "was equally concerned with enabling the Executive to act through controlled delegation as it was with preserving Congress's reserved powers." Doc. 135 at 7-8. They reason that the FLPMA's second purpose, "to delineate the extent [of the Executive's withdrawal authority] without legislation," was, itself, concerned with controlling and reigning in the executive more than with granting the executive authority. *Id.* Thus, they argue, severing the legislative veto from the FLPMA's grant of authority would defeat Congress' intent because it would give the Executive unsupervised discretion to make withdrawals, returning it to the kind of unfettered authority the FLPMA was intended to constrain. *Id.* at 7, citing George Coggins & Robert Glicksman, Pub. Nat. Resources L. § 4:3 (2d. ed. 2011).

Plaintiffs have not shown that the Court's analysis was in error. The Court did not overlook Congress's concern with placing limits on executive withdrawals, but expressly noted that Congress was concerned with granting the executive a "controlled delegation" of withdrawal authority. Doc. 130 at 9. This is consistent with the Commission's recommendation, quoted in the

Court's order, that "[a]ll other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive action." Doc. 102 at 40, quoting Commission Report at 54, Recommendation 8. The Court found a lack of "strong evidence" that the veto could not be severed from Congress's grant of authority. The Court based this finding, in part, on the fact that the Commission did not propose a veto. Doc. 130 at 9. The Court also noted that, structurally, the FLPMA set forth the procedures the Executive must follow to effect particular types of withdrawals. *Id.* at 8-9. For withdrawals over 5,000 acres – those to which the legislative veto in § 204(c) applies – Congress required the Secretary to submit a detailed list of reports on such things as the reason for the withdrawal, the environmental and economic impacts, consultations with local governments and other impacted groups, public hearings, and a geological report. *Id.* at 14, citing § 204(c)(1). The Court found that these requirements provide "a meaningful limitation on executive action even if no legislative veto may be exercised." *Id.* As the Court noted, this finding is consistent with other cases in which courts have struck down veto provisions but retained grants of authority on the basis of congressional reporting requirements. *See id.* 15-16, citing, *e.g.*, *INS v. Chadha*, 462 U.S. 919, 935 (1983); *Alaska Airlines v. Brock*, 480 U.S. 678, 689-90. Plaintiffs may disagree with the Court's analysis that the FLPMA contains sufficient restraints on executive land withdrawals absent the veto to satisfy

Congress's dual intent, but that disagreement is not a basis for reconsideration.

Plaintiffs also argue that severing the veto contravenes the FLPMA's repeal of implied executive branch withdrawal authority. Doc. 135 at 8-9. They argue that the Court failed to address how this historic repeal relates to Congress's purpose of delineating executive withdrawal authority, and failed to address the centrality of the veto to the repeal's efficacy. *Id.* at 9. The Court discussed FLPMA's repeal of *Midwest Oil* and 29 grants of statutory authority as accomplishing Congress's first purpose of reserving certain types of withdrawal authority to itself. Doc. 130 at 8. While the Court did not expressly discuss how the repeal also fit with Congress's purpose of delineating the extent of executive withdrawal authority, the FLPMA's repeal of prior sources of authority and its concurrent enactment of a single, unified source of authority clearly go hand in hand. Contrary to Plaintiffs' argument, severing the veto as one limitation on the executive's newly-defined withdrawal authority does not negate Congress's purpose in repealing prior grants of executive authority, nor does it effectively grant the executive the same level of unfettered withdrawal authority it enjoyed prior to the FLPMA. As the Court noted in its order, the FLPMA replaced a formerly "chaotic" scheme for the management of public lands with one in which the respective roles of Congress and the Executive are clearly set forth. Doc. 130 at 6-9. Congress included the legislative veto as a check on executive withdrawals over 5,000 acres, but severing the veto

provision does not eviscerate the FLPMA's entire statutory scheme which, as noted, includes reserving certain types of withdrawals exclusively to Congress, doing away with prior grants of authority to the executive, and setting forth the procedures for three different kinds of executive withdrawals. *See* Doc. 130 at 7-9. It also does not leave withdrawals over 5,000 acres completely unregulated, but, as discussed above, requires a number of substantive and procedural steps as part of the Executive's deliberative process, thereby adding a significant check on executive withdrawals that did not exist prior to FLPMA. In summary, the Court is not persuaded that severing the FLPMA's veto provision from its grant of authority is inconsistent with Congress's intent to delineate executive authority or its repeal of the Executive's implied withdrawal authority under *Midwest Oil*.

B. *Miller v. Allbright*.

Plaintiffs argue that the Court erred by misapprehending the weight and applicability of Justice Scalia's opinion regarding the inseverability of a provision of the Immigration and Nationality Act ("INA") challenged on equal protection grounds in *Miller v. Albright*, 523 U.S. 420, 457-58 (1998). Doc. 135 at 9-10. Plaintiffs first argue that the Court erred in identifying this part of Justice Scalia's opinion as dicta because, they note, *Miller* had no majority opinion; rather, its dismissal was decided on the opinions of six justices put forth in three separate concurrences. *Id.* at 9. Plaintiffs argue, without analysis, that Justice

Scalia's concurrence was on the narrowest grounds and is therefore deemed the controlling opinion of the Court. *Id.* at 10, citing *Marks v. United States*, 430 U.S. 188, 193 (1977). They also argue that the Court erred in finding that Justice Scalia's opinion did not apply to the facts in this case. *Id.* at 10. The Court need not address whether and to what extent Justice Scalia's opinion is entitled to precedential weight because the Court ultimately based its analysis on distinguishing that opinion from the facts in this case, and Plaintiffs have not shown that the Court's analysis was in error.

In *Miller*, the foreign-born daughter of a U.S. citizen father and an alien mother challenged the constitutionality of a provision of the INA that required an affirmative act establishing the paternity of U.S. citizen fathers not required of U.S. citizen mothers. 523 U.S. at 425-25, 432. Justice Scalia opined that in light of Congress's plenary power over citizenship, the Court did not have the authority to remove a precondition of citizenship, and the INA's general severability clause did not override its more specific language which stated that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise.*" *Id.* at 457-458, quoting 8 U.S.C. § 1421(d) (emphasis added by Justice Scalia). Plaintiffs argue that the Court failed to recognize that the word "only" in § 204(a) of the FLPMA, which states that the "Secretary is authorized to make . . . withdrawals, but only in accordance with the provisions and limitations of this section" (43 U.S.C. § 1714(a)), has the same

meaning as "and not otherwise" in the INA. Doc. 135 at 10. The Court addressed this argument in its order and found, among other things, that the single word "only" was not the equivalent of the language Justice Scalia emphasized as overriding the general severability provision in the INA, and that the word "only" was insufficient to disregard Congress's clear statement that "[i]f *any* provision of the [FLPMA] or the application thereof is held invalid, the remainder of the [FLPMA] and application thereof shall not be affected thereby." Doc. 130 at 12, quoting Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. § 707; 43 U.S.C. § 1701, historical and statutory notes (emphasis added).

Justice Scalia's concurring opinion in *Miller* also relied on additional factors that are not present here. Justice Scalia ultimately concurred in the dismissal in *Miller* on the grounds that the Court was unable to grant the petitioner her requested declaratory relief because she had not met the requirements for citizenship under any existing statute, and there was no way to find she had citizenship under the INA without doing "radical statutory surgery" beyond the purview of the Court. *Miller*, 523 U.S. at 459. This was because in an equal protection challenge, courts are faced not with the question of whether to sever a single provision that is clearly unconstitutional, but with having to choose how to remedy alleged inequalities between separate provisions, something that is not at issue here. *See id.* at 458-459.

Finally, Justice Scalia reaffirmed in *Miller* that a severability analysis requires an individualized

assessment "as to whether Congress would have enacted the remainder of the law without the invalidated provision." 523 U.S. at 457-58, citing *New York v. United States*, 505 U.S. 144, 186 (1992). "The question of severance," he went on to note, "ultimately turns on 'whether the provisions are inseparable by virtue of inherent character,' . . . which must be gleaned from the structure and nature of the Act." *Id.* at 458, quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 322 (1936). Here, unlike the documentation of parentage put forth as the exclusive criteria for establishing citizenship under the INA, the veto provision in the FLPMA is not "inseperable by virtue of inherent character" from the remaining provisions and limitations in that act. The veto did not place any additional obligations upon the Secretary when making withdrawals, but rather gave Congress the ability to assert its own limitation which was both optional and entirely separate from what the Secretary is required to do. As demonstrated throughout its order, the Court thoroughly analyzed the "structure and nature" of the FLPMA and concluded that the veto provision was severable. *Miller* does not compel a different result.

C. Congress's Plenary Property Clause Authority.

Plaintiffs argue that because this case implicates Congress's plenary power over the disposal of federal lands under the Property Clause of the U.S. Constitution, it was "manifest error" for the Court not to address this authority as part of its severability analysis.

Doc. 135 at 6. Plaintiffs misstate the proper analysis. The Court recognized that the Property Clause "vests in Congress the 'power to dispose of and make all needful rules and regulations respecting . . . property belonging to the United States.'" Doc. 130 at 6, quoting U.S. Const., Art. IV, § 3, cl. 2. The question before the Court, however, was not whether Congress had plenary power over land withdrawals, but whether there was "strong evidence" that Congress would not have delegated § 204(c) withdrawal authority to the Secretary in FLPMA absent the veto provision. *See* Doc. 130 at 5-6. The Court concluded that such strong evidence was lacking. *Id.* at 28. The fact that Congress has plenary power over land withdrawals does not change this result or show that the Court's analysis was in error. Moreover, the Court's severance of only the unconstitutional veto provision in § 204(c) is consistent with Supreme Court precedent holding that, whenever possible, courts should limit their corrective action to invalidating only the unconstitutional provision of a statute (*Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006)) and with the Court's finding of a lack of strong evidence that Congress would not have delegated authority to the Secretary under § 204(c) without the veto. The fact that Congress has plenary power over land withdrawals does not compel a different conclusion.

D. The Structure of the FLPMA.

1. Notice and Reporting Requirements.

Plaintiffs argue that the Court's reliance on the FLPMA's notice and reporting requirements as a significant restraint on executive authority was "manifest error." Doc. 135 at 11. They note that the FLPMA's statutory scheme, which allows Secretarial withdrawals to take immediate effect at the time the required notice and reports are filed, is substantially different from the "report and wait" provisions the Court cited to in *Alaska Airlines*, in which Congress, upon receiving notice, would have 60 days in which it "could attempt to influence the Secretary *during the waiting period*, and could enact proper legislation to block the Secretary's regulations *from going into effect.*" *Id.* at 7, quoting Doc. 130 at 15. (emphasis added by Plaintiffs). Plaintiffs argue that the Court overlooked these distinctions.

Contrary to Plaintiffs' assertion, the Court squarely addressed the distinction between the FLPMA and the "report and wait" statutes in *Alaska Airlines* and other legislative veto cases, noting that "Plaintiffs are correct that the absence of a waiting period gives Congress less opportunity to influence an executive decision before it takes effect[.]" Doc. 130 at 17. "[B]ut," the Court went on to say, "this point does not help Plaintiffs." *Id.* The Court reasoned that "[i]f anything, the fact that the FLPMA allows executive withdrawals to go into effect immediately suggests that influencing executive action or attempting to block it

through a legislative veto was less important to Congress in the FLPMA than in the 'report and wait' statutes." *Id.* Significantly, even with these timing differences, Congress retains the same ability, absent the veto, to overturn disfavored executive actions under FLPMA through the normal legislative process that the Supreme Court found significant to its severability analysis in both *Chadha* and *Alaska Airlines*. *See* 462 U.S. at 935, n. 8; 480 U.S. at 689-90.[1] In addition, as the Court explained, the detailed reporting requirements in the FLPMA

> not only inform Congress of the Secretary's large-tract withdrawals so that Congress can respond through the normal legislative process if warranted, they also ensure that the Secretary will consider environmental and economic impacts of the withdrawal, consider current uses of the withdrawn land, consult with local governments and other impacted individuals, hold public hearings and consult qualified experts about the known mineral

[1] Plaintiffs argue that the Court put undue weight on the check provided by the normal legislative process because it overlooked the differences between a veto, which bypasses time-consuming and less-certain constitutional procedures, and full legislation requiring presentment to the President. Doc. 135 at 13. The Court did not make this error. Rather, it stated that "[t]he fact that Congress clearly wanted the ability to take legislative action without presentment does not mean that, faced with the unconstitutionality of that approach, Congress would have withheld its delegation of power even when a proper legislative check on that power would still be available." Doc. 130 at 20. Plaintiffs merely seek to have the Court rethink its analysis on this issue.

> deposits, past and present mineral production, and present and future market demands.

Doc. 130 at 17, citing 43 U.S.C. § 1714(c)(2). In light of these findings, it was not "manifest error" for the Court to conclude that the FLPMA's notice and reporting requirements "will continue to have significant meaning even after the legislative veto is invalidated." *Id.*

Plaintiffs also argue that the Court sidestepped the D.C. Circuit's specific holding in *City of New Haven v. Pierce*, which recognized that "Congress was not 'very much concerned with, let alone determined to achieve, further detail [from reports] about future Presidential impoundments *absent a mechanism for exercising control over them*'" (809 F.2d at 907, n.19 (emphasis in original)), because the Court did not explain how, absent the veto provision in FLPMA, Congress would have a meaningful "mechanism for exercising control" over large-tract withdrawals. Doc. 135 at 11-12. This argument lacks merit. As already discussed, the Court pointed to numerous ways in which the reporting requirements in the FLPMA provide meaningful checks on executive withdrawal authority. Additionally, the Court distinguished *City of New Haven* because the "overwhelming evidence of congressional intent" the D.C. Circuit relied upon for finding the veto provision not severable is not present here. *See* Doc. 130 at 16-17, 27-28.

2. Smaller-Tract Withdrawal Authority.

Plaintiffs argue that the Court erred when it stated that any textual arguments that Congress would not have granted large-tract withdrawal authority to the Secretary absent the veto were "tempered by the fact that Congress gave the Secretary unfettered authority to make 20-year and other unlimited withdrawals under § 204(d) where public uses of smaller, but still significant, acreage was at stake." Doc. 135 at 12, quoting Doc. 130 at 19. Plaintiffs argue that the Court wrongly characterized § 204(d)'s withdrawal authority as "unlimited," thus failing to acknowledge that it applies only to withdrawals of less than 5,000 acres, an important distinction between such small-tract withdrawals and the withdrawal at issue in this case. Doc. 135 at 12. Plaintiffs are in error. The Court specifically noted that the withdrawal authority in § 204(d) was limited to withdrawals in which "smaller, but still significant, acreage was at stake." Doc. 130 at 19. Within the context of these smaller withdrawals, the Court noted that Congress granted the Secretary unfettered authority, a contrast to the multiple checks that apply to withdrawals authorized under § 204(c). *See, e.g.*, Doc. 130 at 14-16, 20-21. The Court did not, as Plaintiffs argue, collapse the distinctions in these two sections. Instead, it found that Congress's unfettered grant of authority in 204(d) tempered any reliance on the structure and text of FLPMA to show that Congress was primarily concerned with reigning in executive authority and would not therefore have delegated large-tract withdrawal authority to the Secretary

absent the veto. At most, the structural and textual differences between Sections 204(c) and 204(d) cut both ways. On one hand, they show that Congress wanted to treat large-tract withdrawals differently from small-tract withdrawals and did so by placing these delegations of authority in separate sections and applying separate constraints. On the other hand, they show that Congress favored allowing the Executive to continue to make land-management decisions, including public land withdrawals, even while it repealed implied and statutory authority to do so. In light of this analysis, it was not error for the Court to conclude that the structure and text of these provisions fail to provide strong evidence that Congress would have withheld its grant of large-tract withdrawal authority absent the legislative veto.

E. Legislative History.

Plaintiffs argue that the Court overlooked strong evidence in the FLPMA's legislative history against severing only the legislative veto.

1. Senate Bill.

Plaintiffs do not dispute that, of the original House and Senate bills preceding the FLPMA, only the House bill contained a legislative veto and a repeal of existing executive withdrawal authority. *See* Doc. 130 at 21. Plaintiffs argue, rather, that the Court erred in giving significance to this distinction because only the House bill addressed withdrawals at all. Doc. 135 at 13-14.

What this says, however, is that the Senate bill would have kept the status quo, allowing the Executive to continue exerting both implied and statutory withdrawal authority unchanged by the FLPMA. This hardly comports with Plaintiffs' arguments that in enacting the FLPMA Congress was primarily concerned with reigning in the executive with respect to federal land management decisions. Plaintiffs rightly argue that what is important is the final legislation which, in this case, included the legislative veto. *Id.* at 14. But when posed with the question of what Congress would have done had it known the veto was unconstitutional, it is relevant to the Court's analysis that one house of Congress initially had not included any curbs on existing executive withdrawal authority as part of its proposed bill.

2. The House Views.

Plaintiffs argue that even if only the House would not have passed § 204(c) of the FLPMA absent the legislative veto, the opposition of one house, alone, is enough to show that it would not have passed. Doc. 135 at 14. Plaintiffs further argue that the Court mischaracterized evidence from the House Report, the separate statements of House members, and statements made in floor debate, all of which provide "strong evidence" that the House, and – by extension – Congress as a whole, would not have enacted the FLPMA absent the veto. *Id.* at 14-16.

Plaintiffs first argue that the Court failed to recognize the veto as representing the kind of "oversight" the House Report identified as a "major objective" of the FLPMA. *Id.* at 14. Plaintiffs misconstrue the Court's analysis. The Court recognized that "one of the 'major objectives' of the bill, as stated in the House Report, was to '[e]stablish procedures to facilitate Congressional oversight of public land operations entrusted to the Secretary of Interior.'" Doc. 130 at 21, quoting H.R. Rep. No. 94-1163, at 6,176, sec. (4) (1976). It went on to cite the Report's reference to the veto provision as part of that oversight. *Id.* at 21-22. But the Court also noted that

> [w]here the Report discusses the veto provision specifically, it does so in the context of a number of other "procedural controls," including that the Secretary must provide notice to Congress, must include with this notice other information as specified in the bill must promulgate the withdrawal on the record and provide an opportunity for hearings, may segregate lands only for one year before taking definitive action, and may act only through the Secretary and "policy officers in the Office of the Secretary appointed by the President with the advice and consent of the Senate."

Id. at 22, citing H.R. Rep. No. 94-1163, at 6,183-84. The Court found that, "[t]aken as a whole, the House Report does not provide 'strong evidence' that the veto provision alone was essential to the House's approval of the delegation of authority in § 204(c)." *Id.* Plaintiffs'

disagreement with this conclusion is not grounds for reconsideration.

Plaintiffs also argue that the Court erred in citing the views of House Committee members who voiced opposition to the veto because it overlooked that the statements made by Representative Udall were presented as "separate views," and those made by Representative Seiberling on behalf of himself and seven other members were presented as "dissenting views," thus representing the views of only a small minority of the House Committee. Doc. 135 at 15.[2] The Court correctly identified these statements as separate and dissenting views and noted simply that they "cast further doubt on the centrality of the veto." Doc. 130 at 22-23. Given that a presumption of severability applies absent "strong evidence" that Congress would not have passed FLPMA without the veto, the Court does not agree that it was insignificant or erroneous to note that eight members of the committee that recommended the House bill specifically objected to – and presumably would readily have eliminated – the veto.

Plaintiffs argue that they put forth sufficient contrary evidence showing that "Congress's dominant views as a whole" would not have favored severability. Doc. 135 at 15-16. They refer to statements made by House members in floor debates and to the Court's recognition that some members who pushed for less

[2] Plaintiffs state that the Committee consisted of 46 members. The voting totals listed in the House Report, however, indicate a total of 36 members. H.R. Rep. No. 94-1163, at 6,207.

congressional oversight did not oppose the veto directly, possibly in order to "appease those who would disfavor any less restricted delegation of authority." Doc. 135 at 16, quoting Doc. 130 at 26. Plaintiffs argue that the Court's acknowledgment of the need of those disfavoring a high degree of oversight to appease members who thought differently shows that "Congress, on the whole, would not settle for any broader delegation, *i.e.*, one lacking the veto." *Id.* Plaintiffs' arguments fail to recognize, as the Court pointed out, that the statements concerning the veto during floor debates represent only a handful of comments going both ways and are insufficient to show that Congress would not have enacted the FLPMA but for the veto. *See* Doc. 130 at 26. Where, as here, severability is presumed on the basis of the FLPMA's severability clause, those opposing severability bear the burden of putting forth "strong evidence" that severance would violate Congress's intent. The Court's finding that this evidence was lacking in the legislative record which, unlike *City of Newhaven*, provides no "overwhelming evidence of congressional intent" with respect to the veto, was not clear error.

IT IS ORDERED that Plaintiffs' motion for reconsideration (Doc. 135) is **denied**.

Dated this 16th day of May, 2013.

/s/ David G. Campbell
David G. Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gregory Yount, et al., Plaintiffs, v. Sally Jewell, Secretary of the Interior, et al.,[1] Defendants.	No. CV-11-08171-PCT-DGC **ORDER** (Filed Jul. 12, 2013)

Plaintiff Northwest Mining Association ("NWMA") has filed a motion that Plaintiff National Mining Association ("NMA") has joined asking the Court to enter final judgment on counts seven and one of their respective complaints pursuant to Federal Rule of Civil Procedure 54(b). Docs. 146, 147. Federal Defendants and Defendant-Intervenors have filed responses in opposition (Docs. 148, 149), and NWMA and NMA have filed replies. Docs. 150, 151. For the reasons set forth below, the Court will deny the motion.

I. Background.

On January 9, 2012, the Secretary of the Department of Interior issued a record of decision and public land order pursuant to subsection 203(c)(1) of the Federal Land Policy Management Act ("FLPMA")

[1] Secretary of the Interior Sally Jewell is automatically substituted as Defendant for former Secretary of the Interior Kenneth L. Salazar pursuant to Fed. R. Civ. P. 25(d).

withdrawing over one million acres of public lands in the Grand Canyon watershed from mineral location and entry subject to valid existing rights. 77 Fed. Reg. 2563-01 (Jan. 18, 2012). NWMA, NMA, and a number of mining and municipal plaintiffs filed complaints in this now-consolidated action challenging the Secretary's decision under the Administrative Procedure Act ("APA") for alleged violations of various federal laws, including the FLPMA and the National Environmental Policy Act ("NEPA"). NWMA and NMA additionally challenged the Secretary's statutory authority to make the withdrawal because subsection 203(c)(1) of the FLPMA contains a legislative veto that they alleged was unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983), and was not severable from the rest of the Act, making the Secretary's decision without legal effect. *See* 12-cv-08042-DGC, Doc. 1, 71 127-145; 12-cv-0838-DGC, Doc. 56, 7197-107.

NWMA and NMA filed motions for partial summary judgment on their *Chadha* claims (Docs. 73, 90), and Defendants and Defendant-Intervenors filed cross motions for partial summary judgment. Docs. 101, 102. On March 20, 2013, the Court denied NWMA's and NMA's motions and granted Defendants' and Defendant-Intervenors' cross motions. Doc. 130. The Court found that although the legislative veto in subsection 203(c)(1) was unconstitutional under *Chadha*, the veto was severable from the rest of the Act and therefore did not invalidate the Secretary's authority to make the withdrawal. *Id.* The Court reaffirmed this finding on reconsideration. Doc. 144. NWMA and NMA now

ask the Court to enter a final judgment on their *Chadha* claims in order to make them immediately appealable to the Ninth Circuit. They argue that these claims are factually and legally separable from the remaining claims in the consolidated action, and there is no just reason for delay.

II. Legal Standard.

Rule 54(b) provides that when more than one claim for relief is presented in an action, or when multiple parties are involved, the district court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). "'A similarity of legal or factual issues will weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will be proper only where necessary to avoid a harsh and unjust result[.]'" *Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985) (citation omitted). "'Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties.'" *Id.*; *see Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th Cir. 2004) ("[I]n the interest of judicial economy Rule 54(b) should be used sparingly.").

III. Discussion.

NWMA and NMA (hereinafter "Plaintiffs") argue that although all of the claims in the consolidated action arise from the same withdrawal decision, the only fact relevant to their *Chadha* claims is the Secretary's assertion of authority pursuant to subsection 203(c)(1). Docs. 146 at 7, 150 at 3-4. They further argue that an appeal of these claims would not require review of the Administrative Record as a potential appeal of the APA claims would, and the constitutional issue presented here is entirely separate from the legal issues in those claims. Doc. 146 at 8-9. These arguments notwithstanding, appeal of the Court's *Chadha* ruling prior to resolution of the remaining claims still presents the likelihood of piecemeal appeals. In such event, separate panels of the Ninth Circuit would have to familiarize themselves with the basic facts of the withdrawal and the facts Plaintiffs have asserted to show Article III standing, calling for at least some duplication in factual and legal analysis.[2] Separate

[2] NMA acknowledges that Defendants could raise standing issues on appeal if the Court grants its 54(b) motion, but argues that resolution of those issues may obviate the need for the Ninth Circuit to consider them a second time. Doc. 151 at 3-4. This presumes that appeal of the Court's *Chadha* ruling would be resolved before the remaining claims in this case are adjudicated and ripe for appeal, something that is not at all certain where appellate arguments on civil cases occur appeal, something that is not at all certain where appellate arguments on civil cases occur "approximately 12-20 months" after the notice of appeal, and decisions usually come months after arguments. *See* U.S. Courts for the Ninth Circuit, Frequently Asked Questions, http://www.ca9.uscourts.gov/content/faq.ph; Doc. 141. This Court will rule on the remaining claims in this case before any 54(b) appeal likely would

appeals would also risk "multiplying the number of proceedings and overcrowding the appellate docket." *Curtiss-Wright Corp. v. General Elec. Corp.*, 446 U.S 1, 8 (1980). "Absent a seriously important reason . . . the interests of judicial administration counsel against certifying claims or related issues in remaining claims that are based on interlocking facts, in a routine case, that will likely lead to successive appeals." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882-83 (2005).

Plaintiffs argue that allowing advance appeal of the *Chadha* issue would help "streamline the ensuing litigation," *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir. 1991), because it could be dispositive as to the legality of the withdrawal and avert the need for the Ninth Circuit to consider appeals related to any remaining claims. Doc. 146 at 9. The Court is not persuaded, however, that separate certification will increase judicial efficiency because the Ninth Circuit could also uphold this Court's finding on the *Chadha* issue, in which case it would still need to address any appeal of the remaining claims. Additionally, as Defendant-Intervenors argue, it is possible that resolution of the remaining claims in Plaintiff's favor could eliminate the case or controversy required for appeal of the constitutional issue before that appeal is decided. Doc. 149 at 10; *see Quinn v. Milsap*, 491 U.S. 95,

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be heard. *See* Case Management Order, April 23, 2013, Doc. 141. In addition, any second appeal might well require standing analysis for the plaintiffs in this case who would not be part of the 54(b) appeal, requiring two Ninth Circuit panels to wrestle with the standing issues in this case.

103 (1989) (noting that a case on appeal must retain the essentials of an adversary proceeding). The possibility that the Ninth Circuit need not reach this issue on appeal weighs against separate certification. *See Wood*, 422 F.3d at 882 (reversing certification and dismissing an appeal where "absent certification, we may never have to decide whether Wood was constructively discharged as a matter of law."). Even if, as NWMA argues, Plaintiffs would seek to appeal the Court's *Chadha* ruling even if the Court remanded the Secretary's withdrawal decision because a successful appeal of the constitutional issue would vacate that decision while a remand might not (*see* Doc. 151 at 5-6), Plaintiffs would still have the ability to appeal that decision once all of its claims are adjudicated, and the Court is not persuaded that they have presented compelling reasons to do so now.

Plaintiffs rely on *PAETEC Commc'n, Inc. v. MCI Commc'n Serv., Inc.*, 784 F.Supp.2d 542, 548 (E.D. Pa. 2011), for the proposition that previously unresolved issues of widespread importance weigh in favor of immediate appeal. Doc. 146 at 9-10. *PAETEC* involved an issue of first impression of importance to the telecommunications industry. 784 F.Supp 2d at 548. Plaintiffs argue that the judgment they seek to appeal is likewise of great importance to the mining industry and has widespread ramifications. Doc. 146 at 10. The Court is not persuaded that this fact alone demonstrates a particular need for the Ninth Circuit to take immediate appeal on an issue that has not heretofore been raised in the nearly four decades that the Secretary has

exercised withdrawal authority, particularly where the remaining claims are set for resolution in a matter of months and all appealable issues may be raised at that time.

Plaintiffs' citation to the Ninth Circuit's ruling in *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313 (9th Cir. 1979), is also unavailing. In *Purdy*, the Ninth Circuit affirmed the district court's finding that there was no just cause for delay in entering final judgment on an interpretation of a federal act for which there was disagreement among the courts and reversal would likely necessitate a second trial. 594 F.2d at 1316-17. Here, there is no judicial disagreement on the severability of the unconstitutional veto in subsection 203(c)(1), and even if the Ninth Circuit reverses this Court's ruling, this outcome would, at most, moot Plaintiffs' remaining claims, not necessitate further proceedings or require the equivalent of a second trial.

Plaintiffs argue that their members will suffer substantial economic harm if the Court does not grant their 54(b) motion because they must pay annual maintenance fees of $140 per claim to maintain claims in the withdrawn area even while the challenged withdrawal prevents them from developing these claims without first undergoing costly and time-consuming mineral exams. Doc. 146 at 10-11. Plaintiffs state that records in this case indicate that there are at least 3,000 mining claims located in the withdrawn area, leading to $420,000 in fees payable annually to the Department of Interior, and this outweighs the costs and

potential for duplication that would result from separate appeals. *Id.* at 11. Defendant-Intervenors argue that these losses are exaggerated because the withdrawal does not preclude development of all existing claims, and, even if it does, Plaintiffs do not identify how many of the asserted 3,000 claims belong to their members. Doc. 149 at 12, n. 5. The Court need not resolve these factual issues because Plaintiffs have not shown that their members would likely develop a substantial number of these claims during the pendency of this case even if the Court granted its motion and the Ninth Circuit were to reverse its finding on Plaintiffs' *Chadha* claims.[3] Although the Court is mindful that Plaintiffs are suffering and will continue to suffer economic harm as they await the ability to develop their mining claims, the Court is not persuaded that, with final briefing on Plaintiffs' motions for summary judgment set to be completed by April 2014 (*see* Doc. 141), this harm is made substantially greater by having to wait to file a single appeal after final judgment on all claims.

The Court will exercise its discretion and deny Plaintiffs' motion for entry of judgment under Rule 54(b). *See Blair v. Shanahan*, 38 F.3d 1514, 1522 (9th

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[3] Defendant-Intervenors note that the Bureau of Land Management ("BLM") estimated in its Final EIS that under the "no action alternative," meaning absent the withdrawal, an estimated 30 uranium mines could be developed in the withdrawal area over the next 20 years for an average of 1.5 per year. *See* BLM, Final EIS, Northern Arizona Proposed Withdrawal (Oct. 2011) at 2-11 to 2-13, *available at* http://www.blm.gov/az/st/en/info/nepa/environmental_library/ eis/ naz-withdraw.html.

Cir. 1994) (district court did not err in denying Rule 54(b) request where a short trial was to begin in only four months and the entire case could be reviewed after trial); *In re Lindsay*, 59 F.3d 942, 951 (9th Cir. 1995) (holding that the bankruptcy court erred in entering partial final judgment under Rule 54(b) and warning about the "dangers of profligate Rule 54(b) determinations"); *Sanchez v. Maricopa County*, No. CV 07-1244-PHX-JAT, 2008 WL 2774528, at *1 (D. Ariz. July 14, 2008) ("The Court finds that this is not the rare case that justifies sending up piecemeal appeals to the Circuit Court. Plaintiff has not shown the sort of pressing needs contemplated by a grant of a 54(b) motion, and denial of his motion will not lead to a harsh or unjust result.").

IT IS ORDERED that Plaintiff NWMA's motion for final judgment (Doc. 146) which Plaintiff NMA joins (Doc. 147) is **denied**.

Dated this 12th day of July, 2013.

/s/ David G. Campbell
David G. Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gregory Yount, et al., Plaintiffs, v. Kenneth Lee Salazar, et al., Defendants.	Nos. CV11-8171 PCT-DGC CV12-8038 PCT DGC CV12-8042 PCT DGC CV12-8075 PCT DGC **ORDER** (Filed Sep. 30, 2014)

This case concerns a withdrawal by the Secretary of the Interior of more than one million acres of federal land from uranium mining. The withdrawn land surrounds Grand Canyon National Park and includes a North Parcel of approximately 550,000 acres, an East Parcel of approximately 135,000 acres, and a South Parcel of some 322,000 acres. The withdrawal will close these lands to the exploration and development of uranium mining claims for 20 years, although mining of a few existing claims will be permitted. Plaintiffs in this case include counties, associations, companies, and an individual with interests in uranium mining. They ask the Court to set aside the withdrawal as illegal under several federal statutes.

Motions for summary judgment have been filed by Plaintiffs American Exploration & Mining Association ("AEMA") and Gregory Yount (Doc. 167), Plaintiffs Nuclear Energy Institute and National Mining Association ("NEI and NMA") (Doc. 170), and Plaintiffs Arizona Utah Local Economic Coalition ("the

Coalition") and Quaterra Resources, Inc. (Doc. 173). Defendant United States and Defendant-Intervenors Center for Biological Diversity, Grand Canyon Trust, Havasupai Tribe, National Parks Conservation Association, and the Sierra Club (collectively "Defendants") have filed cross-motions for summary judgment. Docs. 198, 208. The Court heard oral argument on September 9, 2014. For reasons that follow, the Court will grant summary judgment in favor of Defendants and not set aside the Secretary's withdrawal decision.

I. Background.

Lands around the Grand Canyon have seen mining activity since the late 1800s. AR 84. When President Theodore Roosevelt created the Grand Canyon Preserve in 1906, he withdrew much of the land from mining, but mines were opened on land surrounding the canyon when uranium deposits were discovered in the 1940s and 1950s. AR 2. Uranium near the canyon is found in breccia pipes – pipe-shaped mineral deposits that extend thousands of feet underground. Five of these pipes were mined for uranium in the 1950s, with the Orphan Mine producing more than 2,000 tons of uranium between 1952 and 1969. AR 84. Exploration increased when uranium prices spiked in the 1970s. AR 2. Much of the exploration was in the North Parcel. AR 84.

During the 1970s, the U.S. Geological Survey ("USGS") began studying uranium deposits in the area and produced maps detailing breccia pipe deposits. In

the 1980s and 1990s, six new uranium mines produced almost 1.5 million tons of uranium and more than 900 exploration holes were drilled in the Tusayan Ranger District. AR 2.

Many of the uranium mines were put on standby status when the price of uranium dropped in the 1990s, but a price rise in 2004, followed by a surge to more than $130 per pound in 2007, prompted renewed interest in uranium mining and thousands of new mining claims were located. AR 3. These new claims prompted concerns about the potential impact of uranium mining on the Grand Canyon watershed and led Arizona Congressman Raúl Grijalva to introduce legislation that would permanently withdraw more than one million acres around the canyon from mining. *Id.*

On July 21, 2009, Interior Secretary Ken Salazar published a notice of intent to withdraw 633,547 acres of public lands and 360,002 acres of National Forest land for up to 20 years from location and entry under the Mining Law of 1872. *See* Notice of Proposed Withdrawal, 74 Fed. Reg. 35,887 (July 21, 2009). The notice had the immediate effect of withdrawing the lands for a period of two years to permit analysis and study under the National Environmental Protection Act ("NEPA"). The Bureau of Land Management ("BLM") published a notice of its intent to prepare an Environmental Impact Statement ("EIS"), with the stated purpose "to protect the Grand Canyon watershed from adverse effects of locatable mineral exploration and mining, except for those effects stemming from valid existing rights." 74 Fed. Reg. 43,152-53 (Aug. 26, 2009).

In accordance with NEPA, BLM issued its Draft EIS ("DEIS") on February 18, 2011 (76 Fed. Reg. 9,594), and, after an extended comment period, issued its Final EIS ("FEIS") on October 27, 2011 (76 Fed. Reg. 66,747). The Department of the Interior ("DOI") issued a Record of Decision ("ROD") on January 9, 2012, which withdrew 1,006,545 acres from mining pursuant to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1714. AR 1-23. This 2012 decision, referred to in this order as "the Withdrawal," is challenged by Plaintiffs in this case.

On January 8, 2013, the Court granted in part and denied in part Defendants' motions to dismiss several claims for lack of standing. Doc. 87. The Court dismissed all claims under NEPA brought by Plaintiffs Yount, AEMA, and Quaterra, leaving only NEPA claims by NEI, NMA, and the Coalition. Plaintiffs' claims under the FLPMA and the Administrative Procedures Act ("APA") remain. Plaintiff Yount also alleges that the Withdrawal's stated purpose of protecting the cultural and religious heritage of Native American tribes violates the Establishment Clause of the United States Constitution. Doc. 27, ¶ 144-148.

II. The Withdrawal Decision.

The Secretary decided to proceed with the Withdrawal after evaluating possible effects of uranium mining in the DEIS and FEIS. These documents included a detailed analysis of four different alternatives: (a) no withdrawal of land from uranium mining,

referred to in the FEIS as the "no action" alternative; (b) withdrawal of the proposed 1,006,545 acres; (c) withdrawal of 648,802 acres; and (d) withdrawal of 292,086 acres. AR 13-14. Before selecting these alternatives, BLM considered other possible courses of action including a shorter withdrawal period of 10 years, a withdrawal limited to lands with a low mineral potential, phased mining, a permanent withdrawal, a change in federal law to provide additional environmental protections, and the adoption of new mining regulations. BLM eliminated each of these alternatives before preparing the FEIS, and the Secretary ultimately selected the full withdrawal alternative. AR 14-15.

In preparation for the EIS, the Secretary directed USGS to prepare a scientific report on various issues raised by the proposed withdrawal. In response, the USGS prepared Scientific Investigations Report 2010-5025 (the "USGS Report"). AR 57-415. With this report in hand, BLM prepared the DEIS and published it in February 2011 for a 45-day public comment period. The public comment period was later extended to 75 days, and more than 296,000 comments were received. BLM also hosted four public meetings and held community meetings with various tribes to discuss the DEIS. AR 17.

The DEIS, FEIS, and ROD relied heavily on the USGS Report. In the report, USGS analyzed soil and sediment samples at six sites that experienced various levels of uranium mining north of the Grand Canyon, including reclaimed uranium mine sites, approved

sites where mining was temporarily suspended, and exploratory sites that were drilled but not mined. Uranium and arsenic were consistently detected in these areas at levels above natural background. AR 9. Samples from 15 springs and five wells in the region contained dissolved uranium concentrations greater than EPA maximum concentrations for drinking water. USGS was uncertain whether these concentrations resulted from mining, natural processes, or both. *Id.* USGS also found that floods, flash floods, and debris flows caused by winter storms and intense summer thunderstorms transported substantial volumes of trace elements and radionuclides. *Id.*

USGS also evaluated an additional 1,014 water samples from 428 sites and found that about 70 sites exceeded the primary or secondary maximum contaminant levels for certain major ions and trace elements such as arsenic, iron, lead, manganese, radium, sulfate, and uranium. AR 10. USGS noted that fractures, faults, sinkholes, and breccia pipes occur throughout the area and are potential pathways for downward migration of contaminants, but concluded that a more thorough investigation is required to understand groundwater flow paths, travel times, and contributions from mining. AR 9-10.

In addition to this analysis of potential contamination, the FEIS found that the "no action" alternative would result in significantly more mining activity than would occur under the full Withdrawal: 19 more uranium mines, 211,280 more ore truck trips, 16 more miles of power lines, 1,200 more acres disturbed for

mining, and 200,000,000 more gallons of water used in mining. AR 2774. This was true even though some uranium mining would continue under the Withdrawal. *Id.*

One common problem was encountered by all of the withdrawal studies: the size of the proposed withdrawal area and its location as remote forest and rural land meant that relatively little data was available for analysis. The FEIS and ROD acknowledged this lack of information. *See, e.g.*, AR 9; AR 2070-71. In particular, these documents noted uncertainty about the potential impacts of uranium mining on perched and deep aquifers, including the R-aquifer (the principal aquifer in the area), and about the effects of increased radionuclide exposure on plants and animals. AR 10.

In the face of these uncertainties, the FEIS and ROD adopted "a cautious and careful approach." AR 9. This approach was deemed warranted for several reasons, expressed in these words by the ROD:

> Crafted by the immense power of the Colorado River, the Grand Canyon and the greater ecosystem that surrounds it have long been recognized as one of the Nation's most treasured landscapes. The area is known as a home or sacred place of origin to many Native Americans, including the Havasupai, Hualapai, Navajo, Hopi, Zuni, Southern Paiute, and others, and its cultural significance goes back thousands of years. . . . The Park is a world heritage site and an international icon.

* * *

> The Grand Canyon and the greater ecosystem surrounding it is a cornerstone of the region's economy with hunting, fishing, tourism, and other outdoor recreation generating billions of dollars in economic activity in the area. Millions of people living in seven states in the U.S. and in Mexico depend upon the Colorado River for water for drinking, irrigation, and individual use, as well as for hydropower.

AR 4-5.

The FEIS ultimately found that the risk of groundwater contamination from uranium mining was low, but that the possible consequences of such contamination were severe. AR 9. Faced with even a remote prospect of severe contamination in waters adjacent to the Grand Canyon, DOI chose to err on the side of caution. It elected to proceed with the full Withdrawal for a period of 20 years.

In addition to risks of groundwater contamination, the ROD opted for the full Withdrawal because "[a]ny mining within the sacred and traditional places of tribal people may degrade the values of those lands to the tribes who use them." AR 9, 11. The ROD also found that "[t]he volume of truck traffic expected without a withdrawal could create a major cumulative effect to visual resources resulting from dust emissions of vehicle passage." AR 11. The ROD further noted that even with the Withdrawal in place, up to eleven uranium mines would be permitted to operate in the withdrawn area on the basis of existing claims, a pace of development "roughly equivalent to the pace of

development that occurred during the peak of uranium interest during the 1980s." AR 9. Thus, "even with a full withdrawal, the economic benefits of continued uranium mining could still be realized by local communities." AR 11. The ROD noted that "[w]hile the lands are withdrawn, studies can be initiated to help shed light on many of the uncertainties identified by USGS in [the USGS Report] and by BLM in the EIS." *Id.*

III. Standing.

Defendants argue that Plaintiffs NEI, NMA, and the Coalition cannot establish standing for the remaining NEPA claims. To establish Article III standing, a plaintiff must show "that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Plaintiffs must also show prudential standing, which examines whether "a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004). Prudential standing analysis historically has required NEPA plaintiffs to show that their alleged injury falls within NEPA's zone of interests. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 861 (9th Cir. 2005).

The Supreme Court's recent decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014), has changed the terms of discussion for prudential standing. It explained that "prudential

standing is a misnomer as applied to the zone-of-interests analysis," and recast the test as a matter of statutory interpretation "which asks whether this particular class of persons ha[s] a right to sue under this substantive statute." *Id. Lexmark* directs courts to "determine the meaning of the congressionally enacted provision creating a cause of action." *Id.* at 1388.

A. NEI and NMA.

Defendants argue that NEI and NMA's alleged injury is speculative, that the injury does not fall within NEPA's zone of interest, and that any claim that the injury is environmental as opposed to economic is a pretext. Doc. 198 at 29-31.[1] In its ruling on Defendants' motion to dismiss, the Court engaged in a lengthy analysis of Plaintiffs' standing. Doc. 87. The Court found that NEI and NMA had shown Article III standing because the Withdrawal imposed expensive and years-long examination processes on their members and reduced the value of existing mining claims and claim investments. *Id.* at 8. The Court noted that private economic losses due to governmental action are routinely found sufficient to show injury for purposes of Article III standing. *Id.* The Court stands by this decision. NEI and NMA have clearly shown that their members suffered financial harm as a result of the Withdrawal. *Id.* at 6-10.

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[1] Citation to documents in the Court's docket will be to page numbers added to the top of each page by the Court's CMECF system, not to page numbers at the bottom of each page.

In assessing whether injury to NEI and NMA fell within NEPA's zone of interest, the Court found that NEI and NMA had alleged a link between the Withdrawal and an environmental injury that, if supported, would bring them within NEPA's zone of interests. *Id.* at 31. Specifically, NEI and NMA claimed to have environmental interests in reducing aggregate mining impacts by conducting environmentally responsible mining operations. They alleged that mining rich breccia pipes found around the Grand Canyon produces less environmental disturbance than mining lower quality uranium ore in other locations, and that the Withdrawal therefore would force them to engage in more environmentally harmful mining. Taking these allegations as true, the Court found that NEI and NMA had identified an injury within NEPA's zone of interests. *Id.* The Court also observed that the cases cited by Defendants arose at the summary judgment stage, not the pleading stage. *Id.* This case is now at the summary judgment stage, and Plaintiffs must present proof – and not merely allege – that they have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("In response to a summary judgment motion . . . the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts[.]").

Purely economic injuries do not fall within NEPA's zone of interests. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005). But this does not mean that plaintiffs who assert economic injuries are precluded from bringing suit under NEPA. A plaintiff

can sue under NEPA "even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005), as amended (Aug. 17, 2005).

In its previous order, the Court noted that the parties had cited no authority for the proposition that a plaintiffs' environmental injury must also satisfy the requirements of Article III standing. Doc. 87 at 32-33. The Court therefore held that NEI and NMA "can satisfy Article III standing by their members' very real economic injuries discussed above, and satisfy NEPA prudential standing by the environmental interests they and their members possess in limiting the disruptive effects of uranium mining." *Id.* at 33. In other words, the Court found that one of their injuries (economic harm caused by the Withdrawal) could satisfy Article III standing, while a different injury (being forced to engage in more environmentally disruptive mining) could satisfy NEPA.

The Court now concludes that this was error. In this round of briefing, Defendants have cited case law holding that "the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests' for purposes of prudential standing." *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1231 (D.C. Cir. 1996); *see also Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 256 (D.D.C. 2011) (same). The Ninth Circuit appears to

have applied the same requirement in a recent unpublished opinion, holding that the plaintiff could not bring suit under NEPA because the plaintiff's "economic injury . . . suffices for Article III standing but does not fall within NEPA's zone of interests . . . [and Plaintiff's] environmental injury . . . is within NEPA's zone of interests but will not be redressed by a favorable decision [and thus does not satisfy Article III standing]." *Oberdorfer v. Jewkes*, No. 12-36082, 2014 WL 3644015 *1 (9th Cir. July 24, 2014). In other words, Article III standing and the NEPA zone of interests test must be satisfied by the same injury. *See Mountain States*, 92 F.2d at 1231 ("[I]f plaintiffs established an interest sufficiently aligned with the purposes of the ESA for prudential standing, but failed to show (for example) an adequate causal relation between the agency decision attacked and any injury to that interest, we could not adjudicate the claim – even if plaintiffs had constitutional standing with respect to some other interest that was outside the requisite 'zone.'").

Neither *Mountain States* nor *Oberdorfer* provides any rationale for the requirement that one injury must satisfy both forms of standing. *Mountain States* describes the requirement as "obvious," but also notes that it could find no other case that adopted it. 92 F.3d at 1231. And *Oberdorfer* cites no authority for this requirement.

The Court concludes, nonetheless, that the single-injury requirement makes sense. In *Lexmark*, the Supreme Court explained that whether a plaintiff comes within a statute's zone of interests requires courts "to

determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 134 S. Ct at 1387. The focus is on legislative intent. In this case, the stated purpose of NEPA is entirely environmental – to "promote efforts which will prevent or eliminate damage to the environment and biosphere[.]" 42 U.S.C. § 4321. "Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). Given *Lexmark'* s focus on legislative intent and the exclusively environmental purposes of NEPA, it makes sense to require that the gravamen of Plaintiffs' complaint – the wrong that brings them to court – must fall within NEPA's zone of interests. Requiring that a concrete, Article III injury fall within that zone of interests will ensure that the animating wrong asserted by Plaintiffs comports with the environmental purposes for which NEPA was enacted. The claims will align with congressional intent – the primary consideration after *Lexmark*.

The Court will follow *Mountain States* and *Oberdorfer*. To pursue a claim under NEPA, "the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States*, 92 F.3d at 1231.[2]

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[2] NEPA does not afford a private right of action, but courts hold that an aggrieved party can obtain review under the APA for violations of NEPA provided their claims fall within NEPA's zone

NEI and NMA do not satisfy this requirement. Their economic injury – the expensive and lengthy claim examination process and the loss of value in existing claims and investments – satisfies Article III standing because it constitutes injury in fact, is traceable to the Withdrawal, and likely would be redressed if the Court were to set aside the Withdrawal. *Lujan*, 504 U.S. at 560. But the injury is a purely economic injury and therefore does not fall within NEPA's zone of interests. *Ashley Creek*, 420 F.3d at 940.

Conversely, NEI and NMA's environmental injury – being forced to engage in more environmentally disruptive mining – falls within NEPA's zone of interests, but it is not a concrete injury sufficient to satisfy Article III. NEI and NMA rely on the affidavit of a Vice President of Mining at Uranium One, a member of both NEI and NMA. Doc. 171-1 at 5-8. The affidavit describes uranium claims held by Uranium One in Utah and asserts generally that they are of lower quality and more difficult to mine than breccia pipes. But the affidavit fails to provide any concrete evidence regarding when, how, or even whether Uranium One will actually mine these deposits. *Id.* The affidavit states that Uranium One "is still deciding which of its uranium deposits at other sites it will mine." *Id.*, ¶ 7. Because the affidavit does not state that such mining will occur and provides no specific information about the grade of the uranium to be mined or what environmental impacts would result from mining it, NEI and NMA have

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of interests. *Ashley Creek*, 420 F.3d at 939; *Ocean Advocates*, 402 F.3d at 861.

failed to show that they are "imminently threatened with a concrete and particularized 'injury in fact' " as a result of the need to mine less concentrated uranium ore. *Lexmark*, 134 S. Ct. at 1386. Their alleged environmental harm therefore does not satisfy the injury-in-fact requirement for Article III standing. *Id.*

In short, NEI and NMA fail to establish a single injury that both satisfies the requirements of Article III and falls within NEPA's zone of interests. They therefore cannot assert a NEPA claim under the requirement recognized in *Mountain States* and *Oberdorfer*. The Court will enter summary judgment on NEI and NMA's NEPA claims.

B. The Coalition.

In ruling on the motions to dismiss, the Court found that the Coalition had standing to bring NEPA claims on behalf of its member Mohave County. Doc. 87. The Court engaged in an extensive analysis of the County's proprietary interests and procedural injury (*id.* at 16-24), and found that these interests and injuries satisfied Article III standing requirements and fell within NEPA's zone of interests under cases such as *Douglas Cnty. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), and *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975) (Doc. 87 at 45). Defendants do not challenge most of this analysis in their motion for summary judgment. They instead argue that the County (and therefore the Coalition) lacks standing because its injury is speculative and it failed to raise its environmental

concerns before the agency. The Court disagrees with both assertions.

The Coalition has shown that Mohave County "has a mandate to retain environmental quality and to capitalize on its wealth of natural, built and human resources." 12-cv-8075, Doc. 30, ¶ 24.[3] As stated in the County's General Plan, this mandate includes "the 'growth of communities that maintain the health and integrity of its valuable environmental features'; the protection of 'wetlands, washes, aquifer recharge areas, areas of unique flora and fauna, and areas with scenic, historic, cultural and recreational value'; and avoiding industrial development that has the 'undesired effect of increasing air pollution.'" *Id.*

The Coalition has also shown that the Withdrawal will reduce Mohave County's available funds to pave its roads (thereby reducing dust and erosion) and protect desert tortoise habitat. Doc. 72-2, ¶¶ 27, 32-34; Doc. 188-6, ¶¶ 7, 14-28. Projected state revenues that flow to Mohave County from the mining industry will be reduced as a result of the Withdrawal. The Coalition has presented evidence that, but for the Withdrawal, "there would be over a 40-year period: 1,078 new jobs in the project area; $40 million annually from payroll; $29.4 billion in output; $2 billion in federal and state corporate income taxes; $168 million in state severance taxes; and $9.5 million in mining claims payments and fees to local governments." 12-cv-8075, Doc.

[3] Citations to pleadings filed before the cases were consolidated are preceded by the original case number.

30, ¶ 127; *see also* Doc. 72-2 at 13-14, ¶¶ 36-37. Loss of the county's share of this revenue will impair its ability to pave its 1,277 miles of unpaved roads and manage its desert tortoise habitat, both stated goals of its Land Use Plan. 12-cv-8075, Doc. 30, ¶¶ 25-31.

Defendants argue that these environmental injuries are speculative because the County's declarations merely assert that increased mining revenues "could" be devoted to these purposes. The Court does not agree. The Coalition has presented evidence that improved air quality through the paving and maintenance of dirt roads and improved conservation efforts for the desert tortoise habitat are existing objectives in the County's written plans, (Doc. 188-6, ¶¶ 17, 19-21, 23-25); that the Coalition sought the NEPA-mandated dialogue with BLM to reconcile the Withdrawal decision with these existing County plans, (*id.* at ¶¶ 29-30); and that the County will, as a result of the Withdrawal, experience a significant reduction in revenues that could be applied to all County objectives, including the existing environmental objectives, (*id.* at ¶¶ 9-13). The Court does not find these injuries speculative or pretextual.

Nor is the Court persuaded by the government's contention that the County cannot assert its environmental interests in this case because it failed to assert them during the EIS process. Buster Johnson's declarations state that BLM did not allow local governments to submit supplemental economic data about how the Withdrawal would affect their communities, disregarded Mohave County's comprehensive plan and its environmental protections, and ignored notices and

invitations from Coalition members demanding reconciliation of inconsistencies between the Withdrawal and their local plans and policies. Docs. 72-2 at 9-10; 188-6, ¶¶ 28-35. "Mohave County requested BLM to coordinate on land use as a way to resolve the inconsistencies and to minimize harm to its interests in managing roads and air quality, and being in a position to fund other land use and environmental projects, such as desert tortoise protection." Doc. 188-6, ¶ 28 (citing A.R. 56740, 56743-44). This evidence is sufficient to show that the Coalition raised issues within the NEPA zone of interests during the NEPA process. The Coalition has satisfied the zone of interests test and shown its standing to pursue claims under NEPA.

IV. NEPA Claims.

In light of these standing rulings, the Court will address the following NEPA claims brought by the Coalition: that BLM violated the NEPA requirements of adequate consultation with local governments (12-cv-8075, Doc. 30, ¶¶ 150-58), and that the FEIS failed to address scientific controversies including disputes regarding the impacts of uranium mining on water resources, the estimates of the uranium endowment, the amount and distribution of mineable uranium, and the adverse economic impacts of the Withdrawal on Arizona and its communities (*id.* at ¶¶ 159-64). Although some of these arguments are addressed in NEI and NMA's motion for summary judgment, they were incorporated by reference in the Coalition's motion and raised in its complaint. The Court will not address NEI

and NMA's arguments about BLM's alleged failure to consider adequate alternatives (Doc. 170 at 4-12) because the Coalition did not make that NEPA claim in its complaint (12-cv-8075, Doc. 30, ¶ 57).

A. Standard of Review.

1. NEPA Claims.

"NEPA is our basic national charter for protection of the environment." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (internal quotes omitted). "NEPA seeks to make certain that agencies will have available, and will carefully consider, detailed information concerning significant environmental impacts, and that the relevant information will be made available to the larger [public] audience." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (internal quotes omitted) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, (1989)).

NEPA's "requirements are procedural." *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997) (citing *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 522 n. 1 (9th Cir. 1994)). The statute establishes factors to be considered in agency action, but does not mandate a particular substantive result. *Id.* (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)). In reviewing compliance with NEPA, a court will not substitute its judgment for that

of the agency "concerning the wisdom or prudence of a proposed action." *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). Instead, the court will "defer to an agency's decision that is 'fully informed and well-considered'" and does not constitute a "clear error of judgment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (citations omitted).

A key procedural requirement of NEPA is the preparation of an EIS. *City of Carmel-By-The-Sea*, 123 F.3d at 1150. In reviewing an EIS, courts apply a "rule of reason" and determine whether the EIS contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Id.* (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)). NEPA does not require courts to "settle disputes between scientists, [but rather] dictates that [courts] defer to agency opinion if it is not otherwise shown to be arbitrary or capricious." *Id.* at 1151-52 (*Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989) ("Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'") (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976))).

2. APA Review.

In applying NEPA, the Court must evaluate the Withdrawal decision under the APA. *See Akiak Native Cmty. v. USPS*, 213 F.3d 1140, 1146 (9th Cir. 2000). The

Court may set aside DOI's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action should be overturned only when the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "This standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotes and citation omitted).

3. Plaintiffs' Arguments.

Plaintiffs' motions and responses identify numerous alleged deficiencies in the USGS Report, FEIS, and ROD. The briefs often delve into minute detail, taking issue with specific facts BLM did or did not consider and arguing that conclusions drawn from the evidence are flawed. The Court seeks to address all of Plaintiffs' arguments, but it will not do so in the detail set forth in Plaintiffs' scores of pages of briefing.

As noted, the Court must apply a "rule of reason" and ask whether an EIS contains a "reasonably

thorough discussion of the significant aspects of the probable environmental consequences." *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (citation omitted). Reasonable thoroughness, not correct-in-every-detail, is the standard. Courts should not "fly speck" an EIS and " 'hold it insufficient on the basis of inconsequential, technical deficiencies.' " *Earth Island Inst. v.. U.S. Forest Serv.*, 697 F.3d 1010, 1020 (9th Cir. 2012) (quoting *Oregon Envtl. Council*, 817 F.2d at 492).

B. Failure to Consult with State and Local Governments.

NEPA requires federal agencies to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements." 40 C.F.R. § 1506.2(b). Such cooperation should include joint planning, environmental research and studies, public hearings, and environmental assessments. *Id.* The Coalition argues that BLM did not make the NEPA process meaningful and that comments of Coalition members "were dismissed and most of the important cooperating agency meetings occurred without state and local governments." Doc. 214 at 33.

The record shows that BLM granted Coconino and Mohave Counties cooperating agency status in the EIS process, as well as Kane, San Juan, and Washington Counties in Utah. AR 1630-31. Defendants note that BLM provided these counties with several

opportunities to participate in the NEPA process, including holding two public scoping meetings, five meetings with cooperating agencies, and three meetings or hearings with the Coalition specifically. Doc. 205-1 at 54-55. Defendants also argue that the FEIS specifically considered Mohave County's resolution opposing the Withdrawal and discussed any inconsistencies with local plans. *Id.* at 55-56.

The FEIS does address the county and local plans that may be impacted by the Withdrawal, including noting that Coconino County passed a resolution opposing uranium mining near Grand Canyon National Park. AR 1642. It also discussed Mohave County's General Plan and that its resolution urging Congress to preserve access to northern Arizona's uranium reserves. *Id.* The FEIS noted that the resolution was inconsistent with the Withdrawal (*id.*) and discussed the existing purposes of the general plans in affected counties (AR 1946-1951). It also addressed the economic impacts of the proposed alternatives on the affected counties, basing its analysis "on comments received during scoping, comments on the Draft EIS, and input from tribal consultation and cooperating agencies." AR 2254. Given this record, as well as the presumption of legality that attends BLM's actions in this case, the Court cannot conclude that the Counties were denied meaningful participation. *Nw. Ecosystem Alliance*, 475 F.3d at 1140 (review is highly deferential and presumes validity of agency's action).

The Coalition also argues that BLM failed to comply with the requirement in 40 C.F.R. § 1506.2(d) that

BLM "discuss any inconsistency of a proposed action with any approved State or local plan and laws" and, "[w]here an inconsistency exists . . . describe the extent to which the agency would reconcile its proposed action with the plan or law." Specifically, the Coalition argues that the Withdrawal is inconsistent with resolutions of Mohave County and the Coalition opposing the Withdrawal, and yet the FEIS fails to reconcile these inconsistencies. Doc. 173 at 22. But the regulations do not require BLM to describe efforts to reconcile the Withdrawal with resolutions; they require BLM to describe efforts to reconcile the Withdrawal with "any approved State or local plan and laws." 40 C.F.R. § 1506.2(d). The Coalition does not argue that the resolutions were approved State or local plans or laws. Moreover, as already noted, the FEIS did discuss County plans and did not identify inconsistencies with the Withdrawal. *See* AR 1642-43. What is more, the ROD described the various county resolutions and concluded that "[t]he withdrawal will be consistent with the Coconino County Resolution 2008-09, but inconsistent with Mohave County Resolution 2008-10 and 2009-040." AR 21. The Court concludes that BLM's consideration of local plans and laws did not violate NEPA. *See Quechan Tribe of Fort Yuman Indian Reservation v. U.S. Dep't of Interior*, 927 F. Supp. 2d 921, 946 (S.D. Cal. 2013) ("BLM considered the inconsistencies with local law and reasonably concluded there was no conflict.").

The Coalition also argues that the Withdrawal decision excluded consideration of the Arizona

Department of Environmental Quality ("ADEQ") Aquifer Protection Permit ("APP") program and the Arizona Pollutant Discharge Elimination System. Doc. 173 at 14-15. The Coalition argues that the ROD is flawed because it relied on the USGS Report, which did not assess the regulatory system for uranium mining in Arizona. *Id.*

The record reflects that ADEQ itself commented on the DEIS, that the comments discussed the existing Arizona regulations, and that the comments did not assert that the Withdrawal would be inconsistent with the state regulatory framework. Doc. 182-4. Rather, ADEQ asserted that the Withdrawal was unnecessary in light of the existing state regulations. The Coalition cites no regulation that requires action under NEPA where there is no inconsistency with local or state environmental plans.

Further, even if the Withdrawal was inconsistent with the Arizona regulatory framework, NEPA does not require that a project fail because of such an inconsistency, only that the inconsistency be discussed and that the agency describe the extent to which it would reconcile its actions with the existing law. 40 C.F.R. § 1506.2(d). The FEIS does acknowledge ADEQ's APP program and its regulatory effects on uranium mining in the region (Doc. 175-3 at 40), stating that "[f]or purposes of this EIS, it is assumed that mines comply with all applicable state and federal regulations" (*id.* at 33). The Coalition's claim that the Withdrawal violates NEPA because the ROD failed to consider Arizona's existing regulatory scheme is without merit.

C. Failure to Address Information Gaps.

When there is incomplete or unavailable information for evaluating foreseeable environmental effects in an EIS, 40 C.F.R. § 1502.22 requires an agency to make clear that information is lacking. When the information is essential, and is not obtained by an agency because of exorbitant costs or because methods to obtain it are unknown, the agency must explain the missing information's relevance and what existing evidence is evaluated in its place, and must provide an evaluation based on theoretical approaches. 40 C.F.R. § 1502.22.

As noted above, the FEIS acknowledged incomplete information regarding essential aspects of the Withdrawal, including impacts on water resources and the extent of the uranium endowment in the withdrawn area. Doc. 170 at 14-15. Plaintiffs argue, however, that the government failed to comply with the requirements of § 1502.22 and made "unsupported and overly cautious assumptions" that distorted the decision-making process and overemphasized speculative harms. *Id.* at 16 (citing *Robertson*, 490 U.S. at 356). They argue that a footnote in the ROD stating that additional information about water quality was not essential cannot save the FEIS because such a determination should have been made earlier in the NEPA process. Doc. 170 at 16-17. They also claim that the footnote does not address other information deficiencies. *Id.*

1. Obligations Under 40 C.F.R. § 1502.22.

The government asserts that its obligations under § 1502.22 were not triggered because the agency reasonably concluded that the information missing from the FEIS "was not 'essential' to informed decisionmaking." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 498 (9th Cir. 2014). As noted, this determination was set forth in a footnote in the ROD. Doc. 198 at 51; AR 10 n. 1. Plaintiffs argue that the determination in *Point Hope* was made early in the EIS process and therefore was available during the study period when participants could comment on it. 740 F.3d at 498.[4] They argue that postponing the "non-essential" determination until the ROD was particularly improper in light of NEPA's requirement "that an EIS analyze environmental consequences of a proposed plan as soon as it is 'reasonably possible' to do so." *Id.* at 497.

As a preliminary matter, even if the unavailable information was essential to the agency's decision, § 1502.22 does not require a separate, formal disclosure in the FEIS. *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1172-73 (10th Cir. 1999) ("[W]e are unwilling to give a hyper-technical reading of the regulations to require the Forest Service to include a separate, formal disclosure statement in the environmental impact statement to the effect that lynx population data is incomplete or unavailable. Congress did

[4] In their reply, Plaintiffs assert that *Point Hope* is merely a district court decision that is not binding on this Court (Doc. 225 at 38), but the Ninth Circuit decided the case in 2014. *See Native Vill. of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014).

not enact [NEPA] to generate paperwork or impose rigid documentary specifications." (citation omitted)). Plaintiffs argue that the FEIS should have explicitly stated whether the information was essential and, if so, why it was unobtainable or too expensive, but they cite no authority for such a requirement. Doc. 170 at 15. Courts have held that where participants in the environmental review process are made aware of the relevance of missing information, "[t]he regulations do not prescribe the precise manner through which an agency must make clear that information is lacking." *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 532 (7th Cir. 2012). Additionally, the regulations themselves provide that "any trivial violation of these regulations [does] not give rise to any independent cause of action." 40 C.F.R. § 1500.3.

In any event, the FEIS does describe incomplete and unavailable information. Indeed, Plaintiffs acknowledge that the FEIS "repeatedly admits" that information on uranium deposits and the environmental impacts associated with the Withdrawal is "missing or uncertain," that this admission is contained in sections of the FEIS titled "Incomplete or Unavailable Information," and that other portions of the FEIS text discuss missing data and uncertainties. *See* Doc. 170 at 13 & n. 50. As one example, a section of the FEIS titled "Incomplete or Unavailable Information" discusses missing information regarding groundwater quality, groundwater movement, and the effects of mining on groundwater in areas around the Grand Canyon. AR 2070-71. This section describes how such information

might be obtained in the future, and explains the data relied on in the FEIS and the assumptions made when data was not available. *Id.* While acknowledging the missing information, the FEIS also states that it relies on the "best available information and conservative assumptions" to make reasonable assessments that would "provide the decision-maker with an adequate basis for weighing the relative potential for impacts to water resources." *Id.* Furthermore, the FEIS was based on the USGS Report, which in turn acknowledges uncertainty regarding the effects of the Withdrawal on water quality and quantity. Doc. 173 at 9; AR 9 (the USGS Report "acknowledged uncertainty due to limited data").

These disclosures satisfy § 1502.22's requirement that the FEIS identify missing information. The further disclosure requirements set forth in § 1502.22(b) apply only if the missing information is essential, and in this case DOI deemed it non-essential. *Point Hope*, 740 F.3d at 497 ("Nor did BOEM go through the steps required by § 1502.22(b) if it had found "essential" information to be unobtainable."); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 163 F. Supp. 2d 1222, 1255 (D. Or. 2001) ("the § 1502.22(b) analysis is required only if the incomplete information is relevant to reasonably foreseeable significant adverse impacts and is essential to a reasonable choice among alternatives"), *rev'd on other grounds*, 309 F.3d 1181 (9th Cir. 2002). Although DOI did not make clear until the ROD that it regarded the missing information as non-essential, this did not mislead

participants. Those involved in the EIS process knew from the USGS Report, the DEIS, and the FEIS that information was missing. The Court also agrees with the Seventh and Tenth Circuits that § 1502.22 does not prescribe a precise time or place for compliance with its requirements. *Habitat Educ. Ctr.*, 673 F.3d at 532; *Colorado Envtl. Coal.*, 185 F.3d at 1172-73. The Court concludes that the FEIS's treatment of missing information satisfies the rule of reason.

2. Uranium Endowment Estimate.

The extent of the uranium endowment in the withdrawn area was estimated in the USGS Report. AR 58-415. The report concluded that 48% of the 1.3 million tons of all undiscovered uranium in favorable areas in northern Arizona, as estimated in a 1990 U.S. Geological Survey, could be found in the area slated for withdrawal or in previously withdrawn areas. AR 84. In other words, 48% of the uranium in northern Arizona would be off-limits to mining if the Withdrawal occurred.

To reach this estimate, the USGS Report began its analysis with a 1990 survey that estimated the uranium endowment in all of northern Arizona, including Grand Canyon National Park, two national monuments, a game preserve on forest lands, and tribal lands. *Id.* That survey was the result of an agreement with the U.S. Department of Energy to update undiscovered uranium resources in specific areas of the United States. AR 87. The survey estimated that 1.3

million tons (2.6 billion pounds) of undiscovered uranium existed in breccia pipes in northern Arizona. *Id.* Because the exact amount of a deposit cannot be known without drilling or mining, the endowment estimate was the mean of a range of estimates from high probability of occurrence to low probability of occurrence. *Id.*

The USGS Report also examined other mineral resource studies in the Grand Canyon area, all of which were undertaken prior to the 1990 estimate and none of which provided quantitative resource estimates, but which did provide additional context for the 1990 estimate. *Id.* It then engaged in a discussion of the uncertainties inherent in uranium resource estimates for breccia pipes. AR 90. Those uncertainties include where breccia pipes are located if they are unexposed (as many are), as well as the extent to which the pipes are mineralized. AR 90-92. The density of uranium in unexposed breccia pipes is particularly difficult to gauge without drilling, a process that can be disruptive and expensive given the depths to which breccia pipes can extend. *Id.*

With these limitations in mind, USGS assessed the applicability of the 1990 estimate and the techniques used to reach it and determined what adjustments were necessary. AR 95. For example, the USGS recognized that the proposed withdrawal area would cover a smaller surface area than was assessed in the 1990 study and made adjustments for that decrease. AR 66, 95. The USGS made an overall adjustment for the mean density of the undiscovered endowment in

the proposed area, adopting an endowment density of 96.6 tons per square mile, the density applicable to the portion of the Withdrawal in which most of the undiscovered uranium endowment was thought to lie. AR 92-93.

Moreover, USGS identified unknown information when undertaking both the estimate and making the Withdrawal decision. *See, e.g.*, AR 6058 (noting the unknowns in relation to the uranium resource estimate). The estimate was made using the best information available and was peer-reviewed within the agency. Plaintiffs had the opportunity to comment on the methodology, which they did during the EIS process.

Plaintiffs vigorously dispute the government's estimate. They argue that USGS did not do any original research – "it just recycled the 1990 report" – and that the adjustments made by USGS are unsupported. Doc. 173 at 17-18. Plaintiffs present their own estimate, which comes in at five times more uranium ore than the USGS estimate. Then Plaintiffs' estimates were presented to BLM during preparation of the EIS, BLM provided this response:

> [T]hese alternative approaches have not been developed or peer reviewed to the extent that they can replace or superseded the USGS endowment assessment presented in [the USGS Report]. 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.

AR 18.

The Court does not doubt the sincerity of Plaintiffs' views, but it must "defer to an agency's decision that is fully informed and well-considered," so long as the decision does not evince a "clear error of judgment." *Blue Mountains*, 161 F.3d at 121 (citations omitted). NEPA does not require the court to "settle disputes between scientists, [but rather] dictates that [courts] defer to agency opinion if it is not otherwise shown to be arbitrary or capricious." *City of Carmel-By-The-Sea*, 123 F.3d at 1151-52 (citing *Laguna Greenbelt*, 42 F.3d at 526; Marsh, 490 U.S. at 377). The Court cannot conclude that BLM's estimate of the uranium endowment constituted a clear error of judgment or was arbitrary and capricious.

3. Water Resources Impacts.

Plaintiffs complain that the FEIS adopted an impermissibly cautious approach regarding water impacts that was not supported by science. Doc. 173 at 12-14. Specifically, Plaintiffs argue that some of the well samples were taken outside of the withdrawn area and that the risks to groundwater were exaggerated, as evidenced by the highly conservative assumptions made in the FEIS and by "significant dissent" from a National Park Service hydrologist. *Id.* at 12-14. This hydrologist concluded that uranium mining presented

little or no risk of contamination to the R-aquifer, but the FEIS was not changed to reflect this opinion. *Id.* at 13-14.

The government argues that there was nothing misleading about the location of the springs that were tested, and that any argument that groundwater near closed or abandoned mines should not be tested lacks merit because there were no active uranium mines in the withdrawal area when the testing was done. Doc. 198 at 45-46. The government also asserts that disagreement from one employee expert about the impacts on groundwater does not render the Withdrawal arbitrary and capricious. *Id.* at 46.

Plaintiffs argue that the potential for adverse impacts to groundwater is so low as to not support the stated rationale for the Withdrawal of protecting water resources. Importantly, however, the agency never attempted to disguise the uncertainty or the low probability of contamination from mining; it simply determined that even a low risk was too great given the proximity of potential mining operations to the Grand Canyon.

The FEIS detailed the incomplete or unavailable information and the scientific uncertainties related to impacts on water resources. AR 2070-71. It analyzed water quality samples from 687 locations in the study area and a 6-mile buffer around each of the parcels under each of the proposed alternatives. AR 1784-85. These buffers allowed for consideration of groundwater and surface water features adjacent to the parcels

and provided relevant information in the absence of more proximate data. The FEIS concluded that the chances of groundwater contamination from uranium mining are low, and noted that the only evidence of such contamination from previous mines comes from the unreclaimed Orphan Mine. AR 1762-1766. That same low probability is reflected in the ROD, which acknowledged that "the probability of any impact to springs ranged from 0% (in the South and East Parcels with full withdrawal) to 13.3% (in the North Parcel with no withdrawal)." AR 10. The FEIS also noted significant uncertainty as to the impacts on deep aquifer springs and the R-aquifer. AR 1768. Even assuming a relatively high concentration of potential discharge from mines to the R-aquifer, the FEIS found that no spring in that aquifer would exceed EPA minimum concentrations for drinking water. AR 10.

The ROD and FEIS did find, however, that there was a small but potentially major risk to some water sources. Historical water data for 1,014 water samples from 428 sites indicated that about 70 sites exceeded contaminant levels for major ions or trace elements such as arsenic iron, lead, manganese, sulfate, radium, and uranium. AR 202. Samples from 15 springs and 5 wells in the region contained dissolved uranium concentrations exceeding maximum contaminant levels for drinking water. *Id.* Dissolved uranium concentrations in the North Parcel, where the majority of the uranium endowment was believed to exist and where the majority of historical mining has taken place, were 16 times higher than those typical for the Grand

Canyon region. *Id.* The ROD concluded that the risk from uranium mining, when considered in light of uncertainties about geology and groundwater flow in the area, justified the Withdrawal decision.

The record does reflect some disagreement among experts within the relevant agencies. One hydrologist decided not to comment on the draft FEIS because he believed it went "to great lengths in an attempt to establish impacts to water resources from uranium mining" and "create[d] enough confusion and obfuscation of hydrogeologic principles to create the illusion that there could be adverse impacts if uranium mining occurred." AR 6820. While the Court does not wish to discount the views of this hydrologist, surely one internal expert's disagreement with a conclusion reached by other internal experts does not make a final agency decision arbitrary or capricious. If it did, agency actions would survive APA review only when there was complete unanimity among internal experts, an unlikely outcome on difficult questions. The practical reality is that a certain amount of "disagreement among the countless individuals involved in developing or commenting on" a plan is to be expected. *Nat'l Fisheries Inst., Inc. v. Mosbacher*, 732 F. Supp. 210, 227 (D.D.C. 1990). Internal disagreements are not necessarily bad – they can be viewed as "indicat[ing] that the debate was as open and vigorous as Congress intended." *Id.* Thus, courts have not found that a difference of opinion among government employees shows "the agency ignored its own experts," and have held that "a diversity of opinion by local or lower-level

agency representatives will not preclude the agency from reaching a contrary decision, so long as the decision is not arbitrary and capricious and is otherwise supported by the record." *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1186-87 (10th Cir. 2013).

Moreover, although it is true as Plaintiffs contend that the data was sparse and the uncertainties substantial in this investigation, BLM openly acknowledged uncertainty on how water resources might be impacted. It candidly recognized a low probability of groundwater contamination from uranium mining. It nevertheless examined the available science, solicited and considered comments both internally and from the public, and ultimately concluded that the uncertainties, coupled with even a low potential for major adverse effects, warranted a level of precaution that justified the Withdrawal. The Court does not find this arbitrary or capricious.[5]

4. Other Scientific Controversies.

Plaintiffs argue that tests on contaminated soil samples were misrepresented in the USGS Report because they came from unreclaimed mining sites (Doc.

[5] Quaterra and the Coalition argue that portions of the withdrawal area lie outside the Grand Canyon watershed, could have no effect on water resources at the Grand Canyon, and therefore should not have been included in the Withdrawal. Doc. 173 at 17. But this one-paragraph argument fails to address the other reasons for the Withdrawal and how those reasons apply to lands near the Canyon but outside its watershed. *Id.*

173 at 16-17), and that the FEIS and ROD did not do a risk assessment on radiation and exposure effects on plants and wildlife (*id.* at 17). These do not amount to NEPA violations.

The USGS Report accurately describes where soil samples were obtained, whether the mine sites were or were not reclaimed, and how the concentrations of uranium and arsenic found at the sites compared to background levels. AR 110-111. The Court does not find the presentation of this data misleading.

With respect to risks from radiation exposure, the Coalition's brief accurately summarizes the USGS Report:

> [The Report] addressed whether increased radiation and exposure to trace elements would adversely affect plants and wildlife. The report summarized existing literature and identified the data gaps noting that caution should be used when applying the information to plants or animals in Northern Arizona.

Doc. 173 at 17 (record citations omitted).[6] The Coalition argues that the report was prepared on the assumption that the FEIS would include a risk assessment, but that no such assessment was done. The Coalition does not explain, however, how this

[6] The USGS Report explicitly acknowledged "that toxicity data for many radionuclides and biological receptors are lacking," but found nonetheless that recommendations in the report "could be useful in the environmental impact statement to be developed." AR 399.

violated NEPA. To the extent the Coalition is again arguing that the Withdrawal decision was not based on sufficiently reliable science, the Court cannot agree. "NEPA does not require us to decide whether an EIS is based on the best scientific methodology available. Nor does NEPA require us to resolve disagreements among various scientists as to methodology. Instead, '[o]ur task is simply to ensure that the procedure followed by the Service resulted in a reasoned analysis of the evidence before it.'" *Greer Coal., Inc. v. U.S. Forest Serv.*, 470 F. App'x 630, 633 (9th Cir. 2012)) (quoting *Friends of Endangered Species, Inc., v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985)).

V. FLPMA Claims.

The "FLPMA requires that 'the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.'" *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000) (quoting 43 U.S.C. § 1701(a)(8)). The FLPMA permits challenges "by land users to ensure appropriate federal guardianship of the public lands which they frequent." *Id.* at 1177. Where an agency does not demonstrate exacting compliance with the FLPMA, the error may be deemed harmless if the agency action nonetheless satisfies the purposes of the statute. *See Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764 (9th Cir. 1986) ("We agree that the notices did not comply in every respect with the terms of section 204(b). However, we find the error

to be harmless since the purposes of FLPMA's notice requirement were fully satisfied."). Moreover, claims that an agency violated the FLPMA are viewed under the discretionary review standard of the APA. *See Desert Citizens*, 231 F.3d at 1180.

A. Reviewability of Claims.

Plaintiffs challenge, among other things, the ROD's stated purposes for the Withdrawal. The government argues, without citation to legal authority, that the Court lacks jurisdiction to review these claims because Plaintiffs have articulated no legal standard by which the Court can evaluate them and the Withdrawal constitutes an action committed entirely to the agency's discretion. Doc. 198 at 15 (citing 5 U.S.C. § 706).

Challenges to agency actions are reviewed under the standard of the APA, using the legal framework of the violated statute. 5 U.S.C. §§ 701-706. Under the APA, "[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. The APA excludes only a narrow window of agency action from review. *Id.* § 701. "This narrow exception to the presumption of judicial review of agency action under the APA applies 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1082

(9th Cir. 2014), (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Webster v. Doe*, 486 U.S. 592, 599 (1988) (exception applies where there is "no law to apply") (internal quotation marks and citation omitted)).

Plaintiffs argue that there is a presumptive right to judicial review of actions under the FLPMA. *See Perkins v. Bergland*, 608 F.2d 803, 805-06 (9th Cir. 1979) ("[The] FLPMA explicitly provides that 'it is the policy of the United States that . . . judicial review of public land adjudication decisions be provided by law.' . . . [and] this declaration of policy at the outset of FLPMA removes any doubt Congress might otherwise have allowed to obscure the reviewability of . . . decisions[.]") (citing 43 U.S.C. § 1701(a)(6)). In response, Defendants assert that the presumption of judicial review is not a right to judicial review where no substantive legal standard applies. Doc. 225 at 8. The government asks the Court to apply the narrow exception of § 701 to preclude review of the purposes of the Withdrawal. Doc. 198 at 15. While the government asserts that the Court has jurisdiction to review whether the Secretary complied with the procedural requirements for withdrawals under *Drakes Bay Oyster Co.* and *Ness Inv. Corp. v. U.S. Dept. of Agric., Forest Serv.*, 512 F.2d 706 (9th Cir. 1975), it argues that Plaintiffs have failed to identify any legal standards or statutes that provide a substantive guide for review. Doc. 198 at 16-20. The Court is not persuaded.

The FLMPA does provide legal standards for withdrawals. It allows withdrawals only "where appropriate" under the regulations, 43 C.F.R. § 2300.0-1(a), and,

beginning at 43 C.F.R. § 2310.3-1, the regulations set forth specific procedural requirements. Those requirements include publication and public meetings, *id.*, and scientific studies of the proposed withdrawal area, including studies on land use, water use, environmental assessments or impact statements, cultural resources, wilderness uses, mineral resources, biological assessments, and economic impacts, *id.* § 2310.3-2. The regulations also specify the agency's obligations in regard to the size and duration of withdrawals. *Id.* § 2310.3-4.

In addition, the FLPMA's definitions section states that "[t]he term 'withdrawal' means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, *for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program* [.]" 43 U.S.C. § 1702(j) (emphasis added). The statute mandates that the Secretary provide, within three months after filing a notice of withdrawal, "a clear explanation of the proposed use of the land involved which led to the withdrawal." § 1714(c)(2)(1).

Furthermore, even if the validity of the stated purpose for the Withdrawal was not reviewable, the APA clearly provides a standard of review by which to judge the nature of the agency's decision-making process and, thereby, its justification for the stated purposes of the Withdrawal. Under the APA, actions by the Secretary to withdraw land, like other agency actions, are "valid if the agency considered the relevant factors and

articulated a rational connection between the facts found and the choices made." *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013) (quoting *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010)). The statute requires an explanation of the proposed use that led to the withdrawal, 43 U.S.C. § 1714(c)(2)(1), as well as extensive study and procedure prior to withdrawal, 43 U.S.C. § 1714(c)(2), and expresses a presumption of judicial review of the final withdrawal decision, 43 U.S.C. § 1701(a)(6).[7]

Given these statutory and regulatory requirements, the Court cannot accept the government's claim that the Withdrawal is unreviewable under the FLPMA and APA.

B. Merits of FLPMA Claims.

Section 204 of the FLPMA provides the Secretary of the Interior with the authority to make, modify, revoke, and extend withdrawals, subject to valid existing rights. 43 U.S.C. § 1714. A "withdrawal" means "withholding [of] an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public

[7] NEI and NMA also note that "withdrawals must be justified in accordance with the Department of the Interior Land Withdrawal Manual 603 DM 1 and the BLM regulations at 43 CFR 2310." Doc. 170 at 19. That language follows directly from BLM's Energy and Mineral Policy. AR 80613.

purpose or program." *Id.* § 1702(j). The withdrawn lands must be managed under principles of multiple-use and sustained yield unless provided otherwise by another law. *Id.* § 1732(a).

1. Purpose and Scope of Withdrawal.

The ROD justifies the Withdrawal on the basis of (1) threats and uncertainty regarding the effects of uranium mining on water resources, (2) impact of uranium mining on cultural and tribal resources, (3) the need for more study of the impact of uranium mining on other resources, including wildlife, and (4) the existence of preapproved mines and valid existing rights (VER's) in the withdrawn area that will not be affected by the Withdrawal. AR 9-12. Plaintiffs argue that none of these reasons for the Withdrawal is supported by evidence in the record. Doc. 170 at 18; Doc. 214 at 19; Doc. 167 at 13. The Court does not agree.

Plaintiffs argue that the record does not support the ROD's first justification for the Withdrawal: that investigations revealed potential harmful effects of uranium mining on water resources, and that even though the likelihood and extent of the impact was uncertain, it was unacceptable enough to warrant the Withdrawal. Doc. 167 at 16; *see also* AR 9-10. Plaintiffs AEMA and Yount argue that had BLM adequately considered the application of existing regulations when assessing the potential impacts on perched aquifers, the speculative harm discussed in the FEIS would be largely mitigated. Doc. 167 at 18-19. Plaintiffs NEI and

NMA point to evidence in the record where BLM employees express concern about the lack of knowledge regarding the geo-hydrology in the North and East Parcels, as well as the fact that there is a groundwater divide between parcels in the Withdrawal. Doc. 170 at 18. They argue that "BLM fully understood that the science did not support a full withdrawal." *Id.* at 19.

The FEIS's findings on potential impacts to water resources are discussed in this order's earlier sections. BLM acknowledged uncertainty regarding groundwater flow, recharge, aquifers, and other hydrologic features. Looking at available data and making conservative assumptions, it predicted only a low probability of contamination from uranium mining. BLM did not hide this conclusion or pretend to find with certainty that contamination would occur if uranium mining proceeded at a market-dictated pace. The FEIS also "acknowledges the extensive framework of existing regulations applicable to hard-rock mining in the area." AR 2455; *see also* AR 2074 (assuming that regulations under the APP Program are met).

Despite this uncertainty – and, in part, because of it – DOI decided to err on the side of protecting the environment. Its task was predictive, and predictive in an area where sparse data precluded reasonable certainty. The Court cannot conclude that its decision to proceed cautiously was legally inappropriate. Where an agency is "making predictions, within its area of special expertise, at the frontiers of science . . . a reviewing court must generally be at its most

deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

AEMA and Yount argue that DOI was not justified in basing its decision on uncertainty – that DOI instead was obligated to obtain the information necessary to eliminate the uncertainty. As support, Plaintiffs cite *Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287 (D. Utah 2010). Although *Skull Valley* did find that DOI was unjustified in denying the requested action on the basis of incomplete information, and should have obtained the missing information, it is distinguishable from this case. The court in *Skull Valley* noted that DOI itself found the FEIS to be inadequate. *Id.* at 1295. The court also found that "the DOI, acting through the BLM, has readily available mechanisms which it could have invoked to obtain the information it found lacking the in the FEIS." *Id.* at 1297. In this case, by sharp contrast, DOI did not find the FEIS to be inadequate, nor did it have readily available sources for the information that was missing in the withdrawal area.[8]

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[8] Because DOI's stated purpose of protecting water resources supports its decision, the additional purposes listed in the ROD need not also support the Withdrawal. Nevertheless, DOI's concern regarding impacts on tribal and natural resources and its understanding that mining would continue even after the Withdrawal and could contribute to the local economy and generate additional data with which to make future environmental decisions, are valid considerations. AR 9-12. Plaintiffs point to no authority that would prohibit the approach adopted by the government in this case. The only case law cited by Plaintiffs, *New Mexico v. Watkins*, 969 F.2d 1122, 1135 (D.C. Cir. 1992), was not

2. Estimate of Uranium Endowment.

Plaintiffs argue that the FEIS, by underestimating the amount of uranium, violated the FLPMA requirement that a withdrawal fully disclose the value of minerals to be closed to development. Docs. 170 at 25; 173 at 18; 214 at 29-31. Plaintiffs NEI and NMA argue that the inaccurate uranium estimate "skew[s] the FLPMA decision process, preventing any semblance of the required balancing of competing environmental and multiple-use interests" because it "artificially elevates the environmental risks." Doc. 170 at 25. Plaintiffs Quaterra and the Coalition assert that the consequences for the allegedly flawed assessment "are significant" because it "understated the loss in severance taxes to the state and communities as well as the loss to the nation." Docs. 173 at 18; 214 at 29-31.

The FLPMA requires agency reports to Congress, including "a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and

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reviewing an agency's original purpose for a withdrawal, but rather whether an agency could change purposes in order to extend a withdrawal. The D.C. Circuit explicitly distinguished the procedures for withdrawals from those for extending withdrawals. *Id.* Plaintiffs also argue that these additional reasons for the Withdrawal were developed late in the ROD-preparation process, but cite no authority to suggest that late-breaking rationales are prohibited under NEPA or FLPMA when they are supported by the FEIS. The FEIS addressed each of these additional purposes.

potential market demands." 43 U.S.C. § 1714(c)(2)(12). The implementing regulations require "[a] mineral resource analysis prepared by a qualified mining engineer, engineering geologist or geologist[.]" 43 C.F.R. § 2310.3-2(b)(3)(iii).

As already noted, DOI's estimate of the uranium endowment was based on the USGS Report prepared at the request of the Secretary. AR 57-415. The report includes a chapter on the uranium endowment prepared by government experts in the field, and discusses how the experts adjusted 1990 estimates to reach their conclusion. AR 84-102. The USGS Report made adjustments to the 1990 estimates in light of additional information and the area of the proposed withdrawal. Nothing in the FLPMA or its implementing regulations requires that the estimate be exact; rather, "known mineral deposits" are to be identified and "future mineral potential" is to be identified. 43 U.S.C. § 1714(c)(2)(12); 43 C.F.R. § 2310.3-2(b)(3)(iii). The USGS Report addressed "future mineral potential" and was a peer-reviewed, scientific study. AR 3893, 82092. The Court's role is not to second-guess such scientific analysis by agency experts.

3. Failure to Coordinate With Counties.

The Coalition argues that the agency's alleged failure to engage in meaningful participation and coordination with the counties violated the FLPMA. Doc. 214 at 33. The Coalition acknowledges that several meetings were held, but asserts that its "members'

comments were dismissed and most of the cooperating agency meetings occurred without state and local governments." *Id.* Plaintiffs rely on 43 U.S.C. § 1712, the FLPMA provision dealing with land use plans. Subsection (a) requires public involvement in the development plans and subsection (c)(9) requires that the Secretary, "to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those [] plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and [] provide for meaningful public involvement of State and local government officials [] in the development of land use programs, land use regulations, and land use decisions for public lands."

These regulations deal with land use plans, not agency withdrawal obligations. In addition, the obligations are largely the same as under NEPA: the agency must consider local land use plans and provide meaningful participation for State and local governments. The Court has found that the NEPA obligation was satisfied. Public meetings were held and comments were submitted by local counties and included in the FEIS and ROD. Counties were granted cooperating agency status (AR 1630-31), and the EIS discussed the county and local plans that may be impacted by the Withdrawal (AR 1642, 1946-1951) and the economic impacts of the proposed alternatives on the affected

counties (AR 2254). The Court cannot conclude that the FLPMA required more.[9]

C. Other allegations.

Plaintiffs argue that DOI's notice to Congress of the Withdrawal was deficient (Doc. 170 at 27), that the Forest Service's consent to the Withdrawal was arbitrary and capricious (Doc. 167 at 26), and that the Withdrawal violated the BLM Resource Management Plan (Doc. 170 at 24).

1. Notice to Congress.

Plaintiffs NEI and NMA argue that the government's notice to Congress regarding the Withdrawal violated the FLPMA and the APA. Doc. 170 at 27. They argue that the notice violated the FLPMA because it incorporated the allegedly faulty portions of the FEIS. Doc. 170 at 28. They argue that the notice was also deficient because it failed to provide all the information required under the FLPMA, including "a clear explanation of the proposed use of the land involved which led to the withdrawal" as required by 43 U.S.C. § 1714(c)(2)(1), and accurate information regarding

[9] To show that its members were denied meaningful participation, the Coalition asserts that alternatives were discussed only after BLM had determined them, notes of meetings reflect only brief discussions, and handouts were not distributed until the day before meetings. Doc. 173 at 21. The Court is reluctant, however, to judge the level of coordination by the length of meeting notes or when handouts were distributed. Such minute judicial oversight is not contemplated by the FLPMA or the APA.

"the economic impact of the change in use on individuals, local communities, and the Nation" as required by § 1714(c)(2)(2). Doc. 170 at 30.

The government contends that the savings provision of the FLPMA precludes judicial review of the required reports to Congress, including the notices required by § 1714(c). Doc. 225 at 19. The Court agrees. The statutory notes to the FLPMA state that "the adequacy of reports required by this Act to be submitted to the Congress or its committees shall not be subject to judicial review." 43 U.S.C. § 1701(j) (Stat. Notes). Further, where reports to Congress are not expressly statutorily subjected to judicial review, courts generally find it inappropriate to subject such reports – which essentially are checks between the legislative and executive branches – to review. *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 317 (D.C. Cir. 1988) (noting that "[c]ongressional reporting requirements are, of course, legion in federal law. . . . [but] petitioners have failed to provide a single pertinent authority that suggests, much less holds, that these commonplace requirements are judicially reviewable").

At oral argument, Plaintiffs asserted that the notice to Congress is not a "report to Congress" within the meaning of the statutory notes. *See* 43 U.S.C. § 1701(j) (Stat. Notes). The Court acknowledges that "a reporting-to-Congress obligation is entirely different than a congressionally imposed requirement that an Executive Branch department or agency gather information and make that information, upon compilation, publicly available." *Hodel*, 865 F.2d at 319 n.30. Nevertheless,

Plaintiffs point to no authority that would authorize judicial review of the contents of the FLPMA notice separate and apart from the review allowed under the APA of the sufficiency of agency's actions. The only authority Plaintiffs cite is, again, *Watkins*, 969 F.2d at 1136, where the D.C. Circuit noted that "[t]he reporting requirement [of the FLPMA] is not just a formality. It is instead a fundamental part of the scheme by which Congress has reserved the right to disapprove administrative withdrawals." In *Watkins*, however, DOI modified the purpose for a withdrawal and extended the withdrawal "without ever reporting to Congress." *Id.* That is not the situation here. A detailed report was provided to Congress regarding the Withdrawal. AR 3104-15.

Even if the notice is judicially reviewable, the Court does not find it deficient. The Court does not agree that incorporation of the FEIS and ROD somehow tainted the notice. The FEIS and ROD note deficiencies in information about the uranium endowment and water impacts, and both documents were attached to the notice and cited repeatedly. Additionally, the notice contains separate sections for the twelve disclosure categories in 43 U.S.C. § 1714(c)(2), provides appropriate summaries, and cites applicable portions of the ROD, FEIS, and other relevant management plans. AR 3104-15. The proposed use of the land and a discussion of the economic impacts of the Withdrawal is included in those documents.

2. Forest Service's Consent.

Plaintiffs argue that the Forest Service acted arbitrarily, capriciously, and not in accordance with the law when it consented to the Withdrawal because it ignored the multiple use mandate of the National Forest Management Act ("NFMA") and the Kaibab National Forest Plan. Doc. 167 at 26; *see also* AR 3098 (Department of Agriculture's consent to the Withdrawal). Plaintiffs argue that the Forest Service's consent did not comply with the existing Forest Plan and therefore was essentially a retroactive amendment to the plan, which courts have found impermissible. *Id.* at 26-30.

The government argues that this claim does not appropriately challenge agency action under the APA because it is DOI, not the Department of Agriculture (where the Forest Service is located), that has authority to manage mineral resources. *Id.* It further asserts that the Withdrawal does not contravene the multiple use mandate because "forest plans cannot by law open or close lands to mineral entry" and that the Withdrawal cannot, therefore, conflict with the Forest Plan. Doc. 225 at 41.

a. Agency Action.

An "agency action" under the APA "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The Forest Service's consent constitutes a license. Under the APA, a "'license' includes the whole or a part of an agency permit,

certificate, approval, registration, charter, membership, statutory exemption or other form of permission." § 551(8)). The Forest Service's consent to the Withdrawal clearly was an approval.

The consent also had legal ramifications. It was required under the FLPMA if the Withdrawal was to encompass Forest Service lands, as it did. 43 U.S.C. § 1714(i). While the government is correct that DOI, not the Department of Agriculture, has final authority to manage mineral resources, the APA provides review, upon final agency action, for a "preliminary, procedural, or intermediate agency action or ruling not directly reviewable[.]" 5 U.S.C. § 704. "The scope of judicial review of final agency action includes the power to review the intermediate and procedural agency actions leading up to the final challenged result." *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992). Defendants argue that Plaintiffs have cited no case law that would authorize such review if the intermediate or preliminary action is taken by an agency other than the one making the final determination, but nothing in the language of the APA so limits the review of the Court, and the government has cited no case law that would support such a limitation. The Forest Service's consent was a license under the APA, was a required preliminary action for the Withdrawal, and had legal consequences. The Court therefore concludes that it is a reviewable agency action.

b. Contravention of Forest Plan.

Plaintiffs argue that the Forest Service's consent ignored NFMA requirements that "multiple use" and "sustained yield" be the guiding principles for forest management. Doc. 167 at 26 (citing 16 U.S.C. § 1604(e)). Plaintiffs assert that because consent to the Withdrawal required contravention of the existing plan, and the Forest Service cannot retroactively amend a forest plan, the consent was arbitrary and capricious. Doc. 167 at 27-29.

The ROD stated that the Forest Service's management plans do not apply to regulation of mineral resources, and explicitly found that "withdrawal decisions are outside the authority of National Forest Planning, so no plan amendment is required. Any development of existing mining claims that can prove valid existing rights will follow the same standards and guidelines identified in applicable Forest Plans." AR 12.

The NFMA applies to the management of forests and rangelands and their "renewable resources." Doc. 167 at 26; 16 U.S.C. § 1600(1)-(3) (Congressional findings in the Act related to "renewable resources" from the Nation's public and private forests and rangelands). Minerals, of course, are not renewable resources. The NFMA requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of

State and local governments and other Federal agencies." 16 U.S .C. § 1604(a). In development of plans, the Secretary of Agriculture is charged with assuring that the plans "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. §§ 528-531]." *Id.* § 1604(e)(1). That act in turn requires multiple uses and sustained yields for, again, "renewable surface resources." *Id.* § 528. Indeed, the 1960 act explicitly states that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands." *Id.*

In addition, FLPMA's withdrawal provision permits only the Secretary of the Interior to withdraw lands from mineral entry. 43 U.S.C. § 1714(a); *see also* 43 C.F.R. § 2310.3-3 (with two narrow exceptions not applicable here, "the allowance or denial, in whole or in part, of a withdrawal, modification or extension application, may only be made by the Secretary [of the Interior].").

These statutes and regulations make clear that the Secretary of Agriculture and the forest plans created within his agency do not have authority to open or close lands to mining. That power has been delegated by the FLPMA to the Secretary of the Interior. The ROD therefore correctly concluded that Forest Service management plans do not apply to mining-related withdrawals. Such plans may provide some regulation of mining on Forest Service lands when mining is otherwise permitted, as it will be for existing

valid claims in the withdrawal area, but they do not have the legal effect of opening or closing those lands to mining. Given this fact, the Withdrawal was not an amendment of any mining right granted by a Forest Service plan.

AEMA also argues that the Forest Service failed to provide sufficient justification for consenting to the Withdrawal, focusing primarily on the shortness of the Forest Service letter of consent. The letter contained this explanation:

> The Forest Service has been a cooperator in the preparation of the Environmental Impact Statement (EIS) that considered the effects of this potential withdrawal and has been engaged in the process since it began. . . . The EIS acknowledges that impacts are possible from uranium mining in the area, including impacts to water resources. Important cultural and other resource values would also be protected by the withdrawal. The Forest Service supports the withdrawal of its lands.

AR 3098.

This letter identifies the Forest Service's reasons for consenting. Those reasons comport with reasons stated in the ROD – the possible impacts of uranium mining on water resources and the protection of important cultural resources. The letter makes clear that it is referring the consideration of these issues in the FEIS, in which the Forest Service participated. Because the Court has found these reasons to be

sufficient for DOI's decision, it also finds them sufficient for the Forest Service decision.

AEMA argues that the letter fails to address the Forest Service's multiple use mandate, but, as noted above, that mandate refers to renewable resources. 16 U.S.C. § 528. AEMA also argues that the Forest Service fails to address the likelihood of adverse environmental impacts, the severity of those impacts, or the sufficiency of existing regulatory schemes to protect against such impacts, but these matters are addressed in the FEIS to which the Forest Service letter refers. The Court concludes that the Forest Service, like DOI, can choose to proceed cautiously in the face of uncertainty regarding environmental impacts near the Grand Canyon or in the Kaibab National Forest. The Forest Service participated in the EIS process, understood the uncertainties described in the FEIS, and yet specifically concluded that it "supports the withdrawal of its lands." AR 3098. The Court does not find that conclusion arbitrary or capricious.

3. BLM's Resource Management Plan.

Plaintiffs argue that the Withdrawal contravenes BLM's resource management plan ("RMP") and that an amendment of the RMP was therefore required. Doc. 170 at 25-28. Defendants argue that withdrawals are outside the authority of BLM and that RMPs need not contemplate nor encompass them – that withdrawal decisions are to be made by Congress, the

President, or the Secretary, entirely separate from RMPs. Doc. 225 at 20.

More than 300,000 acres of the withdrawal land is managed under the Arizona Strip RMP. AR 1626-27. Plaintiffs argue that the RMP does not contemplate the Withdrawal, but rather specifies that the lands should remain open to mining. Doc. 170 at 26. The RMP, however, specifically excludes withdrawals in its contemplation of future mineral leases, locations, and sales on that land. AR 30214 (stating under "desired future conditions" that it would "[a]llow entire Arizona Strip FO to remain open to mineral leasing, location, and sale *except where restricted by wilderness designation, withdrawals*, or specific areas identified in this RMP") (emphasis added). Plaintiffs appear to argue that this phrase contemplates only existing withdrawals, but the plain language is not so limited. Plaintiffs' argument that the RMP conflicts with the Withdrawal is therefore without merit.

Plaintiffs argue that an amendment to the RMP was required for the Withdrawal, but point to no language that would require amendments to RMPs, and the Court has been unable to locate any in 43 U.S.C. § 1714. Moreover, while § 1712 does require that land use plans be updated and revised, Plaintiffs never pled a claim based on the Secretary's failure to update a land use plan.

4. Tribal Resources.

Although they do not label it as a claim under the FLPMA, the Coalition and Quaterra argue that BLM's consideration of tribal resources in the FEIS and ROD exceeds statutory authority. Doc. 173 at 23. They object to the ROD's conclusion that "[a]ny mining within the sacred and traditional places of tribal people may degrade the values of those lands to the tribes who use them" (AR 9), arguing that DOI has no statutory authority to reach this conclusion. Plaintiffs cite various statutes that grant protection to Native American interests and argue that the broad tribal concerns addressed in the FEIS and ROD do not fall within any of these statutes.

The FLPMA, however, requires that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). At least two of the listed values – historical and archeological – apply to the tribal interests addressed in the FEIS and ROD. Far from exceeding statutory authority, these values fall squarely within the FLPMA.

Plaintiffs cite *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1486 (D. Ariz. 1990), and its concern about granting tribes "a veto power over activities on federal land[.]" The tribes in that case, however, argued that they had a First Amendment free exercise right to block development of their historical lands, a proposition which, if accepted, truly would grant them veto

power. Nothing similar is at work here. DOI considered tribal resources in the FEIS and ROD as part of its obligation under the FLPMA. It did not grant tribes a First Amendment veto over mining.

VI. Establishment Clause.

Plaintiff Yount argues that one of the government's stated justifications for the Withdrawal – that uranium mining in the Withdrawal area impacts cultural and tribal resources and the impact cannot be mitigated effectively (AR 9-12) – is a violation of the First Amendment's Establishment Clause. Doc. 167 at 32-40. In assessing whether government action violates the Establishment Clause, the Ninth Circuit follows *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Access Fund v. U.S. Dep't. of Agric.*, 499 F.3d 1036, 1042 (9th Cir. 2007). Under the *Lemon* test, "an action or policy violates the Establishment Clause if (1) it has no secular purpose; (2) its principal effect is to advance religion; or (3) it involves excessive entanglement with religion." *Access Fund*, 499 F.3d at 1043 (citing 403 U.S. at 612-13). The Supreme Court has also phrased the establishment inquiry as "whether the government, through its actions, impermissibly endorses religion." *Id.* (citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Cnty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592-93 (1989) (adopting endorsement and discussing it more generally). The Withdrawal easily passes these tests.

A. Secular purpose.

Plaintiff Yount cites no record evidence to show that the purpose of the Withdrawal was anything but secular. In fact, the ROD states four purposes for the Withdrawal, each of which is secular: (1) to protect against threats and uncertainty regarding water resources, (2) to protect against the impact of uranium mining on cultural and tribal resources, (3) the need for more study of the impact of uranium mining on other resources including wildlife, and (4) the existence of pre-approved mines and valid existing rights in the withdrawn area. AR 9-12.

Yount contends that because he has urged the Court to hold that the threats to water resources were not legitimate, that non-secular purpose was inadequate. Doc. 167 at 35-36. But even if the protection of tribal and cultural resources was the only purpose asserted by the government, the protection of cultural and traditional values has been held to be a proper secular purpose. *Access Fund*, 499 F.3d at 1043 (holding that Forest Service's purpose to preserve a historic cultural area was a proper secular purpose); *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 752 (D.C. Cir. 2007) (finding that a withdrawal that stated as one of its purposes the protection of areas of traditional religious importance to Native Americans did not violate the Establishment Clause).

Yount argues that a federal action may only protect American Indian religious beliefs and traditions if they "are tied to a specific site" eligible for listing under

the National Historic Preservation Act ("NHPA"). Doc. 167 at 37. In support, he cites *Access Fund* and *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004), but neither case holds that this is a requirement. As noted above, the FLPMA authorizes DOI to consider historical and archeological values without regard to whether they concern NHPA sites.

B. Principal Effect and Excessive Entanglement.

Yount contends that the Withdrawal violates the second and third prongs of the *Lemon* test because the DOI was not "neutral" in its decisionmaking. Doc. 167 at 38. He argues that "[t]he withdrawal gives the American Indians 'veto power' to prohibit otherwise lawful land uses," and "creates a preference for American Indian religious activities over all other uses on federal lands." Doc. 167 at 38-39.

As the FEIS and ROD make clear, the Withdrawal does not primarily affect religious interests; it primarily affects uranium mineral resources and seeks to protect water and other natural and historical resources from the effects of mining those resources. Additionally, it "neither regulates religious practices nor increases Native American influence over management of the [area]." *Mount Royal*, 477 F.3d at 758. No veto power is conferred on any tribe through the authorization of the Withdrawal.

VII. Conclusion.

Ultimately, the question in this case is whether DOI, when faced with uncertainty due to a lack of definitive information, and a low risk of significant environmental harm, can proceed cautiously by withdrawing land for a period of time under the FLPMA. The Court can find no legal principle that prevents DOI from acting in the face of uncertainty. Nor can the Court conclude that the Secretary abused his discretion or acted arbitrarily, capriciously, or in violation of law when he chose to err on the side of caution in protecting a national treasure – Grand Canyon National Park.

IT IS ORDERED that Defendants' motions for summary judgment (Docs. 198, 208) are **granted.** Plaintiffs' motions for summary judgment (Docs. 167, 170, 173) are **denied**. The Clerk shall enter judgment accordingly and terminate this matter.

/s/ David G. Campbell
David G. Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gregory Yount, Plaintiff v. Ken Salazar, et al., Defendants.	No. CV11-8171-PCT DGC (Lead case)
National Mining Association, Plaintiff v. Ken Salazar, et al., Defendants.	No. CV12-8038 PCT DGC
Northwest Mining Association, Plaintiff v. Ken Salazar, et al., Defendants.	No. CV12-8042 PCT DGC
Quaterra Alaska Incorporated, et al., Plaintiff v. Ken Salazar, et al., Defendants.	No. CV12-8075 PCT DGC

(Filed Jan. 8, 2013)

On November 1, 2011, Plaintiff Gregory Yount, a self-employed prospector and miner, filed a *pro se* complaint seeking declaratory and injunctive relief in response to Defendants' actions withdrawing more than one million acres of federal land in Northern Arizona from mining location and entry activities. Doc. 1, *amended by* Doc. 27. Other Plaintiffs in the above-captioned actions – the National Mining Association ("NMA") and the Nuclear Energy Institute ("NEI"); the Northwest Mining Association ("NWMA"); Quaterra Alaska, Inc. and Quaterra Resources, Inc. (collectively "Quaterra"); and the Arizona Utah Local Economic Coalition ("the Coalition"), on behalf of the Board of Supervisors of Mohave Country, Arizona ("Mohave County"), also filed complaints challenging the withdrawal. On August 20, 2012, the Court consolidated the cases and permitted Vane Minerals, LLC ("Vane Minerals") to intervene as a plaintiff. Doc. 56.

Defendants Kenneth L. Salazar, Secretary of the Department of the Interior; the Department of the Interior ("DOI"); the Bureau of Land Management ("BLM"); the Forest Service; and the Department of Agriculture (collectively, "Defendants") have filed motions to dismiss each of these actions. The Court held oral argument on October 26, 2012. For the reasons set forth below, the Court will grant the motions in part and deny them in part.

I. Relevant Statutory and Regulatory Scheme.

Pursuant to the General Mining Law of 1872, 30 U.S.C. § 22, "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase[.]" Vacant public land is "open to prospecting, and upon discovery of mineral, to location and purchase." 43 C.F.R. § 3811.1. To locate a mining claim, a person establishes the boundaries of the land claimed and records a notice or certificate of location. 43 C.F.R. § 3832.1. The claim is not valid until a discovery is made within the boundaries of the claim. 43 C.F.R. § 3832.11. "If the validity of the claim is contested, the claimant must prove that he has made a 'discovery' of a valuable mineral deposit thereon." *McCall v. Andrus*, 628 F.2d 1185, 1188 (9th Cir. 1980), *abrogated on other grounds by Miranda v. Anchondo*, 684 F.3d 844, 846 (9th Cir. 2012).

There is a "distinction between the exploration work which must necessarily be done before a discovery, and the discovery itself." *Converse v. Udall*, 399 F.2d 616, 621 (9th Cir. 1968). Proof of discovery is judged by the prudent person test. "Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met." *Chisman v. Miller*, 197 U.S. 313, 322 (1905). The mineral must be physically exposed to constitute a valid discovery. *Wilderness Society v. Dombeck*, 168 F.3d 367, 375 (9th Cir. 1999).

"The Secretary of the Interior is charged with seeing that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved." *United States v. Coleman*, 390 U.S. 599, 600 n.1 (1968) (internal quotation, ellipses, and brackets omitted). Under § 204(c) of the Federal Land Policy and Management Act ("FLPMA"), the Secretary may withdraw federal land "from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values." 43 U.S.C. § 1702(j). For withdrawals of more than 5,000 acres, the Secretary must notify both houses of Congress and provide them with a comprehensive report of the withdrawal. *Id.* at § 1714(c)(1)-(2). The statute states that Congress may terminate the withdrawal by adopting a concurrent resolution within 90 days. *Id.* at § 1714(c)(1). Withdrawals by the Secretary are limited to twenty years. *Id.*

Land withdrawals under the FLPMA are subject to valid existing rights, 43 U.S.C. § 1701, Note (h), but the BLM or another federal land management agency must conduct a mineral examination before allowing the development of noticed claims. *See, e.g.*, 43 C.F.R. § 3809.100(a) (BLM regulations). The purpose of this examination is to determine whether the claimant had a valid claim before withdrawal and whether the claim remains valid. *Id.* Because the right to prospect for minerals ceases on the date of withdrawal, a discovery must have existed – meaning that minerals must have

been exposed – by the date of withdrawal. *Lara v. Sec'y of Interior*, 820 F.2d 1535, 1542 (9th Cir. 1987).

II. Background.

On July 21, 2009, Secretary Salazar published notice of his intent "to withdraw approximately 633,547 acres of public lands and 360,002 acres of National Forest System lands for up to 20 years from location and entry under the Mining Law of 1872." Notice of Proposed Withdrawal, 74 Fed. Reg. 35,887, (July 21, 2009) (the "2009 Notice"). The 2009 Notice had the effect of withdrawing the land from location and entry for up to two years to allow time for analysis, including environmental analysis under the National Environmental Protection Act ("NEPA"). *Id.*

On August 26, 2009, the BLM, an agency within DOI, published notice of its intent to prepare an Environmental Impact Statement ("EIS") under NEPA addressing the proposed withdrawal. 74 Fed. Reg. 43,152 (Aug. 26, 2009). The purpose of the withdrawal as explained in the notice was "to protect the Grand Canyon watershed from adverse effects of locatable mineral exploration and mining, except for those effects stemming from valid existing rights." *Id.* at 43,152-53.

On February 18, 2011, after soliciting public comments, the BLM issued a notice of availability of a Draft EIS. 76 Fed. Reg. 9,594 (Feb. 18, 2011). The Draft EIS considered four alternatives in detail: a "No Action" alternative; the withdrawal of approximately 1,010,776 acres for 20 years; the withdrawal of approximately

652,986 acres for 20 years; and the withdrawal of 300,681 acres for 20 years. *Id.* at 9,595. After an additional, extended opportunity for public comment, the BLM published a notice of availability of the Final EIS on October 27, 2011. 76 Fed. Reg. 66,747 (Oct. 27, 2011). The Secretary issued a Record of Decision ("ROD") on January 9, 2012, choosing to "withdraw from location and entry under the Mining Law, subject to valid existing rights, approximately 1,006,545 acres of federal land in Northern Arizona for a 20-year period." *See* No. 3:12-cv-08042, Doc. 27-1 at 3.

Plaintiffs have filed claims under the FLPMA, NEPA, the National Forest Management Act ("NFMA"), and the Establishment Clause of the United States Constitution. Plaintiffs ask the Court to set aside the Secretary's withdrawal decision as arbitrary and capricious under the Administrative Procedure Act ("APA"). Plaintiffs NWMA, NMA, and NEI also challenge the constitutionality of the FLPMA provision from which the Secretary derived his authority to make the withdrawal, and ask the Court to set aside the withdrawal as unconstitutional.

Defendants move to dismiss Plaintiffs' complaints under Rule 12(b)(1) on the following grounds: (1) Plaintiffs lack Article III standing to challenge the withdrawal, (2) Plaintiffs' claims are not ripe, (3) Plaintiffs lack prudential standing under NEPA, and (4) Plaintiffs lack standing to challenge the constitutionality of the FLPMA. The Court will address each of these arguments as they apply to individual plaintiffs.

III. Article III Standing.

The burden of establishing standing falls on the party asserting federal jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "Standing includes two components: Article III constitutional standing and prudential standing." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011). The "core component of standing" is the case-or-controversy requirement found in Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Constitutional standing requires a plaintiff to "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Prudential standing examines whether "a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004).

To seek injunctive relief, a party must establish a present injury or an "actual and imminent" – not "conjectural or hypothetical" – threat of future injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Such injury must be present "at the commencement of the litigation." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (citation omitted).

A. Plaintiffs with Mining Interests.

Plaintiffs Yount, Quaterra, and Vane Minerals assert losses to their own mining interests as the primary basis for their injuries (Docs. 27, ¶¶ 9-11; *30, ¶¶ 17-19; *35-1, ¶¶ 11-12, 17),[1] while Plaintiffs NMA, NEI, and NWMA assert losses to the mining interests of their members (Docs. *1, ¶¶ 5, 7-8; *56, ¶¶ 80-85, 88). Defendants argue that each of these Plaintiffs lacks Article III standing because they have failed to allege actual and imminent injuries. Because standing requires that a plaintiff's alleged injury be "concrete and particularized," *Defenders*, 504 U.S. at 555, the Court will analyze each of the mining Plaintiffs' claims separately.

1. NMA and NEI.

An association has standing to bring suit on behalf of its members when they would otherwise have standing to sue in their own right, when the interests at stake are germane to the organization's purpose, and when neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

NMA is a national trade association representing the mining industry, whose members include "the producers of most of America's locatable minerals and

[1] The Court will use an asterisk before document numbers to indicate when a document was filed prior to consolidation and was docketed using the original case number.

coal; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry." Doc. *56, ¶¶ 1, 7. NEI is a national policy organization representing the nuclear energy industry, whose members include "all companies licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, suppliers of fuel, materials licensees, uranium mining companies, and other organizations involved in the nuclear energy industry." *Id.*, ¶¶ 1, 8.

NMA and NEI alleged in their original complaint that the Secretary's withdrawal decision injures their members because it imposes immediate costs and delays in uranium mining, jeopardizes mining claims, and deprives claimants of the value of their investments. Doc. *1, ¶ 1. Defendants argue that NMA and NEI have not identified any members with mining claims who have suffered alleged delays and increased costs in developing these claims as a result of the withdrawal. Doc. *39 at 13.

NMA and NEI amended their complaint to identify Uranium One as a member of both associations that holds approximately 500 unpatented mining claims in the withdrawal area. Doc. *56, ¶ 82. NMA and NEI allege that prior to the withdrawal Uranium One was able to explore and develop its claims following an expedited notice procedure that did not require formal approval, but now it cannot conduct exploration or mining operations until BLM completes a mandatory mineral examination that will likely take years to

complete. *Id.*, ¶¶ 83-84, 87.[2] NMA and NEI allege that Uranium One has invested approximately $3.5 million in acquisition costs and an additional $5 million in exploration and drilling costs, and must pay annual fees of approximately $75,000 to maintain its claims even though it is restricted by the withdrawal from all but "casual use" – limited, hand-tool exploration and development – pending the now-required mineral examinations. *Id.*, ¶¶ 85-86; *see also*, Decl. of James D. Rassmussen, Doc. 64-1, ¶ 12.

Defendants contend that these allegations are insufficient to show injury in fact because unpatented mining claims have always been subject to contest, and Uranium One has no legally protected interest in being free from the mineral examination requirement. Doc. *72 at 10-11. *See Defenders*, 504 U.S. at 560 (defining "injury in fact" as "an invasion of a legally protected interest") (internal citations omitted). The Court is not persuaded. Defendants' argument – that NMA and NEI members are in essentially the same position as they were before the withdrawal – fails to account for

[2] In support, Plaintiffs cite a statement in the ROD that "[d]etermining 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," and the BLM's statement in the EIS that the examination "process could significantly lengthen the planning/permitting time frame for mining operations under any of the action alternatives and represents a factor of uncertainty in the mine life cycle[.]" Doc. 64 at 13. Plaintiffs also attach the declaration of former BLM mineral examiner David C. Fedley, which states that "merely initiating the required mineral examination can take years" and attests to a prior mineral examination that took thirteen years for final resolution. Doc. 64-1, ¶ 14.

the practical difference between the regulatory scheme governing open lands, under which NMA and NEI members made their mining claims and upon which they relied when making significant exploratory investments, and the regulatory scheme in place after the withdrawal. Doc. *64 at 17, 17 n.8. The prior regulatory scheme permitted discretionary mineral examinations (*see* 43 C.F.R. § 4.451-1) that rarely occurred (*see, e.g.*, Decl. of David C. Fredley, Doc. *65 at 3, ¶ 6). The regulation applying to withdrawn lands makes individualized mineral examinations mandatory on all claims. 43 C.F.R. § 3809.100. The withdrawal has thus imposed on NMA and NEI members an expensive and years-long examination process that rarely occurred before the withdrawal. In addition, NMA and NEI members must continue to pay annual maintenance fees while the now-mandatory and time-consuming examination process proceeds. *See, e.g.*, Decl. of James D. Rassmussen, Doc. *64-1 at 71, ¶ 12.

Plaintiffs have also alleged that the withdrawal and the complications it presents for location and development of mining claims has significantly reduced the value of existing claims and the value of claim investments made to date. Doc. 56, ¶ 85. Courts have routinely found private economic losses due to governmental action sufficient to show injury in fact for purposes of Article III standing. *See Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001) (finding injury in fact requirement satisfied where a business enterprise alleged economic losses incurred from a newly-enacted city zoning ordinance); *Clinton v. City of*

New York, 524 U.S. 417, 432-33 (1998) ("The Court routinely recognizes probable economic injury resulting from governmental actions . . . as sufficient to satisfy the Article III 'injury in fact' requirement.") (internal quotation marks and citation omitted). This is true for agency action that reduces a plaintiff's property value on federal land. *See Barnum Timber Co. v. EPA*, 633 F.3d 894, 898-901 (9th Cir. 2011) (finding alleged diminishment of a plaintiff's property value on national forest land due to EPA's Clean Water Act regulations "sufficient to demonstrate injury in fact at the pleading stage."). Unpatented mining claims are sufficient to convey real property interests. *U.S. v. Shumway*, 199 F.3d 1093, 1095, 1100, 1103 (9th Cir. 1999) (stating that "an unpatented mining claim is property," and – equating mill sites and mining claims – "[the fact] that an applicant has yet to receive, or even apply for, a patent does not mean that the government has plenary power over the mill site.").

Defendants' argument that NMA and NEI do not have standing because unpatented mining claims are not a "legally protected interest" also lacks merit. This argument was addressed in *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996). The district court rejected a logging company's claims of injury in fact due to the Forest Service's delay in approving logging that resulted in closure of the company's mill and the lay-off of 25 workers. The district court found that the company did not have "a legally cognizable economic interest in a specified level of timber." *Id.* The Court of Appeals disagreed, holding

that although "[t]he plaintiffs may not have any particular right to federal timber contracts, . . . no such 'right' is required any more than a 'right' to view crocodiles in foreign sites was necessary for the plaintiffs in [*Defenders*]." *Id.* The Court of Appeals concluded that "[g]overnment acts constricting a firm's supply of its main raw material clearly inflict the constitutionally necessary injury." *Id.*

The sufficiency of NMA and NEI's allegation of injury does not depend, as Defendants argue, on evidence that their members have actually been subjected to the new examination requirement. *See* Doc. *72 at 8-9. NMA and NEI have alleged that the mineral examination requirement to which its members became subject at the time of the withdrawal has effectively barred their members from continuing all mining operations and has significantly diminished the market value of their claims. Doc. *56, ¶¶ 84-85, 87. Even if the full extent of member losses incurred while awaiting the now-mandatory mineral examinations cannot be quantified before they initiate such action, NMA and NEI have alleged current and ongoing harm to their members that did not exist prior to the withdrawal. As the Supreme Court has stated, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (internal quotation marks, citation omitted). NMA and NEI have alleged current and impending economic harm. This is sufficient for the injury in fact requirement of Article III standing.

2. NWMA.

NWMA is a trade association whose stated 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." Doc. *1, ¶¶ 1-2. NWMA alleges that many of its members are actively engaged in exploration programs to discover and produce high grade uranium found in breccia pipe deposits in Northern Arizona. *Id.*, ¶ 7.

Defendants argue that NWMA has failed to show any legally-protected interests of its members that have been harmed or are under imminent threat of harm due to the withdrawal. Doc. *27 at 10-12. Defendants claim that NWMA has not identified any members who hold existing mining claims in the withdrawal area and has not asserted that its members have pursued currently-available procedures for surface-use authorization, making any alleged injury merely conjectural. *Id.* at 13-15.

Contrary to Defendants' assertion, the complaint alleges that several NWMA members "have properly located and currently maintain hundreds of unpatented mining claims" in Northern Arizona, virtually all of which are located within the withdrawal area. Doc. *1, ¶ 8. It also alleges that, but for the withdrawal, its

members would seek to locate new claims on the withdrawn lands. *Id.*

The fact that NWMA has not specifically identified these members does not deprive it of standing at the pleading stage. *See Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) (an association need not "name members on whose behalf suit is brought"). Although the Supreme Court did say in *Summers*, 555 U.S. at 498, that organizations must "make specific allegations establishing that at least one identified member had suffered or would suffer harm," the Court cited to a summary judgment case – *Defenders*, 504 U.S. 555, 563. *Summers* also cited *Sierra Club v. Morton*, 405 U.S. 727 (1972), which addressed standing at the pleading stage, but *Morton* found a lack of standing not because the Sierra Club failed to identify individual members, but because it "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 735. "Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Id.*

Unlike *Morton*, NWMA alleges that its members' use of the withdrawn lands has been and will be curbed or significantly affected by the withdrawal. Doc. *1, ¶¶ 7, 8, 58(c). NWMA has provided affidavits from its executive director and individual members (Doc. *55-1 at 22-30, 41-47; Doc. *55-2 at 11-14, 16-20), each attesting to the economic injury specific members have

incurred and will incur as a result of the withdrawal. *See, e.g.*, Decl. of Thomas H. Howell, Doc. *55-2 at 11-14, ¶¶ 4-10 (alleging loss of market value and lease income on existing claims, inability to engage in more than casual use absent a lengthy mineral examination, inability to explore for and locate additional claims). For purposes of standing, the Court must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490 (1975). Additionally, the Court has discretion "to allow . . . the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." *Id.* at 502. NWMA has done so here.

Defendants argue that these allegations of injury – both as to existing claims and the inability to locate new claims – fail for lack of imminence. Doc. *59 at 5-10. As to existing claims, Defendants argue that NWMA has not alleged that any of its members have pursued the administrative process available to them to validate these claims in order to go forward with mining operations and thus cannot show that the members have been harmed by the mineral examination requirement. *Id.* at 6. This argument fails for the reasons already discussed with respect to NMA and NEI. Like those plaintiffs, NWMA asserts that prior to the withdrawal its members had to wait only 15 days after providing notice before engaging in notice-level operations (Doc. *55 at 27 n.17, 28 n.18; Decl. of Kris Hefton, Doc. *55-2 at 36, ¶ 8; *see* 43 C.F.R. § 3809.321(a)),

whereas they now must pay for and undergo a mineral examination that the ROD itself describes as "complex and time-consuming." Doc. *55 at 27 n.17, 28 n.18; *see* 43 C.F.R. § 3800.5(b); Doc. *55-1 at 4, ROD at 7. NWMA has presented member affidavits documenting the chilling effect this has had on their pursuit of claims. Doc. *55 at 28; *see, e.g.*, Decl. of Lawrence D. Turner, Doc. *55-1 at 45-46, ¶ 17 (stating that "it is hard to justify the time and money to prepare and submit a notice only to be subjected to a lengthy and costly mineral examination process."). As noted above, NWMA members also attest to the current loss of market value and lease revenue while their claims are restricted to no more than casual use. Defendants' argument that NWMA's injuries are not imminent until its members subject their claims to the mineral examination process ignores the fact that NWMA has alleged both immediate and ongoing financial injury to their investments as a result of the new regulatory scheme – allegations the Court must accept as true at this stage of the litigation.

Defendants also argue that the alleged intention of NWMA's members to pursue future claims is too conjectural to confer standing. Doc. 59 at 8-9. Defendants cite the declarations of two NWMA member company presidents, representing DIR Exploration and Vane Minerals, as stating that their companies were "ready, willing, and able" to explore for new claims at the time of the 2009 Notice. *Id.* at 9; *see* Decl. of Lawrence D. Turner, Doc. *55-1 at 43, ¶ 8; Decl. of Kris Hefton, Doc. *55-2 at 35-36, ¶ 7. Defendants argue that these statements represent only vague intentions and

are even less definitive than the environmental plaintiffs' intentions to return "someday" to lands they "had visited" that the Supreme Court found too speculative to confer standing in *Defenders*, 505 U.S. at 563-64. Doc. *59 at 9.

This argument fails for two reasons. First, as already noted, *Defenders* dealt with standing at the motion for summary judgment stage, not the pleading stage where the Court must take the allegations made as true. Second, the Court cannot conclude that a company in the business of mining that has invested substantial time and money locating claims in a particular area can be characterized as having only hypothetical plans to engage in such activities in the future. The above-cited declarations show that DIR Explorations previously located over 600 mining claims in Northern Arizona and spent roughly $2.9 million in its mining endeavors. Decl. of Lawrence D. Turner, Doc. *55-1 at 42, ¶ 6. Vane has located 678 claims in Northern Arizona since October 2004 and spent more than $8.5 million. Decl. of Kris Hefton, Doc. *55-2 at 35, ¶¶ 4-5. NWMA's other declarations are similar. *See, e.g.*, Decl. of Thomas H. Howell, Doc. *55-2 at 12-13, ¶¶ (Nu Star located 128 mining claims in Northern Arizona and expended $165,000, and – but for the withdrawal – would seek further notice-or plan-level operations). The fact that these companies engaged in these activities in the past, and continue to hold substantial numbers of claims in the withdrawal area, is sufficient evidence of their intentions to locate new mining claims in the area in the future. It is more than vague speculation.

NWMA's allegations of harm to their mining investments are sufficient to show injury in fact.

3. Yount.

Yount alleges that he owns two hard rock uranium mining claims in the South Parcel of the withdrawal area. Doc. 27. ¶ 7. He alleges that he properly filed notice of these claims and, after expending hundreds of man hours and tens of thousands of dollars developing and exploring them, he determined to a high degree of certainty that they contain uranium breccia pipes. *Id.*, ¶ 8. He then submitted a plan of operations to the Forest Service ("USFS") for exploration drilling. *Id.* Yount alleges that after the Secretary issued the 2009 Notice, the USFS stopped processing plans of operations and returned his plan without action, preventing him from drilling and making "discovery" of uranium on his claims. *Id.*, ¶ 9-10. Yount alleges that his unpatented claims went from being valuable mining properties to having little or no value because he was prevented from exposing the minerals prior to the withdrawal, and, after the withdrawal, only claims with exposed minerals will be deemed valid and open to mining. *Id.*

Defendants argue that Yount has failed to allege an actual and imminent injury because he is still free to seek approval for exploration and development of his claims, just as he was prior to the withdrawal. Doc. 33 at 13-14. They argue that Yount's claim is speculative until he submits a proposed plan of operations and subjects his claims to a validity determination. *Id.*

Defendants argue that the USFS would either validate Yount's claims, in which case he would suffer no injury, or would initiate "contest proceedings," and Yount would have the opportunity to demonstrate that his claims constitute valid existing rights that are not disturbed by the withdrawal decision. *Id.*

Defendants' arguments ignore the fact – acknowledged by defense counsel at oral argument – that minerals must first be exposed to the surface before a valid "discovery" can be made. Before withdrawal, Yount could explore the land prior to exposure of minerals at the surface, obtain the right to drill and thereby expose the minerals, and, having exposed the minerals, secure a valid claim that he could sell or mine. After withdrawal, Yount can conduct drilling activities on the land only if he has a valid claim, which he does not have because he has not yet been permitted to drill and expose minerals on the surface. Yount has effectively lost his opportunity to validate the claims in which he has made substantial personal investments. Although it is true that Yount's claims could have been subjected to examination at any time under the pre-withdrawal law, Plaintiffs have presented evidence that such examinations rarely occurred, particularly at the exploration stage. They are now mandatory, and mean that Yount will have no opportunity to validate his claims.

Yount's injury is not merely speculative. He alleges that he invested significant time and money in the exploration and development of claims he cannot now perfect. Additionally, although Defendants argue that the validity of Yount's claims is as-yet-unknown

(Doc. 48 at 4), Yount attests to conducting substantial exploratory work, including geophysical and electromagnetic surveys and laboratory analyses, which indicated a high probability of breccia pipe formations. Doc. 44, ¶¶ 6-9. Yount credibly asserts that this work established economic value even without discovery (Doc. 27, ¶ 9), and that the value is now lost because he is barred by the withdrawal from taking the few additional steps needed to validate his claims.

Yount need not go through the exercise of seeking a mineral examination before he can allege injury. The results of such an examination are known – his claims will be found invalid because no mineral has been exposed. Forcing Yount to go through the formality of obtaining this certain determination is not necessary for the Court to conclude that Yount has shown injury in fact.

4. Quaterra.

Quaterra alleges that it holds 1,000 unpatented mining claims located entirely within the North Parcel of the withdrawal area. Doc. *30, ¶¶ 17-18. Since 2005, it has invested more than $12 million – approximately 30% of its exploration expenditures in North America – in this region, and it seeks to expand its operations and locate more claims. *Id.*, ¶ 18. Quaterra further alleges that it cannot locate new claims in light of the withdrawal, and its development plans for its existing claims are now frozen absent a lengthy and expensive mineral examination for each claim. *Id.*, ¶ 19.

These allegations mirror those made by NMA, NEI, and NWMA on behalf of their mining-company members. For reasons already stated with respect to those plaintiffs, Quaterra's allegations are sufficient to show injury in fact.

5. Vane.

Vane alleges that it holds 678 unpatented mining claims located entirely within the withdrawal area. Doc. *35-1, ¶¶ 11-12. Since 2004, it has invested more than $8.5 million in mineral exploration and location of these claims, and it seeks to expand its operations and locate additional claims. *Id.*, ¶ 12. Vane alleges that it received approval from the USFS on December 20, 2007 to conduct exploratory drilling and surface disturbing activities within an area of the Kaibab National forest currently within the withdrawal area, but that this approval became subject to a lawsuit that ended in a settlement whereby the USFS agreed to perform an EIS before allowing Vane to drill. *Id.*, ¶¶ 13-15. Vane alleges that the USFS failed to complete the EIS as it had agreed, and that it ceased preparing for an EIS after the Secretary issued his 2009 Notice. *Id.*, ¶ 16. Vane alleges that the Secretary's subsequent withdrawal freezes Vane's development plans and negates the prior settlement agreement because Vane must now submit each of its claims to a lengthy and expensive mineral examination before it can proceed with mining operations. *Id.*, ¶ 17.

Vane makes allegations of injury similar to Yount. Vane alleges that it submitted, but then withdrew, a plan of operations for drilling on many of its claims after the Secretary's 2009 Notice because it was told it could not get approval for its plan absent the exposure of minerals, but it also could not drill to expose minerals until it got approval of its plan. Doc. 76 at 5; *see* Decl. of Kris Hefton, Doc. 77 at 5, ¶ 13. Vane also makes allegations of injury similar to those of NWMA with respect to the restriction against locating new mining claims. Even more specifically than NWMA, Vane supports its intention to make new mining claims with the declaration that it was continually identifying targets for such claims and that it currently maintains a list of these targets ready for staking in the withdrawal area. Decl. of Kris Hefton, Doc. 77 at 3-4, ¶¶ 7-9. For the reasons already stated, Vane's allegations are sufficient to show injury in fact.

B. The Arizona Utah Local Economic Coalition.

The Arizona Utah Local Economic Coalition ("the Coalition") filed suit on behalf of named member Mohave County. Doc. *30. Mohave County is a unit of local government within Arizona that contains a large portion of the North Parcel of the withdrawal area within its borders. *Id.*, ¶ 11. Mohave County and other members of the coalition were granted cooperating agency status in developing the EIS. *Id.*, ¶ 7. Mohave County also developed its own Comprehensive Land Use Plan to protect its environmental interests. *Id.*, ¶ 12.

The Coalition alleges that Defendants failed to coordinate with its members to avoid conflicts with local plans, Defendants failed to follow proper FLPMA and NEPA procedures, the withdrawal decision ignored scientific data, and the decision will cost Mohave County and other members "tens of millions of dollars in revenue and jobs," inhibiting their current efforts at economic recovery. *Id.*, ¶ 1. The Coalition also alleges that the withdrawal adversely impacts Mohave County's ability to protect its air and water quality, both because nuclear energy is less harmful to the environment than coal, oil, or gas, and because Mohave County depends on revenue from the use of its lands to pave its roads, thereby reducing dust and erosion, and to manage its desert tortoise habitat, which are stated goals of its Land Use Plan. *Id.*, ¶¶ 25-31; 181.

Defendants argue that the Coalition lacks Article III standing because an association has standing to sue on behalf of a member only if that member would have standing to sue in its own right (*see Hunt*, 432 U.S. at 343), and Mohave County does not have such standing. Doc. 62 at 18. Citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-02 (1982), Defendants argue that a state or local government may sue only to protect three types of interests: (1) sovereign interests, such as enforcement of civil and criminal codes, (2) proprietary interests, and (3) interests relating to the general welfare of the populace under the doctrine of *parens patriae.* Doc. 62 at 19. The third type of interest does not give a county standing in suits against the federal government because "it is the

United States, and not the State, which represents [its citizens] as *parens patriae.*" *Snapp*, 458 U.S. at 610, n.16; *see also Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1453 n.3 (10th Cir. 1994) (applying *Snapp* to counties). The Ninth Circuit has also held that "political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*[.]" *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973). Defendants argue that because Mohave County does not have standing to bring a *parens patriae* action and is not attempting to assert injury to sovereign or proprietary interests, it lacks Article III standing. Doc. 62 at 20-21.

The cases cited above make clear that the County cannot establish standing on the basis of *parens patriae.* If the County has standing, therefore, it must be based on one of the other two grounds recognized by the Supreme Court in *Snapp* – the assertion of sovereign interests or proprietary interests.

The Ninth Circuit has explained that the phrase "proprietary interests" has a broader than normal meaning when the claimant is a local government: "The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets." *City of Sausalito*, 386 F.3d at 1197. Thus, a local government's proprietary interests can include "its ability to enforce land-use and health

regulations," "its powers of revenue collection and taxation," and its "interest in protecting its natural resources from harm." *Id.* at 1198. The Ninth Circuit has found constitutionally sufficient injury to proprietary interests where land management practices on federal land could affect adjacent city-owned land. *Id.*; *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

In *American Motorcyclist Association v. Watt*, 534 F. Supp. 923 (C.D. Cal. 1981), the District Court for the Central District of California applied this principle to conclude that where "the harm caused by the disruption of local comprehensive planning falls directly on the County, [it] may be fairly characterized as harm to the County in a propriety sense." *Id.* at 931-32. The court went on to find that a county's allegations that a federal land use plan would impair its ability to adopt and implement its own comprehensive plan were sufficient to show direct injury to the political entity itself. *Id.; c.f. Bd. of County Supervisors of Prince William County, VA. v. U.S.*, 48 F.3d 520, 524 (Fed. Cir. 1995) ("It is basic law that when local governments engage in land use planning and control, they do so by exercising the sovereign's police power delegated to them by the state.").

In arguing that the County has suffered sufficient injury to its sovereign and proprietary interests, the Coalition focuses primarily on procedural injury. The Ninth Circuit explained the nature of procedural injury in *City of Sausalito*: "We have recently stated, with respect to 'procedural injury,' that 'to show a cognizable injury in fact, [a plaintiff] must allege . . . that

(1) the [agency] violated certain procedural rules; (2) these rules protect [that plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests.'" 386 F.3d at 1197 (quoting *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003)). Defendants do not directly address each element of this three-part test, but argue instead that the Coalition has not shown that it is reasonably probable that the withdrawal will threaten any concrete interests of Mohave County. The Coalition responds that Mohave County "has a mandate to retain environmental quality and to capitalize on its wealth of natural, built and human resources." Doc. 30, ¶ 24. This includes "the 'growth of communities that maintain the health and integrity of its valuable environmental features'; the protection of 'wetlands, washes, aquifer recharge areas, areas of unique flora and fauna, and areas with scenic, historic, cultural and recreational value'; and avoiding industrial development that has the 'undesired effect of increasing air pollution.'" *Id.* (quoting Mohave County General Plan, p. 23). These interests clearly appear to be proprietary within the Ninth Circuit's broad definition of that phrase, as discussed above.

To show that it is reasonably probable that the withdrawal will threaten these concrete interests, the Coalition alleges that the withdrawal will lead to the use of coalfired power plants or other sources of energy that are more harmful to Mohave County's air and water quality than nuclear energy, and will reduce

Mohave County's available funds to pave its roads (thereby reducing dust and erosion) and protect desert tortoise habitat. Doc. 30, ¶¶ 25-30; 181. The Coalition additionally argues that Mohave County cannot adequately plan for future growth as it relates to the development of mining claims on state lands because the BLM has broad discretion to grant access across federal land to these state-land sites, and although the EIS states that right-of-way permits will be processed as usual, it does not say that access will be granted. Doc. 72 at 27. The Court will focus on the second of these alleged injuries.[3]

The Coalition has alleged facts showing that projected state revenues that flow to Mohave County from the mining industry will be significantly reduced as a result of the withdrawal. The Coalition alleges that but for the withdrawal "there would be over a 40-year period: 1,078 new jobs in the project area; $40 million annually from payroll; $29.4 billion in output; $2 billion

[3] The Coalition has not alleged sufficient facts to show that the withdrawal will adversely affect air and water quality in Mohave County. Although the Coalition alleges that Mohave County receives its energy from the Palo Verde Nuclear Generating Station and that it will "otherwise rely on coal-fired power plants" that are more harmful to its air and water quality (Doc. 30, ¶¶ 25-26, 181) it fails to allege any facts showing that the withdrawal will cause the Palo Verde plant to close, scale back its operations, or otherwise cease providing power to Mohave County, thereby forcing the County to turn to coal-fired plants for its energy needs. Nor, on a more general level, has the Coalition alleged facts showing that the withdrawal will lead to a reduction in the overall availability of nuclear-generated electricity and an increase in coal-fired plant usage of a kind and in locations that will affect the air quality in Mohave County, Arizona.

in federal and state corporate income taxes; $168 million in state severance taxes; and $9.5 million in mining claims payments and fees to local governments." Doc. 30, ¶ 127; *see also* Decl. of Buster Johnson, Doc. 72-2 at 13-14, ¶¶ 36-37. The complaint plausibly alleges, and the Court must take as true, that loss of Mohave County's share of this revenue will impair the county's ability to carry out county functions, including paving its 1,277 miles of unpaved roads and managing its desert tortoise habitat, both stated goals of its Land Use Plan. *Id.*, ¶¶ 25-31; 181.

Defendants argue that loss of tax revenue represents a *parens patriae* interest, not a proprietary interest. Doc. 84 at 11-12. Defendants rely on a statement in *Watt* that "[a]lthough impairment of the County's tax base will result in harm to the County as an entity, this harm will merely be derivative of the Plan's impact on taxpayers; therefore, it should not be considered harm to the County's "'proprietary interests.'" 534 F. Supp. at 931-32 (internal citations omitted). In *Watt*, Inyo County, a California political subdivision with statutory authority to adopt a comprehensive general plan, alleged that the DOI and the BLM violated NEPA and the FLPMA when they adopted the California Desert Conservation Area Plan ("CDCA"). 534 F. Supp. at 926, 931. Inyo County's asserted injury was based in part on allegations that adoption of the CDCA would impair the county's tax base due to a loss of revenue from recreation and mining in the area. *Id.* at 931. The county also alleged that the CDCA significantly impaired its ability to adopt its own

comprehensive general plan where over half of the county was within the area now managed under the CDCA. *Id.* Although the court found that loss to the county's tax base was derivative of economic harm to its taxpayers and therefore did not constitute harm to a proprietary interest, there is no evidence in *Watt* that the county alleged any causal connection between the loss to its tax base and its alleged inability to carry out its comprehensive plan. Nor do the cases upon which *Watt* relied contain the facts presented here in which the Coalition has alleged that loss of revenue to the County will directly impair its ability to implement identified municipal functions. *See, e.g.*, *Pennsylvania Ex Rel Shapp v. Kleppe*, 533 F.2d 668, 672-73 (D.C. Cir. 1976) (finding that state's general assertion of injury to its tax base due to allegedly inequitable disaster relief distributions to small businesses did not constitute sufficient injury to state's proprietary interests); *Puerto Rico Ex Rel Quiros v. Snapp*, 469 F. Supp. 928 (W.D. Va. 1979) (harm to the general economy due to loss of employment not a sufficient state proprietary interest); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979) (loss of tax revenue and profits to businesses in the City's commercial zone was a *parens patriae*, not a proprietary, interest).

Watt went on to find that Inyo County had satisfied the injury in fact requirement for Article III standing because the harm it had shown with respect to carrying out its plan was a direct harm to the County, and such harm "may be fairly characterized as harm to the County in a proprietary sense." *Id.* at 932. This

finding, coupled with the Ninth Circuit's broad statement in *City of Sausalito* that "[t]he 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets," suggest that Mohave County's projected economic losses resulting in an alleged inability to carry out specific plan objectives are sufficient to show injury to its proprietary interests. Among the harms that *City of Sausalito* found to be proprietary were detrimental impacts to the city's roads, destruction of the historic character of the town resulting in both aesthetic and economic injury, and harm to the city's natural resources. 386 F.3d at 1198-99; *see also Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002) ("[The City of] Lodi retains its independent authority to protect its proprietary interest in natural resources held in trust by the City.") (cited in *City of Sausalito*, 386 F.3d at 1189). The Coalition's allegations in this case – that the withdrawal will have economic consequences for Mohave County that will directly impair its ability to carry out its governmental functions, including implementation of its Land Use Plan – shows injury to the County's concrete proprietary interests. The fact that taxpayers also feel the effects of decreased revenue does not mean that the County lacks standing. *In Re Multidistrict*, 481 F.2d at 131. The County has an independent interest in securing funding sufficient to discharge its governmental duties. *City of Sausalito*, 386 F.3d at 1197.[4]

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[4] Because the Coalition has made a sufficient showing that economic loss to the County as a result of the withdrawal will

Mohave County also satisfies the additional requirements for procedural injury. First, it has alleged that Defendants violated procedural rules under the FLPMA and NEPA. Doc. *30, ¶ 1. This includes allegations that the Secretary did not consult with local governments in selecting the preferred alternative despite stating that their comments would influence his decision (*Id.*, ¶ 74); the Secretary tainted the NEPA process by announcing a decision before the BLM had reviewed all comments and completed the final EIS (*Id.*, ¶¶ 109-10); and neither the Secretary nor his designees made an effort to resolve inconsistencies between the withdrawal and local plans and policies (*Id.*, ¶¶ 170, 176). Both the FLPMA and NEPA require meaningful participation of and consultation with local governments, and, to the extent possible, consistency of federal actions with local land use plans. *See* 43 U.S.C. § 1712(a) and (c)(9); 42 U.S.C. §§ 4331(a), 4332(2)(C)(v), 40 U.S.C. §§ 1502.9(b), 1502.16(c), 1506.2(d).

Second, the procedural rules cited above are intended to protect the concrete interests of Mohave County. NEPA requires agencies to take into account the comments and views of local governments that are authorized to develop environmental standards. 42 U.S.C. § 4332(2)(C). Mohave County is authorized under state law to implement environmental standards

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impair its ability to carry out specific objectives of its Land Use Plan, the Court need not address the Coalition's additional argument that the BLM's discretion to limit access to uranium claims on state lands in the withdrawal area will impair the County's ability to plan for future growth.

and to develop a comprehensive plan to conserve natural resources and promote the "health, safety, convenience and general welfare of the public." Doc. 72-2 at 5-6, ¶¶ 7-9. As discussed above, Mohave County has alleged that the withdrawal decision interferes with its ability to carry out identified environmental objectives of its Land Use Plan. These are the types of concrete interests that the procedural requirements of NEPA were designed to protect. *See, e.g.*, *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975) (municipality entrusted under state law with enforcing environmental standards and developing a general plan had "municipal interests [that] fall within the scope of NEPA's protections."); *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995) (County that was authorized by state law to develop environmental standards and had statutory right to comment on proposed federal action had "concrete, plausible interests, within NEPA's zone of concern for the environment" underlying its asserted procedural interests.).

Like NEPA, the procedural requirements of the FLPMA are designed to protect the interests of local governments whenever federal agencies develop or implement federal land-use plans. 43 U.S.C. § 1712(a), (c)(9). Because the FLPMA includes environmental objectives similar to those of NEPA (*see id.* § 1701(8)), the concrete interests asserted by Mohave County that merit procedural protection under NEPA also merit protection under the FLPMA. Additionally, the FLPMA represents broader landuse objectives, including that land management "be on the basis of multiple use and

sustained yield" (*id.* § 1701(7)), so the alleged harms to Mohave County's employment and economic interests also implicate concrete interests that fall within the scope of the FLPMA's protections.

The Coalition has shown that Mohave County has suffered injury in fact sufficient for Article III standing. The Coalition therefore has standing to bring these claims on the County's behalf.

IV. Ripeness.

The doctrine of ripeness prevents premature judicial decisions. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Where administrative action is involved, ripeness also "protects the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-149. The ripeness doctrine also prevents courts from "entangling themselves in abstract disagreements over administrative policies." *Id.* at 148.

Ripeness involves a two-factor test: (1) whether the issues are fit for judicial decision, and (2) whether the parties would suffer hardship if judicial consideration is withheld. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Ripeness depends on whether the dispute presents purely legal questions, whether further administrative action will be taken, and whether the dispute concerns future events that are uncertain or may not

occur. *See Abbott Labs.*, 387 U.S. at 149-152; *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989); *see also Texas v. United States*, 523 U.S. 296, 300 (1998). Generally, if a claim is not ripe, a federal court does not have subject matter jurisdiction. *See Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997).

Defendants argue that the mining plaintiffs' claims are not ripe. *See, e.g.*, Mot. to Dismiss NWMA, Doc. *27 at 19; Mot. to Dismiss Quaterra, et al., Doc. *62 at 17-18. This argument mirrors Defendants' injury in fact argument that allegations of economic losses on existing mining claims are not cognizable until Plaintiffs avail themselves of the administrative procedures for reviewing claims under the withdrawal. The Court has already rejected this argument. For the reasons stated above, and because Defendants' actions effectuating the withdrawal and its regulatory scheme are complete, the Court finds that the mining plaintiffs' allegations of economic loss constitute a concrete injury. The mining plaintiffs' alleged inability to locate and develop new claims is also a concrete injury that does not depend on further factual or administrative development. The claims of the mining plaintiffs are ripe for review.

V. Prudential Standing under NEPA.

Prudential standing examines whether "a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *City of*

Sausalito, 386 F.3d at 1199. "Because NEPA does not provide for a private right of action, plaintiffs challenging an agency action based on NEPA must do so under the [APA]." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005) (citation omitted). To meet the APA statutory requirements for standing, a plaintiff "must establish (1) that there has been a final agency action adversely affecting the plaintiff, and (2) that, as a result, it suffers legal wrong or that its injury falls within the 'zone of interests' of the statutory provision the plaintiff claims was violated." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 861 (9th Cir. 2005) (quotation omitted). The zone of interests test asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). While "there need be no indication of congressional purpose to benefit the would-be plaintiff," the zone of interests test "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987).

NEPA seeks to protect environmental interests. "The overall purpose of NEPA is to declare a national commitment to protecting and promoting environmental quality." *Ashley Creek*, 420 F.3d at 945. As a result, "purely economic interests do not fall within NEPA's

zone of interests" and a plaintiff asserting such interests lacks prudential standing under NEPA. *Id.* at 940.

Defendants argue that even if Plaintiffs have Article III standing and their claims are ripe, they do not have prudential standing to bring NEPA claims. *See, e.g.*, Mot. to Dismiss NMA & NEI, Doc. *39 at 19. Defendants assert that Plaintiffs' interests in challenging the withdrawal are economic, not environmental, and that their injuries therefore do not fall within NEPA's zone of interest.

A. NMA and NEI.

Defendants argue that Plaintiffs NMA and NEI lack prudential standing under NEPA because their interests are solely economic; the environmental interests they allege in their amended complaint are merely pretext for economic interests; and, to the extent they have alleged legitimate environmental interests, such interests would not give them associational standing because such interests do not comport with the purposes of their associations. Docs. *39 at 19-24; *72 at 13-19.

NMA and NEI make two main arguments in response: (1) they have prudential standing under NEPA apart from the zone of interests test because their members' activities are the targets of the withdrawal and they are therefore "regulated by" the withdrawal, and (2) they have alleged environmental, economic, and procedural interests, all of which are protected by NEPA. Doc. 64 at 25-34.

1. Does the Zone of Interests Test Apply?

In a case that did not concern NEPA, the Supreme Court said that the zone of interests test applies "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action[.]" *Clarke*, 479 U.S. at 399. NMA and NEI rely on this statement to argue that where plaintiffs are in fact the subjects of the "contested regulatory action," the zone of interests test does not apply. Doc. 64 at 25. Claiming that they are the subject of the withdrawal at issue in this case, NMA and NEI assert that they need not satisfy the zone of interests test in light of *Clarke.*

NMA and NEI present an interesting reading of the statement in *Clarke*, but they cite no case (and we have found none) in which a court has held that a plaintiff making a NEPA claim can avoid the zone of interests test if the plaintiff is the subject of the regulatory action. Plaintiffs cite two cases that quote the statement from *Clarke* but do not apply it. *See Ashley Creek*, 420 F.3d at 940; *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1040 (D. Ariz. 2001). Those cases provide no guidance to the Court. NMA and NEI cite *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216-17 (9th Cir. 2008), but the plaintiff power company in that case challenged a requirement imposed on it under the Clean Water Act. NMA and NEI do not contend that requirements have been imposed on them under NEPA. Finally, NMA and NEI cite *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1396-97 (9th Cir., 1993), but the plaintiff there was challenging a denial of its appeal under agency rules governing administrative

appeals. No NEPA claim was made. In contrast, numerous Ninth Circuit cases have applied the zone of interests test when addressing prudential standing to assert NEPA claims. *See, e.g.*, *Ranchers Cattleman v. United States Dep't of Agric.*, 415 F.3d 1078, 1102 (9th Cir. 2005); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 903 (9th Cir. 1996); *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979).

NMA and NEI bear the burden of proving that they have standing. *Defenders*, 504 U.S. at 561. In the absence of some authority supporting their broad reading of the statement in *Clarke*, and in the face of numerous Ninth Circuit cases applying the zone of interests test to NEPA claims, the Court concludes that the zone of interests test applies here. This conclusion is buttressed by the fact that the "contested regulatory action" in this case is the Secretary's withdrawal of land under the FLPMA. The Secretary did not withdraw land under NEPA. Thus, the statement in *Clarke* would grant NMA and NEI prudential standing for a challenge under the FLPMA, but it would not necessarily apply to a claim under NEPA.

Moreover, NEPA regulates the conduct of federal agencies, not private parties. It is "designed to control the decisionmaking process of U.S. federal agencies" to ensure protection of the environment. *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993). If there is a subject of NEPA requirements in this case, it

would appear to the Secretary and the DOI, not NMA and NEI.

Quoting from *Association of Data Processing*, 397 U.S. at 153, NMA and NEI also argue that a plaintiff has prudential standing if "the interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." Doc. 64 at 27. Because they have been regulated by the withdrawal, NMA and NEI argue that they have prudential standing. Again, however, NMA and NEI cite no case holding that a plaintiff "regulated by" NEPA is exempt from the zone of interests test. Nor do NMA and NEI make a plausible showing that they are regulated by NEPA. As noted above, NEPA regulates federal agencies, not private parties.

Finally, NMA and NEI argue that FLPMA policy gives them standing to assert their NEPA claims. The FLPMA does state that "it is the policy of the United States that . . . judicial review of public land adjudication decisions be provided by law" (43 U.S.C. § 1701(a)(6)), but this statement merely underscores that NMA and NEI have an avenue to assert their claims under the FLPMA. NMA and NEI present no authority for converting the language in the FLPMA into a basis for asserting prudential standing under NEPA, bypassing the zone of interests test. In fact, the Ninth Circuit rejected just such an argument in *Nevada Land Action Association*, 8 F.3d at 716 n.2, holding that the zone of interests inquiry "would be meaningless if standing under NEPA could be

automatically derived from standing under other statutes which refer to NEPA."

2. Are NMA and NEI within NEPA's Zone of Interest?

NMA and NEI assert that they have environmental interests in reducing aggregate mining impacts and conducting environmentally responsible mining operations. Doc. 64 at 28-31. They allege that the BLM underestimated the amount of high-grade uranium within the withdrawal area by ignoring U.S. Geological Survey studies that estimated up to 320 million pounds of uranium deposits. Doc. *56, ¶ 73. The declaration of the Vice President of Uranium One states that these deposits are some of the richest uranium resources in the United States and that the high concentration of uranium in breccia pipes permits these deposits to be mined with less surface disturbance and fewer environmental impacts than other uranium sources. Decl. of Norman M. Schwab, Doc. 64-1 at 48. ¶ 6. NMA and NEI allege that the withdrawal will necessitate the mining of less-concentrated uranium over larger areas, resulting in a greater environmental impact to the region. Docs. *56, ¶ 95(a); 64 at 29. NMA and NEI claim that their economic interests in challenging the withdrawal are sufficiently related to their interests in minimizing the environmental impacts of mining – interests in keeping with their organizational missions (Doc. *56, ¶ 90) – to give them prudential standing under NEPA. Doc. 64 at 30-31.

For a plaintiff's interest to fall within NEPA's zone of interests, it "must be 'systematically, not fortuitously' or 'accidentally' aligned with those that 'Congress sought to protect.'" *Cal. Forestry Ass'n v. Thomas*, 936 F. Supp. 13, 22 (D.D.C. 1996) (quoting *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924-25 (D.C. Cir. 1989) (hereinafter "*HWTC IV*")). Applying this standard, *California Forestry* found a timber company's and trade association's purported environmental interest in reducing the risk of forest fires for purposes of challenging a Forest Service Plan that would reduce logging not credible where the plaintiffs admitted that their environmental interest in maintaining a healthy forest was to "provide for current and sustained timber production." 936 F. Supp. at 22. The court cited *Trinity County Concerned Citizens v. Babbit*, No. CIV. A. 92-1194, 1993 WL 650393 (D.D.C. Aug. 27, 1996), a factually-similar case in which the plaintiffs alleged economic injuries that would result from logging reductions and added that the reductions would also cause environmental injury by increasing the risk of fire. The court in *Trinity* found that the "plaintiffs' attempt to articulate concern for the health of the forest is in fact no more than an economic injury in disguise." *Id.* at *6 (quoted in *Cal. Forestry*, 936 F. Supp. at 22). *California Forestry* agreed with this analysis and concluded that "[t]he timber industry is a peculiarly *un* suitable proxy for those whom Congress intended to protect [under NEPA], and is therefore not within the zone of interests." *Cal. Forestry*, 936 F. Supp. at 22 (quoting *HWTC IV*, 885 F.2d at 927) (emphasis in original).

The District Court for the District of Idaho came to a similar conclusion with respect to mining companies in *American Independence Mines and Minerals Co. v. U.S. Department of Agriculture*, 733 F. Supp. 2d 1241 (D. Idaho 2010), *aff'd*, No. 11-35123, 2012 WL 3542264 (9th Cir. Aug. 17, 2012). Three mining companies challenged the imposition of a rule limiting motorized vehicle use in the area where they were actively engaged in mining and environmental assessment. *Id.* at 1248. The court found that the plaintiffs lacked prudential standing for their NEPA claims because they had not linked their pecuniary interest in mining to an environmental interest contemplated by NEPA. *Id.* at 1251. The court reasoned that the companies' asserted interests in mining in a manner that reduces environmental impact only related to the methods they used to operate their business and did not show that their interests also aligned with those protected by NEPA. *Id.* at 1252. As to the environmental assessments, the mining plaintiffs admitted that these studies were only conducted in pursuit of the companies' mineral development activities, and the court reasoned that because the inability to continue these assessments only impeded the companies' mining-related interests, the plaintiffs were not within the zone of interests protected by NEPA. *Id.*

The mining companies sought to amend their complaint to add evidence that the road closures would harm the environment by increasing sediment load, but the court determined that this would not bring their claims within the interests protected by NEPA.

Id. at 1264-66. The court reasoned that the companies' interests in the maintenance and use of roads arose from their economic interests in mining, and those interests were not intertwined with the environment. *Id.* at 1266. As with *California Forestry*, the court found that even if the plaintiffs could show that the road-use restrictions would result in some environmental harm, "Plaintiffs' attempts to articulate claims that are linked to the environment continue to be economic injuries in disguise." *Id.*

NMA and NEI present a stronger case when they allege that mining the uranium-rich breccia pipes in the withdrawal area is both the most economically beneficial and least environmentally damaging way to mine uranium. Unlike ancillary interests regarding road use, their interest in mining the claims that produce the greatest economic gain is alleged to be inextricably "coupled with" environmental considerations. *Cf. Port of Astoria*, 595 F.2d at 475 ("pecuniary losses and frustrated financial expectations that are not coupled with environmental considerations . . . are outside of NEPA's zone of interests and are not sufficient to establish standing."). NMA and NEI argue that their "economic interests cannot be divorced from their environmental interests, as their members' costs are directly related to the scale of physical disturbance and environmental impacts." Doc. 64 at 30. This alleged link between economic and environmental interests is sufficient to show that the environmental interests of NMA and NEI members are systematically, rather than merely fortuitously, within the zone of interests

protected by NEPA. The Court cannot say, on this record, that "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

The Court also cannot find at this stage in the pleadings that NMA's and NEI's alleged environmental interests are merely pretextual. The above-cited cases regarding logging and mining companies arose at the summary judgment stage and not, as here, at the pleading stage. NMA and NEI have alleged that both organizations have environmental missions that include conducting environmentally friendly mining operations. Doc. *56, ¶ 91. This includes the interest in minimizing the aggregate physical disturbances from uranium mining that NMA and NEI allege is directly implicated by the withdrawal. *Id.*, ¶ 90. As the Ninth Circuit has stated, "[a] plaintiff can . . . have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers Cattlemen Action Legal Fund*, 415 F.3d at 1103 (quoting *Port of Astoria*, 595 F.2d at 476). In a day when environmentally-friendly business is often good business, the fact that NMA and NEI have economic interests like those asserted by the logging companies in *California Forestry* and *Trinity* and by the mining companies in *American Independence* does not make their asserted environmental interests invalid. *See* Doc. *56,

¶¶ 90-94. *American Independence* noted that it did not "categorically find that pro-business plaintiffs cannot find standing in similar cases[,]" but instead limited its ruling "to the facts and record of this case." 733 F. Supp. 2d at 1266, n.9. In light of the fact that the test for prudential standing is "not meant to be especially demanding" (*Clarke*, 479 U.S. at 399), the Court finds that NMA and NEI have alleged sufficient environmental interests to bring them within the zone of interests of NEPA.

Defendants argue that NMA and NEI's assertion that greater aggregate environmental harms will occur as a result of the withdrawal is too speculative to support standing. Although NMA and NEI allege that closing off the rich breccia pipe deposits in the withdrawal area will lead to a greater aggregate environmental impact "in the region" (Doc. *56, ¶ 95(a)), Defendants assert that they allege no facts showing where these other sources of uranium are located or that they have concrete plans to mine these unidentified deposits. Doc. *72 at 16-17. This argument appears to conflate the requirement of particularized injury for purposes of Article III standing with the zone of interests test. Although NMA's and NEI's asserted environmental interests may not be sufficient to confer Article III standing because they lack an actual or imminent concrete injury, Defendants cite no cases stating that this is a requirement for prudential standing. As Defendants acknowledge (*id.* at 17, n.6), the cases upon which they rely deal with Article III standing, not prudential standing. Article III standing requirements

arise out of the case or controversy provision of the Constitution, a provision which limits federal court jurisdiction to concrete disputes. Prudential standing is a judicially-imposed limitation designed to ensure that a plaintiff has a legitimate interest in suing under a particular statute. The Court cannot conclude that the purposes of prudential standing demand the same injury in fact as Article III standing.

The language of relevant cases confirms this conclusion. The Ninth Circuit and other courts have made clear that the test is not demanding. *See Presidio Golf Club. v. National Park Service*, 155 F.3d 1153, 1158 (9th Cir. 1998) ("Because the zone of interests test is 'not a demanding one,' and the asserted interest need only be '*arguably* within the zone of interests to be protected or regulated by the statute,' a rough correspondence of interests is sufficient." (citations omitted; emphasis in original)); *Alaska State Snowmobile Ass'n, Inc. v. Babbitt*, 79 F. Supp. 2d 1116, 1125, 1125 n.55 (D. Alaska 1999), *vacated as moot*, No. 00-35113, 2001 WL 770442 (9th Cir. Jan. 10, 2001) (snowmobile association challenging closure of Denali Park to snowmobile use had shown injury in fact to their interest in snowmobiling, and their stated purpose of "protection of the environment from irreparable harm," together with a commitment to use the natural environment responsibly, brought their claims within the zone of interests of NEPA).[5]

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[5] Defendants argue for the first time in their reply that NMA and NEI are foreclosed from raising the argument that the

Thus, the Court concludes that NMA and NEI can satisfy Article III standing by their members' very real economic injuries discussed above, and satisfy NEPA prudential standing by the environmental interests they and their members possess in limiting the disruptive effects of uranium mining. This does not mean that interests that arguably fall within the zone of interests of NEPA need not be affected by the challenged agency action. In first articulating the zone of interests test, the Supreme Court stated that "the question is whether *the interest sought to be protected by the complainant* is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n. of Data Processing*, 397 U.S. at 153 (emphasis added). The Court cited to the provision of the APA, upon which claimants necessarily rely to bring their NEPA claims, which states, in part, that "[a] person . . . *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. (emphasis added). Thus, as will become important in the upcoming discussion of NWMA's prudential standing under NEPA, the zone of interests test does require that the party asserting an interest

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withdrawal will result in greater aggregate environmental harms because they did not raise this issue in their comments during the NEPA process. Doc. 70 at 16 (citing *Am. Indep. Mines*, 733 F. Supp. 2d at 1266-67). The Court will not consider arguments made for the first time in a reply brief. *See, e.g.*, *Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008); *Marlyn Nutraceuticals, Inc. v. Improvita Health Products*, 663 F. Supp. 2d 841, 848 (D. Ariz. 2009).

within NEPA's zone of interests also seek protection of that interest or allege that it has been harmed or aggrieved. But Defendants cite no authority suggesting that the injury must be as concrete and immediate as that required for Article III standing. In this case, NMA and NEI have alleged injury to their stated environmental interests – namely, that greater environmental harm will result from an inability to carry out the least environmentally harmful form of uranium mining – that is plausibly intertwined with the injuries to their economic interests that the Court has found sufficient for purposes of Article III standing. The Court is not persuaded that case law requires more for Plaintiffs' claims to come within NEPA's zone of interests.[6]

Nor is the Court persuaded that NMA and NEI lack associational standing to bring NEPA claims

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[6] Defendants cite *Hiatt Grain & Feed, Inc. v. Berglund*, 446 F. Supp. 457, 486-88 (D. Kan. 1978), but the Court does not find it persuasive. *Hiatt* begins its discussion of standing under NEPA with a discussion of injury in fact for purposes of Article III standing. It then appears to conflate the injury in fact requirement for Article III standing with the zone of interests test for prudential standing. *See Hiatt*, 446 F. Supp. at 488 (finding grain dealers' allegations that new regulations will lead to increased air pollution due to additional needs for grain transportation and storage construction to be "so attenuated so speculative, and so obviously subordinate to plaintiff's primary economic interest" that they could not support the plaintiffs' NEPA claim). In *Hiatt*, the grain dealers sought to bring NEPA claims on behalf of the public where their only asserted injury was economic. The court found that they had not alleged any injury within the zone of interests of NEPA and could not bring their purely economic injuries within the zone of interests by asserting speculative injury to the public.

because their asserted environmental interests are not germane to their organizational purposes. *See* Doc. 70 at 17. In addition to alleging that they have strong environmental missions (Doc. *56, ¶ 90), NMA and NEI allege that each NMA member is expected to adhere to a "Sustainable Development Pledge" and to adopt specifically enumerated environmental principles, including "being a leader in developing, establishing, and implementing good environmental practices." *Id.*, ¶ 91. They allege that NEI's organizational purpose as stated in its bylaws includes encouraging " 'the continued safe utilization and development of nuclear energy to meet the nation's energy, *environmental* and economic goals' " (*id.*, ¶ 92) (emphasis in complaint), and that the organization has identified numerous environmental concerns such as clean air, environmental stewardship, and sustainable development, among the "key issues" concerning the organization. *Id.* These allegations are sufficient to satisfy the germaneness test that "courts have generally found . . . to be undemanding." *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1159 (9th Cir. 1998); *accord Cal. Sportfishing Prot. Alliance v. Diablo Grande*, 209 F. Supp. 2d 1059, 1066-67 (E.D. Cal. 2002).

Defendants argue that NMA and NEI's statements do not transform their organizations from being industry organizations established to promote the economic interests of their members (Doc. 70 at 17-18), but the germaneness inquiry does not require centrality of purpose. *See Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 56 (rejecting the argument that

germaneness requires centrality of purpose and finding that the germaneness test was meant to prevent federal courts from having to resolve issues "as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care."). NMA and NEI have alleged sufficient facts from which to conclude that their organizations have expertise and demonstrably care about the issues they have raised.

In summary, NMA and NEI have plausibly alleged injury to an environmental interest that is sufficiently intertwined with their economic interests to bring them within NEPA zone of interests. Accordingly, the Court finds that these plaintiffs have prudential standing to assert their NEPA claims.

B. NWMA.

1. NWMA's Environmental Interests.

NWMA argues that is has prudential standing under NEPA because it has environmental interests that were implicated by the NEPA process. Doc. *55 at 40-41. NWMA cites to allegations in its complaint that its organizational purpose is, in part, to foster "environmentally responsible mining" and that it is "committed to principles that embody the protection of human health, the natural environment, and a prosperous economy." Doc. *1, ¶¶ 5-6. It also cites to declarations of its executive director and a number of member presidents stating that they are committed to NWMA's environmental principles. Doc. *55 at 40-41. NWMA

argues that the withdrawal causes injury to its environmental objectives because (1) existing laws and regulations were sufficient to protect the environment apart from the withdrawal, and (2) the withdrawal has national and global environmental impacts because it locks up an important source of energy production. *Id.* at 41.

Although NWMA has alleged facts showing that it and its members have stated environmental interests, the Court is not persuaded that NWMA has alleged injurious effects on those interests that would bring them within NEPA's zone of interests. NWMA's allegation that existing laws were sufficient to protect the environment without the withdrawal does not show that the withdrawal has harmed NWMA's asserted objectives of environmental preservation. NEPA claimants in *Wyoming v. U.S. Department of Interior*, 674 F.3d 1220 (10th Cir. 2012), similarly argued that the National Park Service could have promulgated a less restrictive rule against snowmobile usage in Grand Teton National Park "without adverse environmental effects." *Id.* at 1237. The Tenth Circuit rejected this argument, finding that "NEPA does not protect against such an injury." *Id.*

NWMA has not alleged facts showing that locking up the uranium resource in the withdrawal area will harm its alleged environmental interests. NWMA cites to comments that it or its member companies made during the NEPA process claiming that not developing the uranium resource in the withdrawal area will increase the country's reliance on foreign uranium

production and is contrary to public policy and the current administration's agenda of reducing the country's reliance on fossil fuels because it "does nothing to reduce America's CO2 footprint." Doc. 51-1 at 28-29, Decl. of Laura E. Skaer, ¶¶ 16, 19. But these general assertions do not plausibly show that NWMA or its members are "adversely affected or aggrieved" by agency action within the meaning of NEPA (5 U.S.C. ¶ 702) or that the organization's generalized commitment to mining in an environmentally responsible manner encompasses these concerns.

2. NWMA's Non-Environmental Interests.

NWMA argues that because NEPA is geared toward protecting the quality of the "human environment," purely economic interests are enough to merit prudential standing. Doc. *55 at 37-38. The Court does not agree. The Ninth Circuit consistently has held that purely economic interests are not within the zone of interests NEPA was intended to protect. *Ashley Creek*, 420 F.3d at 941 (citing cases), 945 (holding that a "purely economic injury that is not entwined with an environmental interest" is not sufficient for prudential standing under NEPA).

NWMA cites *Bennett v. Spear*, 520 U.S. 154 (1997), and argues that the Court should consider non-environmental interests sufficient for prudential standing as long as they pertain to the particular provisions of NEPA at issue in this case. Doc. *55 at 39, 39 n.26. *Bennett* stated that whether a plaintiff's claim satisfies the

zone of interests test "is to be determined not by reference to the overall purpose of the Act in question" (there, the Endangered Species Act), but by reference "to the particular provision of law upon which the plaintiff relies." 520 U.S. at 175-176. NWMA cites cases in which the Eighth Circuit has applied *Bennett* to find that as long as the plaintiffs cite to particular provisions of NEPA that encompass their interests, they have satisfied the zone of interests test. Doc. *55 at 39-40 (citing *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1126-27 (8th Cir. 1999); *Cent. South Dakota Coop. Grazing Dist. v. U.S. Dep't of Agric.*, 266 F.3d 889, 895-96 (8th Cir. 2001).[7]

The Ninth Circuit addressed the Eighth Circuit line of cases in *Ashley Creek* and agreed that *Bennett* instructs courts to define the zone of interests of a statute with respect to the specific provisions at issue. 420 F.3d at 942. The Ninth Circuit disagreed, however, with the Eighth Circuit's extension of this principle to confer prudential standing under NEPA for purely economic interests. *Id. Ashley Creek* addressed the text of § 102(2)(C) of NEPA (the EIS provision found in § 4332(2)(C)(iv)) and concluded that "nothing in the text of [this section] suggests that an EIS must address an economic concern that is not tethered to the environment." 420 F.3d at 943. The Ninth Circuit found

[7] NMA and NEI make a nearly identical argument in their response brief. Doc. 64 at 32, 32 n.26 (citing *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1126-27 (8th Cir. 1999); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002)).

this conclusion to be consistent with more than a quarter century of case law which has interpreted the EIS requirement as protecting the environment (*id.*), and concluded that "[i]f the text of § 102(2)(C) were not enough to demonstrate that the section does not protect purely economic interests, that conclusion is strengthened by the impossibility of divorcing § 102 from the overall purpose of NEPA" (*id.* at 944).

NWMA cites to § 4332 and other provisions of NEPA that require consideration of the effects of an action on the human environment and economics or call for using high quality information and scientific analyses (*see* Doc. *55 at 38-39, 39 n.26 (citing 42 U.S.C §§ 4321, 4331-32; C.F.R. 40 §§ 1500.1(b), 1502.2(g), 1502.6, 1502.14, 1502.22-24, 1503.4, 1508.14)), but these provisions, like the EIS requirement, are clearly entwined with environmental concerns. In § 4332(2)(C), "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" is one of five factors for consideration, the first two of which are "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." § 4332(C)(i)-(ii). Similarly, § 4331(b)(5) includes the objective of "achiev[ing] a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities" and begins its list of objectives with "fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations." § 4331(b)(5).

The implementing regulations that NWMA cites do not lead to a different conclusion. Section 1508.14 requires that an EIS address the effects of a proposed action "on the human environment," but this is only when the "economic or social and natural or physical environmental effects are interrelated." 40 C.F.R. § 1508.14. The regulation clarifies that "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." *Id.* Thus, this regulation makes clear that consideration of the interests NWMA relies on for its NEPA claims only come into play where environmental concerns first trigger the NEPA process. Section 1500.1(b) calls for the use of high quality information, accurate scientific analysis, and public scrutiny, but § 1500.1(c) goes on to underscore that "[t]he NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." § 1500.1(c). In short, none of the regulations to which NWMA cites can be convincingly isolated from NEPA's overriding environmental purpose.

In light of the clear emphasis on environmental concerns in NEPA and its attendant regulations, and the Ninth Circuit's analysis in *Ashley Creek*, the Court cannot conclude that an interest in the economic or human environment, divorced from environmental interests, is enough to bring a plaintiff's claims within NEPA's zone of interests.

3. NWMA's Other Argument's for Prudential Standing.

NWMA argues that because its members have been barred from exploring and developing new mining claims or developing their existing claims they are "'regulated' within the meaning of NEPA" and therefore within its zone of interests. Doc. *55 at 40. Although NWMA does not provide support for this proposition, to the extent it attempts to make the same argument made by NMA and NEI that entities regulated by a statute have standing to challenge it apart from the usual zone of interests test, the Court has already rejected this argument.

NWMA argues that allowing environmental plaintiffs to assert claims under NEPA while preventing plaintiffs with solely economic interests from challenging the same process creates a "one way street." Doc. *55 at 40. This argument ignores the fact, repeatedly affirmed in NEPA cases, that NEPA is an environmental statute aimed at ensuring proper consideration of environmental consequences of agency action. NWMA cites no case law showing that those with non-environmental interests must be afforded equal opportunity with environmental plaintiffs to challenge a process that was designed to protect environmental interests. *Wilderness Society v. U.S. Forest Service*, 639 F.3d 1173, 1171-1181 (9th Cir. 2011), upon which NWMA relies, does not refute the NEPA zone of interests jurisprudence already discussed at length in this order. Rather, the Ninth Circuit in that case rejected its prior holding that only federal entities were permitted to intervene

of right in defense of a NEPA process. *Wilderness Society*, 639 at 1171-1181. That holding has no bearing on the arguments NWMA makes here.

4. NWMA's Argument for Procedural Standing.

NWMA asserts that it has procedural standing under NEPA because it has alleged procedural violations that have impaired its concrete interests. Doc. *55 at 33-34. These interests, NWMA argues, are (1) ensuring that the lands to which it and its member mining companies have a geographical nexus are not unlawfully and arbitrarily closed to mining, and (2) ensuring that its members' property rights are not unlawfully or arbitrarily subjected to a new legal regime. *Id.* at 34. In essence, NWMA asserts an interest in having the government comply with its procedural duties before withdrawing open lands from mining or subjecting them to new regulations. This interest is not, however, a sufficient basis for procedural standing absent an underlying interest in keeping with the interests the procedural statute – in this case NEPA – was designed to protect. *See Defenders*, 504 U.S. at 573, n.8 ("We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.") (emphasis in original). Because the Court already has found that NEPA procedures are not designed to protect the non-environmental

interests NWMA asserts, its assertion of procedural standing fails.

5. NWMA Conclusion.

NWMA has failed to allege adversely affected environmental interests that are within NEPA's zone of interests, and therefore lacks NEPA prudential standing.

C. Quaterra.

1. Quaterra's Environmental Interests.

Quaterra alleges that its interests are within NEPA's zone of interests because it has reclaimed its drilling and mining sites to protect air and water quality and to restore vegetation, and it has contributed to cultural and archeological knowledge through its inventories of mining sites prior to drilling. Doc. 30, ¶ 20. Defendants argue that these allegations are insufficient to satisfy NEPA's zone of interests test, and the Court agrees.

Quaterra cannot plausibly allege that the withdrawal harms its environmental interests in reclaiming mining sites when the withdrawal will preserve the withdrawn land in its original condition and eliminate the need for reclamation. And the fact that Quaterra's inventories of potential drill sites have incidentally contributed to cultural and archeological knowledge does not show that Quaterra is a proper claimant to assert such interests, particularly where it has alleged

that these surveys were done in preparation for drilling, and has alleged no facts plausibly showing that it also has an interest in cultural and archeological research. *See Am. Indep. Mines*, 733 F. Supp. 2d at 1251-52 (mining companies' environmental assessments done solely in pursuit of mineral development activities did not bring their interests within the zone of interests of NEPA). Even if Quaterra had alleged an independent interest in making cultural and archeological discoveries, it has alleged no facts showing that the ability to survey public lands for this purpose will be harmed by the withdrawal.

2. Quaterra's Additional Arguments for Prudential Standing.

Quaterra argues that it has standing to assert NEPA claims because it is the subject of the regulatory action. Doc. 72 at 30-31. It also joins the arguments made by NMA, NEI, and NWMA on the basis of *Bennett v. Spear*, 520 U.S. 175-76, that prudential standing is to be determined by the particular provision of the statute at issue, not its overall purpose, and that NEPA's zone of interests therefore encompasses non-environmental harms. *Id.* at 31-32. Related to this assertion, Quaterra argues that its interest in agency compliance with specific NEPA procedures, such as the requirement that the agency use accurate scientific analysis or that it consult with local governments, is sufficient to bring Quaterra within the zone of interests of NEPA. *Id.* at 32-33.

Quaterra's "regulated by" argument fails for the reasons already discussed with respect to NMA and NEI. Quaterra's argument that it has non-environmental interests within NEPA's zone of interests fails for the reasons already addressed with respect to NWMA. And, for the reasons already discussed with respect to NWMA, the Court rejects Quaterra's attempt to come under NEPA's zone of interests on the basis of alleged procedural violations absent a showing of an underlying environmental interest that the procedures were intended to protect. In summary, the Court finds that Quaterra has failed to meet its burden of showing that it has prudential standing to assert NEPA claims.

D. Vane.

Vane makes two arguments in support of its asserted environmental interests: (1) its interest in mining the uranium from exposed breccia pipes in the withdrawal area coincides with an environmental interest in removing uranium and its harmful effects from the environment, and (2) Vane engages in mitigation efforts to minimize the harmful effects of uranium mining. Doc. 76 at 10.

As previously discussed with respect to Quaterra, the Court is not persuaded that the withdrawal adversely affects Vane's interest in mitigating the environmental effects of mine sites. In support of its assertion that removal of uranium by mining breccia pipes is beneficial to the environment, Vane cites the declaration of its Chief Operating Officer, Kris Hefton,

together with the attachment of Vane's comments submitted during NEPA process, stating that "[n]owhere in the DEIS does it state that a direct positive impact of mining uranium from breccia pipes is that it removes the uranium that is the source of the concern in the first place." Doc. 77 at 5, Decl. of Kris Hefton, ¶ 16; Doc. 77 at 14. Although Vane faults the BLM for not addressing this comment, Vane does not allege that it ever presented evidence that mining uranium from breccia pipes reduces the net environmental impact of uranium deposits on the environment. Thus, even if Vane has an environmental interest in minimizing the harmful effects of naturally-occurring uranium, it has not alleged facts showing that extraction of uranium through continued mining would lead to less harmful effects than leaving the uranium in place.

Vane makes other standing arguments already rejected by the Court. Vane has failed to show that it has prudential standing to assert NEPA claims.

E. Yount.

1. Yount's Environmental Interests.

Yount contends that his economic interests in mining in the withdrawal area are sufficiently tied to environmental interests to come within NEPA's zone of interests. Doc. 44 at 13. Yount alleges that he seeks to use the land in accordance with federal and state environmental laws and to conduct mining operations with as little environmental impact possible. Doc. 44 at 13. As the Court has already discussed, however, an

interest in protecting the environment from the potential harmful effects of mining is not impaired by the withdrawal's elimination or reduction of mining.

2. Yount's Recreational and Aesthetic Interests.

Yount asserts that he has suffered a loss of enjoyment in his recreational use of the lands in the withdrawal area. Doc. 44 at 14. He argues that his aesthetic enjoyment includes being able to perceive the beauty of nature as well as the man-made works on the land, including "roads, hunting camps, cattle fences, water catchments, old copper prospects, and transient uranium mines." *Id.* at 20. He also contends that the loss of exploration drilling diminishes his enjoyment of hiking and camping because, as a prospector, such exploration through drilling is a key to his recreational enjoyment of the land. *Id.* at 20-21.

The Court is not persuaded that NEPA's concern with aesthetic and recreational enjoyment of the natural environment extends to protecting the specific interests in continued uranium mining and exploratory drilling Yount asserts. Nothing in the ROD prevents Yount from perceiving the beauty of the Kaibab forest, including its natural and man-made works, or continuing to hike and observe the geology and surface of the land. *See* Doc. 33, ex. 1 at 7 (The withdrawal "does not affect disposition, use, or management of the lands other than under the Mining Law, including access to and across the lands."). Although Yount asserts that he

had looked forward to enjoying the beauty of the Kaibab Forest while drilling on his claims and developing mining operations (Doc. 44 at 29, ¶ 16), the withdrawal has only restricted Yount's drilling and mining operations. It has not otherwise prohibited him from enjoying and recreating in the Kaibab forest. Moreover, the mineral development activities that Yount contends add to his aesthetic enjoyment of the land are activities the Mining Law has recognized as being for the purpose of economic gain and not for other purposes. *United States v. Coleman*, 390 U.S. 599, 602 (1968). Yount points to no authority showing that such interests are within the zone of interests NEPA protects. The Court concludes that Yount has failed to show that he has prudential standing to assert a NEPA claim.

F. The Coalition.

The Coalition alleges that Mohave County "has a mandate to retain environmental quality and to capitalize on its wealth of natural, built and human resources." Doc. 30, ¶ 24. This includes "the 'growth of communities that maintain the health and integrity of its valuable environmental features'; the protection of 'wetlands, washes, aquifer recharge areas, areas of unique flora and fauna, and areas with scenic, historic, cultural and recreational value'; and avoiding industrial development that has the 'undesired effect of increasing air pollution.'" *Id.* (quoting Mohave County General Plan, p. 23).

NEPA requires agencies to take into account the comments and views of local governments that are authorized to develop environmental standards. 42 U.S.C. § 4332(2)(C). Mohave County is authorized under state law to implement environmental standards and to develop a comprehensive plan to conserve natural resources and promote the "health, safety, convenience and general welfare of the public." Doc. 72-2 at 5-6, ¶¶ 7-9. As discussed above, Mohave County has alleged that the withdrawal decision interferes with its ability to carry out identified environmental objectives of its state-authorized plan. These are interests that the procedural requirements of NEPA were designed to protect. *See, e.g.*, *City of Davis*, 521 F.2d at 672 (municipality entrusted under state law with enforcing environmental standards and developing a general plan had "municipal interests [that] fall within the scope of NEPA's protections."); *Douglas County*, 48 F.3d 1495 (County that was authorized by state law to develop environmental standards and had statutory right to comment on proposed federal action had "concrete, plausible interests, within NEPA's zone of concern for the environment" underlying its asserted procedural interests.).

Defendants argue that the Coalition is precluded from bringing NEPA claims because it did not raise these issues during the NEPA process. Doc. 62 at 24. To challenge agency action under NEPA, plaintiffs are required "to first raise their concerns with the agency to allow the agency to give the issue meaningful consideration." *Am. Indep. Mines*, 733 F. Supp. 2d. at 1267

(internal quotation marks and citations omitted). The Coalition cites to the declaration of Buster Johnson, Chairman of the Mohave County Board of Supervisors, stating that the BLM did not allow the local governments to submit supplemental economic data about how the withdrawal would affect their communities, the BLM disregarded Mohave County's comprehensive plan, and the Secretary ignored notices and invitations from Coalition members demanding coordination with them and reconciliation of inconsistencies between the withdrawal and their local plans and policies. Docs. 72 at 34; 72-2 at 9-10, Decl. of Buster Johnson, ¶¶ 21-23. These allegations are sufficient at the pleading stage to show that the Coalition raised issues within the zone of interests of NEPA during the NEPA process. The Coalition has shown that it satisfies the zone of interests test for purposes of NEPA prudential standing.

IV. Standing to Assert Constitutional Claim.

Plaintiffs NMA, NEI, and NWMA claim that the withdrawal is unlawful because § 204(c)(1) of the FLPMA, which allows Congress to block any administrative withdrawal of lands over 5,000 acres, is unconstitutional. Doc. *56, ¶¶ 97-107; Doc. *1, ¶¶ 127-145. Plaintiffs assert that this provision constitutes an impermissible legislative veto because it allows Congress to act upon a concurrent resolution without presentment to the president. *See, e.g.*, Doc. *56, ¶ 99. They further assert that § 204(c)(1) is not severable from § 204(c), which governs the Secretary's ability to

withdraw public lands, because Congress would not have granted the Secretary authority to withdraw more than 5,000 acres without reserving for itself the authority to intervene. *Id.*, ¶¶ 102-106. Thus, they allege, the Secretary's withdrawal decision, encompassing over one million acres of public land, was made pursuant to an unconstitutional provision and should be set aside. *Id.*, ¶ 107.

Defendants argue that Plaintiffs do not have standing to make this constitutional argument because the legislative veto at issue was not exercised in this case, Plaintiffs cannot claim to have been harmed by it, and its exercise in any case would have terminated rather than effectuated the withdrawal. Doc. *39 at 17. Defendants also argue that the FLPMA's severability clause would allow the court to sever the legislative veto from the rest of § 204(c) without disturbing the Secretary's actions under the remainder of that provision. *Id.* at 18.

Plaintiffs have standing to assert their constitutional claim. They do not claim to have been harmed by a legislative veto. They claim to have been harmed by the withdrawal of land under an unconstitutional law. If the withdrawal provision of the FLPMA is found unconstitutional because it contains an impermissible legislative veto, the withdrawal will have been ineffective and Plaintiffs' claimed harms will be redressed. Whether the legislative veto provision is severable, as Defendants argue, is a question to be resolved on the merits and not at the pleading stage.

VII. Vane's Voluntary Dismissal.

On December 26, 2012, Vane Minerals filed a notice of dismissal stating that it had voluntarily dismissed its complaint, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(1), in order to pursue a damages claim against the United States of America in the United States Court of Federal Claims based on the same operative facts. Doc. 86. Accordingly, Vane's complaint in intervention will be dismissed without prejudice.

IT IS ORDERED:

1. Defendants' motions to dismiss Plaintiffs Gregory Yount (Doc. 33), National Mining Association and Nuclear Energy Institute (Docs. 39 and 72, No. 3:12-cv-08038), Northwest Mining Association (Doc. 27, No. 3:12-cv-08042), Quaterra Alaska, Inc. and Quaterra Resources, Inc. (Doc. 62), and Vane Minerals (Doc. 68) are **denied** with respect to Plaintiffs' non-NEPA claims, and **granted** with respect to Plaintiffs Northwest Mining Association's, Quaterra's, Vane's, and Yount's NEPA claims.

2. Defendants' motion to dismiss the Arizona Utah Local Economic Coalition on behalf of named member the Board of Supervisors, Mohave County (Doc. 62) is **denied**.

3. Vane Mineral's complaint (Doc. 86) is **dismissed** without prejudice.

4. The Court will address further scheduling issues in a separate order.

Dated this 8th day of January, 2013.

/s/ David G. Campbell
David G. Campbell
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Gregory Yount, et al., Plaintiffs, v. Kenneth Lee Salazar, et al., Defendants.	)	**JUDGMENT IN A CIVIL CASE** (Filed Sep. 30, 2014) CV11-8171 PCT-DGC CV12-8038 PCT DGC CV12-8042 PCT DGC CV12-8075 PCT DGC

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order of September 30, 2014, granting Defendants' Motions for Summary Judgment, judgment is hereby entered for Defendants. Plaintiffs shall take nothing by way of the Complaints. The Complaints and these actions are hereby dismissed.

September 30, 2014
Date

BRIAN D KARTH
DCE/Clerk of Court

. s/ Ruth E. Williams
By Ruth E. Williams
Deputy Clerk

FLPMA Section 102

(43 U.S.C. § 1701)

Declaration of Policy

(a) The Congress declares that it is the policy of the United States that –

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before the date of enactment of this Act be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the

views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands 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 Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal government should, on a basis equitable to both the federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

FLPMA Section 204
(43 U.S.C. § 1714)
(excerpts)

Withdrawal of Lands

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

(b) Application and procedures applicable subsequent to submission of application

> **(1)** Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) the rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

(2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall

be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees –

> **(1)** a clear explanation of the proposed use of the land involved which led to the withdrawal;
>
> **(2)** an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the

proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

(d) Withdrawals aggregating less than five thousand acres; procedure applicable

A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head –

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

(e) Emergency withdrawals; procedure applicable; duration

When the Secretary determines, or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d), whichever is applicable, and (b)(1) of this section. The information required in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

(f) Review of existing withdrawals and extensions; procedure applicable to extensions; duration

All withdrawals and extensions thereof, whether made prior to or after October 21, 1976, having a specific period shall be reviewed by the Secretary toward the end of the withdrawal period and may be extended or further extended only upon compliance with the

provisions of subsection (c)(1) or (d) of this section, whichever is applicable, and only if the Secretary determines that the purpose for which the withdrawal was first made requires the extension, and then only for a period no longer than the length of the original withdrawal period. The Secretary shall report on such review and extensions to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.

* * *

(h) Public hearing required for new withdrawals

All new withdrawals made by the Secretary under this section (except an emergency withdrawal made under subsection (e) of this section) shall be promulgated after an opportunity for a public hearing.

(i) Consent for withdrawal of lands under administration of department or agency other than the Department of the Interior

In the case of 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, except when the provisions of subsection (e) of this section apply.

(j) Applicability of other Federal laws withdrawing lands as limiting authority

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431-433); or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)).

* * *

FLPMA Section 704(a)

(90 Stat. 2792)

Repeal of Withdrawal Laws

(a) Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed:

* * *

FLPMA Section 707

(90 Stat. 2794)

Severability

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.

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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, *et al.*, Defendants.	Case No. 3:12-cv-08042-DGC **DECLARATION OF DR. KAREN WENRICH** (Filed Jul. 19, 2012)

I, Dr. Karen Wenrich, declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following statements are true and correct.

1. I have a Ph.D. in Geology from Penn State University and am a Certified Geologist from the American Institute of Professional Geologists. I have spent over 30 years mapping and studying the breccia

pipe terrain across northern Arizona, with the U.S. Geological Survey and as a private consultant. I have been underground and sampled six of the nine breccia pipe uranium mines that have produced ore since the 1970s. During my career, I have traversed, mapped, and sampled over 1,500 collapse structures/breccia pipes in northern Arizona, and published over 160 peer-reviewed articles, including 70 articles relating to collapse breccia pipe uranium mining. In 2005, I was a co-recipient of the Nobel Peace Prize as a member of the International Atomic Energy Agency.

2. In July 2009, I testified before the Subcommittee on National Parks, Forest and Public Lands of the Committee on Natural Resources regarding the environmental, economic, and human impact of withdrawing lands in northern Arizona from operation of the Mining Law. A copy of my written testimony is attached hereto as Exhibit A, and is incorporated herein by reference. I also supplied a copy of my written testimony to the BLM in commenting on the proposed withdrawal, 74 Fed. Reg. 35,887 (July 21, 2009).

3. In November 2011, I again testified before the Subcommittee on National Parks, Forest and Public Lands of the Committee on Natural Resources regarding H.R. 3155, the Northern Arizona Mining Continuity Act of 2011. My testimony may be found at: http://naturalresources.house.gov/UploadedFiles/WenrichTestimony11.03.11.pdf.

4. I am the owner of Crystals Unlimited (registered trade name with the Colorado Secretary of State)

and Wenrich Consulting 4 U, through which I provide consulting services for the mining industry.

5. Crystals Unlimited is a member of Northwest Mining Association ("NWMA") and fully supports NWMA's mission and is committed to NWMA's environmental principles.

6. Prior to the withdrawal, I was actively engaged in, *inter alia*, an exploration and development program designed to locate, delineate, and develop high-grade breccia pipe uranium deposits located in northern Arizona. As a result of the withdrawal, I am no longer actively engaged in uranium exploration and development, where my reputation and primary experience lie, although I am still actively engaged in research relating to breccia pipe uranium mining.

7. I own 71 mining claims in northern Arizona. These properly located and maintained mining claims vest in me constitutionally protected property rights, including but not limited to, the right to use and occupy the mining claims for prospecting, mining, and processing and all uses reasonably incident thereto. I have a joint-ownership agreement with Walter Lombardo on 94 additional claims. Combined, these claims cover approximately 3,000 acres.

8. All of these claims are located within the area withdrawn from mineral location and entry for 20 years on January 9, 2012. Specifically, these claims are located in what is referred to as the North Parcel.

9. Prior to the 2-year segregation period that began on July 21, 2009, I had expended approximately $108,000 exploring, locating, acquiring, and developing mining claims within the area covered by the 2-year segregation period and now the 20-year withdrawal.

10. But for the 20-year withdrawal, I would explore for and locate additional claims adjacent to or near my existing claims within the North Parcel and explore for and locate additional claims in the other two Parcels. Thus, I have suffered injury in fact and I am adversely affected and aggrieved by the 20-year withdrawal.

11. I had a signed asset purchase agreement for 61 of the above-mentioned claims with Green Energy Fields, with American Energy Fields listed as the guarantor. Under the terms of the agreement, I was initially paid $25,000 and an additional $200,000 was to be paid to me if the Secretary did not withdraw the land. Thus, as a direct result the 20-year withdrawal, I lost the ability to sell my claims and to receive $200,000 in return.

12. Because of the withdrawal, I cannot engage in notice- or plan-level operations until after the BLM performs a mineral examination report to confirm the validity of the claims at issue. It is my understanding that preparation of a single mineral examination report could take several years. Indeed, as explained by Secretary Salazar in his Record of Decision for the withdrawal, the preparation of a single mineral

examination report "is a complex and time-consuming" process:

> 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.

Record of Decision at 6-7 (emphasis added). It is hard to justify the time and money to prepare and submit a notice only to be subjected to a lengthy and costly mineral examination process.

13. Thus, because of the 20-year withdrawal, I am effectively limited to engaging in only casual use on my existing claims, unless I wish to engage in an expensive and time-consuming validity examination. Because of the 20-year withdrawal and the inability to develop my existing claims, the fair market value of my claims has significantly decreased. Ultimately, because of the 20-year withdrawal, I may be forced to relinquish my claims because it is not financially prudent to pay the maintenance fees for claims that are effectively undevelopable. Therefore, because of the 20-year withdrawal, I will likely be denied the opportunity to further develop my mining claims and may lose the substantial financial investment I have made in the

area (in addition to the $200,000 and potential royalties from Green Energy Fields I have already lost as a result of the 20-year withdrawal). As a result, I have suffered injury in fact and I am adversely affected and aggrieved by the 20-year withdrawal.

DATED this 17 day of July 2012.

/s/ Karen Wenrich
Dr. Karen Wenrich