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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

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| CENTER FOR BIOLOGICAL DIVERSITY; GRAND CANYON TRUST; and SIERRA CLUB,<br><br>Plaintiffs<br><br>vs.<br><br>RICHARD STAHN, in his official capacity as District Ranger for the Tusayan Ranger District, on the Kaibab National Forest; and UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture,<br><br>Defendants. | CIV 08-8031-PCT-EHC<br><br>MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION |

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## INTRODUCTION

In the Kaibab National Forest just south of Grand Canyon National Park, the U.S. Forest Service approved a drilling project to explore for uranium on December 20, 2007. Drilling activities from the Vane Uranium Exploratory Project and many others like it may expose wildlife, plants, and people -- and potentially groundwater -- to radioactive and toxic materials in the immediate project area as well as areas nearby due to windblown dust. Plaintiffs Center for Biological Diversity, Grand Canyon Trust and Sierra Club have learned that some drilling activities are already occurring. Declaration of Marc D. Fink ("Fink Dec."), Exh. C. To preserve the status quo and to prevent further harm to Plaintiffs and the environment, Plaintiffs respectfully request a temporary restraining order and preliminary injunction pending full review of the merits of the case.

The Vane Uranium Exploratory Project is first uranium related project in over twenty years to be authorized in this area. Although the Kaibab National Forest contains uranium in a geologic formation called breccia pipes, the low price of uranium, the 50-year uranium stockpile and the lack of capacity at the nearest mill site made exploration and development not feasible. In recent years, however, the price of uranium has increased significantly. As a result, although the stockpile and mill capacity have not changed, Vane -- a British company that recently acquired or filed dozens of mining claims known to contain uranium -- now intends to explore for uranium in the National Forest.

Due to its proximity and potential adverse impacts to the Grand Canyon, human health impacts, and the dubious legacy of prior uranium operations in the region, serious concerns about the Vane Uranium Exploratory Project have come from entities beyond the Plaintiffs. The Coconino County Board of Supervisors passed a resolution opposing the project. Two Arizona daily newspapers wrote editorials against the project. Congressman Raul Grijalva introduced legislation aimed at stopping new uranium exploration in the Tusayan Ranger District of the Kaibab National Forest. The Governor's office sent a letter to Secretary of the Interior Dirk Kempthorne requesting that he withdraw all lands surrounding the Grand Canyon from uranium development and conduct a comprehensive

environmental analysis before any project proceeds. In short, the general public is opposed to seeing lands adjacent to the Grand Canyon being turned into an industrial zone littered with radioactive materials.

In an apparent attempt to avoid public scrutiny, the Forest Service invoked a "categorical exclusion" exempting the Vane Uranium Exploratory Project from National Environmental Policy Act (NEPA) review. The Forest Service's reliance on a categorical exclusion violates NEPA. The drilling project does not fit within the narrow categorical exclusion for routine and short-term, mineral investigations. Moreover, prior to invoking the exclusion, the agency failed to consider the relevant significance factors and the potential cumulative impacts from several uranium exploration projects now being proposed in the Tusayan Ranger District. Further, in violation of the Appeals Reform Act, the Forest Service failed to allow for an administrative appeal of the challenged project after initially indicating appeals would be permitted.

## FACTUAL BACKGROUND

Uranium deposits are found on federal, state, tribal and private lands surrounding the Grand Canyon. Development of uranium on these lands through the 1980s caused substantial human health and environmental problems. Exh. 32 at 2-4. Due to the significant health effects of prior operations on nearby Navajo Nation lands, the Tribe has banned uranium exploration and development. Id.

Since the 1980s, however, no new uranium-related activities have occurred, primarily due to the price of uranium on the global market. However, since 2003, 2,215 new mining claims for uranium have been filed within 10 miles of Grand Canyon National Park. Exh. 4 at 1. Many of those have been packaged and sold to international corporations, like Vane Minerals from Great Britain.

The Vane Uranium Exploration Project is located on seven claim sites within the Tusayan Ranger District of the Kaibab National Forest. In March 2007, the Forest Service announced its proposal to allow Vane to drill exploratory holes for uranium. Exh. 2. This was the first new proposal for exploratory uranium drilling on the Kaibab National Forest

in over twenty years. By August, 2007, Vane had developed "a well planned and focused exploration program" for its 38 claims in the area. Exh. 15 at 4-5. Vane's program called for exploration activities to begin on ten sites, with a 12-18 month "Phase 1," followed by an additional 12-18 months for "Phase 2." Id. at 19-1.

On December 20, 2007, the Forest Service issued a Decision Memo announcing its approval for Vane to drill for uranium at seven of its claims. Exh. 1. The agency concluded that the Vane Uranium Exploratory Project was categorically excluded from NEPA review pursuant to "Category 8," which includes "short-term" (one year or less) mineral investigations. Exh. 1 at 4. Previously, the Forest Service gave the public no indication as to the level of NEPA review it would undertake for the Vane Uranium Exploratory Project. The March 2007 Scoping Notice simply identified the project as proposed, providing no insight as to the anticipated impacts. Exh. 2. Plaintiff Sierra Club provided comments on the Scoping Notice in April 2007. Exh. 8. The Sierra Club and other concerned parties, including the Havasupai Tribal Council, requested during that the Forest Service consider the overall cumulative impacts in an environmental analysis. Exh. 8 & 11.

Recognizing that the 1872 Mining Act "confer[s] a statutory right to enter upon public lands to search for minerals," the Forest Service has enacted regulations intended to "minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R.§ 228.1. As set forth in the regulations, a Plan of Operations is required "if the proposed operations will likely cause a significant disturbance of surface resources." 36 C.F.R.§ 228.4(a)(3). The Forest Service approved Plans of Operations for Vane's seven sites on March 13, 2007. Exh. 22-28.

Because the Forest Service never analyzed and disclosed the environmental impacts from the Vane Uranium Exploration Projects, the public and other state and federal wildlife agencies could not provide detailed or informed comments. In response to the release of the Decision Memo, however, Arizona and federal wildlife officials voiced their opposition. In response, the Forest Service amended the Decision Memo on February 6, 2008 to address wildlife impacts. Exh. 3. Based on the measures imposed, the agencies

were concerned the radioactive waste pits would harm wildlife and operations would adversely impacts deer, elk antelope, birds and the endangered California condor. Id. None of the "mitigation" measures were submitted for public review and comment.

While the challenged Decision Memo authorizes Vane to proceed with exploratory drilling on seven of its claims, Vane and other companies have already submitted other proposals to the Forest Service. Exh. 20 at 3.[1] Vane began submitting its "Plans of Operation" for the other sites in October 2007. Exh. 29. Meanwhile, two additional mining companies, DIR Exploration and Neutron Energy, have also submitted uranium drilling proposals to the Forest Service. Exh. 21, 30. All of these uranium drilling proposals are within the Tusayan Ranger District of the Kaibab National Forest.

## PROCEDURAL HISTORY

Prior to filing suit, Plaintiffs sent detailed letters to the Forest Service, explaining the NEPA deficiencies with the Vane project, and requesting the agency to withdraw the project. Exh. 9-10. Because the agency refused to either remedy the NEPA violations or withdraw the project, Plaintiffs filed suit on March 12, 2008. Presumably reacting to the lawsuit, the next day, the Forest Service approved the seven Plans of Operation that had been submitted by Vane. Exh. 22-28. Shortly after filing suit, Plaintiffs began to learn that drilling activities associated with the challenged project could commence. Therefore, on March 20, 2008, Plaintiffs sent a letter to Defendants' counsel, requesting additional information as to when the activities may proceed, and requesting advance written notice prior to the commencement of any ground disturbing activities. Fink Dec., ¶ 6, Ex. B. On Friday, March 21, Plaintiffs received an e-mail from the Forest Service's attorney explaining that Vane had already commenced activities at one of the seven sites, and that the agency was unable to confirm whether drilling had begun. Id., ¶ 8, Ex. C. As a result, Plaintiffs promptly prepared the necessary papers to file this motion for immediate injunctive relief.

[1] Of the ten sites originally proposed by Vane, the Forest Service determined that Vane should not proceed with proposed drilling at three of its sites. Nonetheless, Vane has submitted a new proposal for these previously-withdrawn sites. See Exh. 20 at 3.

## STANDARDS OF REVIEW

### I. TEMPORARY RESTRAINING ORDER - PRELIMINARY INJUNCTION STANDARD

The Ninth Circuit employs a sliding scale for determining whether a court should grant a temporary restraining order or preliminary injunction. First, a TRO or preliminary injunction should issue if the moving party can demonstrate that (1) they are likely to succeed on the merits and (2) there is a possibility of immediate and irreparable injury. Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992). Alternatively, the court should issue a preliminary injunction when (1) the motion raises serious questions on the merits and (2) the balance of hardships tips decidedly in favor of the plaintiffs. Id.; Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1202 (9th Cir. 1980). These two formulations are not separate tests. Rather, they "represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005). Under these standards, the greater the hardship to plaintiffs, "the less probability of success must be shown." Clear Channel Outdoor v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). "Serious questions" are substantial, difficult and doubtful enough to require more thorough investigation. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988).

Under either formulation, the court "must consider the public interest as a factor in balancing the hardships when the public interest may be affected." Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

### II. STANDARD FOR REVIEW OF THE MERITS

The Forest Service's approval of the Vane Uranium Exploration Project under NEPA and the Appeals Reform Act is reviewed under the APA. Earth Island Institute v. United States Forest Serv., 351 F.3d 1291, 1300 (9th Cir. 2003). Agency actions shall be set aside when they are "arbitrary, capricious [or] an abuse of discretion or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D). Applying this standard, a court must determine whether the agency

"considered the relevant factors, [] articulated a rational connection between the facts found and the choice made," and took a "hard look" at the environmental consequences of the Project. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 105 (1983); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998). Courts review whether 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 be the product of agency expertise.

Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto., 463 U.S. 29, 43 (1983). Moreover, questions of statutory construction of reserved for the courts. California Energy Resources Cons. v. Johnson, 807 F.2d 1456, 1461 (9th Cir. 1986).

## ARGUMENT

### I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR TWO CLAIMS

The Forest Service violated the National Environmental Policy Act (NEPA) by relying on a categorical exclusion for the Vane Uranium Exploration Project. The Project does not qualify for a categorical exclusion because it is not "short-term," not "routine," and may result in significant environmental impacts. The categorical exclusion is procedurally invalid because the Forest Service failed to consider the cumulative impacts of the several uranium drilling proposals on the Tusayan Ranger District, as well as other NEPA significance factors. Further, the Forest Service relied on a categorical exclusion that itself was adopted in violation of NEPA. Absent a NEPA document that analyzes the impacts, the Forest Service made an uninformed decision and failed to inform the public about the environmental impacts of a highly controversial uranium project sited two miles from Grand Canyon National Park.

In addition, the Forest Service violated the Appeals Reform Act (ARA) because the public was not provided an opportunity to appeal the Forest Service decision to approve the Vane Uranium Exploration Project or rely on a NEPA categorical exclusion.

A. The Forest Service's Categorical Exclusion Violates NEPA

Congress enacted NEPA to ensure that federal agencies, before approving a project, (1) consider and evaluate all environmental impacts of their decisions and (2) disclose and provide an opportunity for the public to comment on such environmental impacts. 40 C.F.R. §§ 1501.2, 1502.5; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Through the NEPA process, agencies are required to take a "hard look" at the environmental impacts of their actions. Robertson, 490 U.S. at 349.

To satisfy NEPA's dual purpose, prior to undertaking or approving an action, federal agencies must prepare and circulate an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. In an EIS, a federal agency must evaluate and disclose the impacts of a proposed action, consider alternative actions and their impacts, and identify all irreversible and irretrievable commitments of resources associated with an action. 42 U.S.C. § 4332(2). An agency may first prepare a detailed environmental assessment (EA) to determine whether a project has significant impacts and, therefore, requires an EIS. 40 C.F.R. § 1508.9. If the EA concludes that the project may have a significant impact on the environment, then an EIS must be prepared. Id.; National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001). If not, the federal agency must provide a detailed statement of reasons why the project's impacts are insignificant and issue a "finding of no significant impacts" (FONSI). 40 C.F.R. § 1508.13.

Certain agency actions may be categorically excluded from full NEPA review. NEPA regulations define categorical exclusions as "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. CEQ directed each federal agency to develop a list of activities that meet this definition. Id. § 1507.3(b)(2)(ii). A categorically excluded activity may nonetheless require full NEPA analysis if there are "extraordinary circumstances," such as when the action causes significant impacts. Id. § 1508.4.

In determining whether an action requires an EIS, EA or is categorically excluded, federal agencies must broadly review the impacts of the action. Agencies must not only review the direct impacts of the action, but also analyze indirect and cumulative impacts. 40 C.F.R. §§ 1508.7, 1508.8, 1508.25(a)(2). In addition, NEPA regulations require agencies to consider the impacts of "connected actions." Id. § 1508.25(a)(1). To decide whether actions have "significant" impacts, agencies consider their "intensity" and "context." Id. § 1508.27. "Context" refers to the geographic and temporal scope of the agency action and interests affected. Id. at § 1508.27(a). "Intensity" addresses the severity of the environmental impacts and includes consideration of "other actions with individually insignificant but cumulatively significant effects," controversial actions, actions with unknown risks, actions that may establish a precedent for future actions and the proximity to park lands or "ecologically critical areas." Id. at § 1508.27(b).

1. The Relied-Upon Categorical Exclusion Does Not Apply To The Project

The Forest Service's reliance on the categorical exclusion to avoid full NEPA review is plainly erroneous and inconsistent with its own NEPA regulations. See Stinson v. United States, 508 U.S. 36, 45 (1993). When an agency's action does not comport with the chosen categorical exclusion, courts invalidate the action. West v. Secretary of Department of Transportation, 206 F.3d 920, 928-29 (9th Cir. 2000) (rejecting reliance on categorical exclusion for highway interchange); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004) (categorical exclusion could not be applied to special-use permits); Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal. 2007) (categorical exclusion improperly invoked for revised planning rule). Courts must review "whether the path taken to reach the conclusion was the right one in light of NEPA's procedural requirements." West, 206 F.3d at 929.

For the Vane Uranium Exploration Project, the Forest Service relied on a categorical exclusion found in its NEPA Handbook, 1909.15, Section 31.2. Exh. 13. This section applies only to "[r]outine, proposed actions within any of the following categories." Exh. 13 at 8. "Category 8" -- the category the Forest Service applied -- states:

> Short term (one year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than one mile of low standard road, or use and minor repair of existing roads.

FSH 1909.15, Section 31.2, Category 8 (Exh. 13 at 10) (emphasis added). This NEPA categorical exclusion does not apply because (1) the Vane Uranium Exploration Project is not "routine," (2) "individually," the Vane Uranium Exploration Project and its exploration activities at seven sites will not be for "one year or less," and (3) "cumulatively," when added to other Vane exploration projects on the Tusayan Ranger District, the Vane Uranium Exploration Project will not be for "one year or less."

The Vane Uranium Exploration Project is not "routine." This is the first approval for uranium drilling adjacent to Grand Canyon National Park in over 20 years. Exh. 17. Because of past destruction of environmental resources, human health impacts, and low demand, no uranium development has occurred in the region for decades. The Orphan Mine was located in Grand Canyon National Park and was operational in the 1950s and 1960s. BE/BA at 6 (Exh. 31). Although the Canyon Mine located in the Tusayan Ranger District was approved for full operation in the 1980s, it was never operated due to the drop in uranium prices. Id. Past uranium mining on nearby tribal lands and its impacts to groundwater and drinking water led the Navajo Nation to ban exploration and development of uranium. Exh. 32 at 2-3. That the proposed exploration project is not "routine" is also evident by the political opposition to the project at the local, state, and federal level. Exh. 4-7. In sum, drilling up to 38 boreholes 2,000 feet deep next to Grand Canyon National Park on seven sites -- with additional sites already under consideration -- is not a "routine" proposed action, especially because no such sites have been drilled for the last 20 years.

In addition to not being a routine action, the duration of the Vane Uranium Exploration Project prevents it from being categorically excluded under Category 8, which explicitly limits such activities to one year or less. Exh. 1 at 4; Exh. 13 at 10. First, the proposed exploratory activities at the seven sites involve up to three years of reclamation activities. Indeed, Plans of Operations for each of the seven sites make this clear: Part I, section G identifies the completion date for "all required reclamation" as "36 months from

start date." Plan of Operations at 1 (Exh. 22-28). Reclamation activities include covering radioactive mud pits with topsoil and injecting radioactive drill cutting back in the hole. See, e.g., Exh. 22 at 7, 11. Moreover, the reclamation section of the Plan of Operations provides that "[t]he length of operations at the site is dependent on drilling results." Id. at 7.

Second, anticipated additional drilling that will extend beyond one year. The project descriptions for multiple sites acknowledge that "depending on exploration results, additional drilling may be required during the initial phases with subsequent drilling over 2-3 seasons." Exh. 23-28 at 3. In fact, the Forest Service's own March, 2007 scoping notice recognized that the duration of the proposed drilling project may extend past one year. Exh. 2 at 5. In short, the Forest Service had no basis to conclude that the proposed work at the seven sites will last less than one year -- the documents before the agency dictate projects of longer duration.

Third, the challenged project is part of Vane's larger exploratory drilling program within the Tusayan Ranger District of the Kaibab National Forest and other areas just south of Grand Canyon National Park. The scope of Vane's activities is set forth in a Technical Report produced by SRK Consultants. Exh. 15. In this August 2007 report, "38 individual but similar explorations targets" are described; seven of which are the subject of the Forest Service December 20, 2007 Decision Memo, with 26 other sites also within the Tusayan Ranger District. Exh. 15 at 1. While Vane chose 10 target sites to initiate exploration activities for its larger project (id. at 19-1), Vane had provided the Forest Service with Plans of Operations for other drilling sites in the same Ranger District prior to the agency's approval of the challenged project. Exh. 29 (six additional October, 2007 Plans of Operation). By ignoring the breadth of Vane's overall drilling program for the Tusayan Ranger District and arbitrarily segmenting the scope of the action, the Forest Service violated NEPA's prohibition on piecemealing its analysis to avoid full NEPA compliance. See 40 C.F.R. § 1508.27(b)(7) ("Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts."); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998) (rejecting agency's

attempt to break overall post-fire strategy into smaller projects to avoid EIS requirement). Had the agency reviewed the entirety of Vane's program as NEPA requires, the "short-term" categorical exclusion could not have been invoked.

Fourth, Vane's August 2007 Technical Report further recognizes that exploration activities on the first 10 sites, which includes the seven sites approved in the challenged decision, will occur in two phases and take at least 2-3 years. Exh. 15 (Executive Summary at iv). As described in this Report and Vane's October 10, 2007 press release, Phase 1 alone will take 12-18 months. Id. at 19-1; Exh. 16 (stating "it is possible to complete the steps suggested in the report in a 12 to 18 month time frame"). According to Vane's Report, the first phase involves "a minimum of three to five drillholes for at least 10 of the prospective target, with follow-up drilling as needed based on initial drilling results." Exh. 15 at 19-1. This 12-18 month timeframe is based on the "minimum program" necessary to conduct the exploratory activities. Id.[2]

Meanwhile, Phase 2 of Vane's planned exploration is ignored entirely. Phase 2 will involve "follow-up drilling based on success of the proposed Phase 1 program" and will also take 12 to 18 months. Exh 15 at 19-1. Vane's Technical Report describes Phase II:

> A Phase II program will consist of follow-up drilling based on success of the proposed Phase 1 program. The scope of Phase II work will depend entirely upon the results of the initial drilling in Phase I, but may require multiple drillholes and perhaps more expensive directional drilling to define resource potentials.

Id. The Forest Service, however, makes no mention of Phase 2 of the exploration project in the March 2007 Scoping Notice or the December 2007 Decision Memo. NEPA does not permit the Forest Service to ignore and shield from public disclosure the entirety of the Vane Uranium Exploration Project. Blue Mountains, 161 F.3d at 1215 (holding single EIS was required to assess impacts of overall post-fire strategy).

To shoehorn the Vane Uranium Exploration Project into a categorical exclusion, the Forest Service had to claim the project was less than a year. However, even the agency's

[2] The December 2007 Decision Memo ignores the entirety of "Phase 1" of the exploration project, which include "gamma logging," geological mapping, and sample analyses. Exh. 15 at 19-1.

own March 2007 Scoping Notice recognized that "some additional exploration drilling may occur at the same sites which may, or may not, extend the duration of the entire project past one year." Exh. 2 at 5 (emphasis added). The "additional drilling," which will occur after the initial 1,500 foot holes are drilled, is what the Technical Report anticipates is necessary "to confirm [the breccia] pipes and define pipe shapes" during Phase 1. Exh. 15 at 19-1. In direct contrast to the Vane Technical Report, Vane's Plans of Operation, and the March 2007 Scoping Notice, the December 2007 Decision Memo summarily concludes "some additional exploration drilling may occur at the same claims sites within the one-year period." Exh. 1 at 2 (emphasis added). Despite the substantial weight of evidence demonstrating that the project will last longer than one year, the Forest Service unlawfully changed the language to match its chosen categorical exclusion.

In sum, the Vane Exploratory Drilling Project is not "routine" and will take longer than one-year. The Forest Service failed to properly consider all aspects and all phases of the Vane Uranium Exploration Project as well as Vane's other exploratory sites in the Tusayan Ranger District prior to relying on a categorical exclusion. For these reasons, Plaintiffs are likely to succeed on their First Claim.

2. The Vane Uranium Exploratory Project Is Likely To Cause Significant Environmental Impacts, Precluding The Use Of A Categorical Exclusion

The Forest Service cannot rely on a NEPA categorical exclusion if the action may have significant impacts individually or cumulatively. According to NEPA regulations, the categorically excluded action must "not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4 (emphasis added). The Forest Service's NEPA Handbook similarly provides that if "the proposed action may have a significant environment effect, prepare an EIS," and not a categorical exclusion. Exh. 12 at 4. As the Ninth Circuit has held, plaintiffs "need not show that significant impacts will in fact occur, but raising 'substantial questions' that a project may have significant impacts is sufficient." Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2005) (emphasis in original); Citizens for a Better Forestry v. Dept. of Agriculture, 481 F.Supp.2d 1059, 1090 (N.D. Cal. 2007) ("invocation of any CE is inappropriate if the

agency action may have significant effects on the environment as defined by the CEQ regulations."). "[A]ll that is required to render the CE [Categorical Exclusion] inappropriate is the possibility of significant effects." Citizens for a Better Forestry, 481 F.Supp.2d at 1088 (emphasis added). Further, extraordinary circumstances prevent reliance on a categorical exclusion. Jones v. Gordon, 792 F.2d 821, 827-28 (9th Cir. 1986). Extraordinary circumstances has been defined as those "in which normally excluded activities may have a significant effect." California v. Norton, 311 F.3d 1162, 1168 (9th Cir. 2002).

Here, as detailed below, the Forest Service was required to prepare an EA or EIS because the Vane Uranium Exploration Project may result in significant impacts.

First, Vane submitted and the Forest Service approved seven Plans of Operation for exploratory drilling activities at seven different sites on the Tusayan Ranger District -- identified as CP-3, CP-4, CP-6, CP-8, CP-10, CP-11, and Antelope Pipe. Exh. 1 at 2; Exh. 22-28. As a matter of law, these Plans of Operations demonstrate that a categorical exclusion was not appropriate for the Vane Uranium Exploratory Project. Forest Service regulations governing mining in a National Forest explicitly recognize the agency authority to regulate surface uses. 36 C.F.R.§ 228.1 (requiring Forest Service to "minimize adverse environmental impacts on National Forest System surface resources."). A Plan of Operations is the primary means of accomplishing this mandate. Notably, a mining company is required to submit a Plan of Operations "if the proposed operations will likely cause a significant disturbance of surface resources." Id. § 228.4(a)(3) (emphasis added). Conversely, when operations merely "might cause significant disturbance of surface resources," a developer need only submit a "notice of intent." Id. § 228.4(a). Accordingly, because separate Plans of Operation were submitted for each of the seven sites, the Vane Uranium Exploratory Project "will likely cause a significant disturbance of surface resources" and therefore does not qualify for a categorical exclusion.

Second, the Vane Uranium Exploratory Project may cause significant impacts to groundwater and the aquifer that supplies water to Coconino County communities and

some ranches.[3] As stated in the Decision Memo, each of the seven sites will drill uranium down to 2,000 feet. Exh. 1 at 2, 6. Two cross-sections in Vane's Technical Report depict the geological location of the uranium being explored. Exh. 15 at 6-10, Fig. 6.2 and 6.3. Both indicate that the uranium is found in the Hermit Shale and Supai Group formations, which are below the geologic layer called "Coconino Sandstone." Id. Accordingly, uranium drilling will pass through the Coconino Sandstone.

A recent report by the U.S. Geological Survey makes clear that Coconino Sandstone contains groundwater and portions of the C-aquifer. Exh. 12 at 19 ("Hydrogeology of the Coconino Plateau and Adjacent Areas, August 2007" (hereinafter "USGS 2007")). "The C-aquifer occurs mainly in the eastern of southern parts of the 10,300 square mile Coconino Plateau study area." Id. at 1 & 8 (narrative description and map depicting Coconino Plateau study area). "The C-aquifer is a water table aquifer for most of its occurrence with depths to water that range from a few hundred feet to more than 1500 feet." Id. at 1.[4] Accordingly, the C-aquifer is found at depths (up to 1,500 feet) and geologic formations (Coconino Sandstone) above the 2000-foot drilling proposed in the Vane Uranium Exploration Project. As a result, at a minimum, there are 'substantial questions' that the Vane Uranium Exploration Project may have significant impacts on groundwater. See Ocean Advocates, 402 F.3d at 865.

The Forest Service's claim that groundwater will not be impacted is baseless. The December 2007 Decision Memo provides that "The groundwater basin in this area is at a depth of 3000 feet; maximum drilling depth would be at 2,000 feet." Exh. 1 at 6; id; at 2 ("The deepest borehole (2000 feet) is well above the existing water table of approximately 3200 feet"). There is no support -- no cites to reports, studies, other documents, or even personal communications -- for this statement in the Decision Memo. Accordingly, the

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[3] NEPA's "significance factors" require the Forest Service to consider potential impacts to "public health and safety." 40 C.F.R. § 1508.27(b)(2).

[4] "The C aquifer, which overlies the Redwall-Muav aquifer, comprises of the Kaibab formation, the Coconino Sandstone, and rock units of the Supai Group mainly to the eastern and southern parts of the plateau." Exh. 12 at 2; id at 69 (noting Coconino Sandstone rock unit in eastern part of study area in "partly to fully saturated").

Forest Service's conclusion has no reasonable basis and is arbitrary and capricious. See Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (recognizing agency cannot rely on statements unsupported by hard data and analysis).

Third, the Vane Uranium Exploration Project may adversely impact various wildlife species in the project area, including the federally-endangered California condor. The Forest Service's NEPA Handbook identifies impacts to endangered species as extraordinary circumstances that preclude reliance on a categorical exclusion. Exh. 13 at 3 (FSH 1909.15, Section 30.3.2(g)). Similarly, under the CEQ's NEPA regulations, impacts to endangered and threatened species are presumed to be significant, and warrant preparation of an environmental impact statement. 40 C.F.R.§ 1508.27(b)(9).

Condors occur in the project area. They frequently congregated at the South Rim of the Grand Canyon. See Hunt, Movements of Introduced California Condors in Arizona in Relation to Lead Exposure at 79, 84-85.[5] Global Positioning System Tracking has demonstrated that condors also venture farther south from the South Rim and into the Tusayan Ranger District. Id. at 86, fig. 3. The Arizona Game and Fish Department's game management unit # 9 encompasses the Tusayan Ranger District, is part of the condor's range, and is part of a program to reduce condor lead poisoning from this area. Sullivan, Arizona's Efforts to Reduce Lead Exposure in California Condors at 109, 113, fig. 11.[6]

Although neither the Decision Memo or the Scoping Notice detail impacts to the condor, birds, or antelope, a February 6, 2008 Amendment to the Decision Memo imposes measures designed to protect these species from the Vane Uranium Exploration Project. Exh. 3. For the condor, the Forest Service added the following measure:

> If a condors shows up at a drill site, the Forest Service will be contacted immediately and any project-related activities likely to harm the condor will halt temporarily until the condor flies away or is driven away by permitted personnel.

Exh. 3 at 1. For antelope, at three drill sites, "no drilling activities will occur . . . from April 15 through June 15." Id. For "birds" to be protected from the Vane Uranium Exploration Project, "[open fluid pits will not only be fenced but will be netted to prevent

[5] www.peregrinefund.org/pdfs/ResearchLibrary/Hunt%20et%20al%202007.pdf.
[6] www.peregrinefund.org/pdfs/ResearchLibrary/Sullivan%20et%20al%202007.pdf

access." Id. Plaintiffs do not necessarily debate the adequacy of these measures, although their effectiveness has never been analyzed.[7] However, their inclusion highlights the fact the Forest Service never analyzed or disclosed to the public the impacts to the condor, antelope or birds prior to categorically excluding the Vane Uranium Exploration Project from NEPA review. Even in the February 2008 Amendment the Forest Service fails to detail the impacts that deserve mitigating. Absent such details, neither the Court nor the public can determine if the adopted mitigation measures are adequate. Similarly, the Forest Service provides no support for concluding that there will no impacts such that a categorical exclusion is appropriate. See Idaho Sporting Congress, 137 F.3d at 1151 (court rejected agency's conclusory statement that mitigation measures were sufficient where analytical and supporting data was lacking); National Parks & Conservation Ass'n, 241 F.3d at 734 ("speculative and conclusory statements were insufficient to demonstrate that the mitigation measures would render the environmental impacts so minor as to not warrant an EIS"); Western Land Exchange Project v. U.S. Bureau of Land Management, 315 F. Supp.2d 1068, 1094 (D. Nev. 2004) (mitigation plan violates NEPA because court could not evaluate whether it will be effective "in the absence of any 'supporting analytical data' whatsoever").

In addition, the manner in which the Forest Service added these measures two months after approving the Vane Uranium Exploration Project reveals the flaws in the agency's NEPA process. Only after the Decision Memo was issued did Arizona and federal wildlife agencies become aware of some of the potential wildlife impacts. As the February 2008 Amendment provides, [u]pon review of the [December 2007] decision memo, the Arizona Game and Fish Department and the U.S. Fish and Wildlife Service recommended three additional mitigation measures that would further protect wildlife from drilling activities." Exh. 3 at 1 (emphasis added). Like the two wildlife agencies, because

[7] The Forest Service's mitigation measure allows impacts up to the point of "likely to harming" a condor. "Likely to harm" under the Endangered Species Act means killing or significantly harassing an endangered species, which is strictly prohibited under section 9 of the ESA. However, activities that impact a condor at a level below "likely to harm" certainly "may" significantly impact condors.

the Forest Service never disclosed the project's impacts, the public was never made aware of the impacts.

Fourth, public controversy surrounding the Vane Uranium Exploration Project precludes the use of a categorical exclusion and supports a finding that it may cause significant impacts. See 40 C.F.R. § 1508.27(b)(4). Agencies must prepare environmental impact statements whenever a federal action is "controversial," that is, when there is "a substantial dispute [about] the size, nature, or effect of the major Federal action." Blue Mountains, 161 F.3d at 1212. When multiple parties are highly critical an agency's decision and disputes an agency's unsubstantiated conclusion of no impacts at all, this is "precisely the type of 'controversial' action for which an EIS must be prepared." Sierra Club v. U.S. Forest Serv., 843 F.2d 1190, 1193 (9th Cir. 1988); Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986) (rejecting use of categorical exclusion when public controversy existed).

In California v. Norton, the Ninth Circuit noted the proposed lease suspensions were the subject of public controversy, as evident by letters from the Governor of California and both Senators "on behalf of the people of California" expressing strong opposition. 311 F.3d at 1176 (noting history of oil spills). There is similar strong public opposition to uranium activities on the Tusayan Ranger District. The Coconino County Board of Supervisors passed a Resolution on February 5, 2008 "opposing uranium development on lands in the proximity of the Grand Canyon National Park and its watersheds." Exh. 5 at 1. The County recognized that "Grand Canyon National Park is an economic engine whose 5 million visitors per year contribute significantly to the economy of Coconino County" and that prior uranium operations "have contaminated creeks and aquifers providing public drinking water." Id. at 1. The County opposed the Vane Uranium Exploration Project in the Resolution in part because it is "within two miles" of the Park's boundaries. Id.

On March 6, 2008, citing the County's lead and noting nationwide press on the issue, Arizona Governor Janet Napolitano requested that the Secretary of the Interior withdraw all federal lands surrounding the Grand Canyon from uranium exploration and

development. Exh. 4 at 1. Concerned about "economic, cultural and environmental repercussion" and the lack of an "overall environmental impact analysis" on uranium activities around the Park, the Governor noted the "high level of public concern." Id.

On March 17, 2008, Arizona Congressman Raul Grijalva -- Chairman of the Subcommittee on National Parks, Forests, and Public Lands of the House Natural Resources Committee -- introduced legislation to preclude uranium activities on lands adjacent to the Grand Canyon. Exh. 7. The Congressman intends to hold hearings on the legislation, which includes protections for 327,367 acres in the Tusayan Ranger District, in Flagstaff on March 28. Making the case for his legislation, Congressman Grijalva's press release remarkes on the approval for the Vane Uranium Exploratory Project: "The drilling is taking place on the Kaibab National Forest under what are known as categorical exclusions from the National Environmental Policy Act with very little environmental review and without public comment or involvement." Id.

Thus, every level of government -- local, state and federal -- has opposed the Vane Uranium Exploration Project. The Arizona Daily Star and Tucson Citizen both issued editorials opposing the Vane Uranium Exploration Project. Exh. 6. Based on the fact that this Project has generated significant opposition from elected officials throughout Arizona, the Forest Service violated NEPA by relying on a categorical exclusion for a project generating such high public controversy. See California v. Norton, 311 F.3d at 1176.

3. The Forest Service Violated NEPA By Ignoring Cumulative Impacts

NEPA requires the Forest Service to consider the cumulative impacts before categorically excluded an action from NEPA review. 40 C.F.R. § 1508.4 (defining categorical exclusions as "category of actions which do not individually or cumulatively have a significant effect on the human environment"); 40 C.F.R. § 1508.27(b)(7); West, 206 F.3d at 928-29; Citizens for a Better Forestry, 481 F.Supp.2d at 1089. Cumulative impacts include impacts of "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. A cumulative impact analysis must provide a "useful

analysis" that includes a detailed and quantified evaluation of cumulative impacts to allow for informed decision-making and public disclosure. Kern v. U.S. Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 1118 (9th Cir. 2004) (holding "[t]he Corps' findings about cumulative impacts [in an EA] were perfunctory and conclusory and do not provide a helpful analysis of past, present, and future projects"). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. Earth Island Institute, 351 F.3d at 1306-7.

The NEPA obligation to consider cumulative impacts extends to all "present" and "reasonably foreseeable" future projects, including when a project is part of larger program or an identifiable series of projects. Blue Mountains, 161 F.3d at 1214-15 (requiring Forest Service to consider cumulative impacts of all logging projects set forth in regional strategy in NEPA document for first project); Kern, 284 F.3d at 1076; Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (finding cumulative analysis on land exchange for one development failed to consider impacts from other developments potentially subject to land exchanges).

Here, the Forest Service was well aware of other present and reasonably foreseeable uranium exploration proposals. For example:

- Vane's August 2007 Technical Report explains that in addition to the initial 10 sites, there are 28 additional sites in Vane's portfolio that will also need to be explored, including 23 additional sites within the Tusayan Ranger District. Exh. 15 at 3-2 - 3-3.[8]
- Vane submitted six Plans of Operation to the Forest Service for additional claims on October 31, 2007. Exh. 29 at 1, 10, 18, 26, 34, 42.[9]
- The Forest Service's "Schedule of Proposed Actions" on February 1, 2008, identified two other Vane "Exploratory Projects," one with 23 additional claims and one with three additional claims. Exh. 20 at 3.
- As explained above, Vane acknowledges that its Vane Uranium Exploration Project for the initial seven sites will proceed in two phases, which is described

[8] A Vane press release dated October 10, 2007 touts Vane's "Northern Arizona Breccia Pipe Exploration Project" as including "38 breccia pipe properties" "offer[ing] an excellent suite of exploration targets," that together define "a well planned and focused exploration program." Exh. 16.

[9] Similarly, a Forest Service email states "[w]e have already received another Plan of Operation from Vane Minerals for exploratory drilling at 6 sites." Exh. 14 at 1.

in an August, 2007, Technical Report. Exh. 15 at 19-1.[10]

- On December 21, 2007, DIR Exploration submitted an "amended" Plan of Operations, detailing its proposal to conduct exploratory uranium drilling at twenty separate holes on the Tusayan Ranger District, with the earliest start date listed as May 1, 2008. Exh. 21 at 1; Exh. 20 at 3.
- On January 22, 2008, Neutron Energy submitted to the Forest Service its Operating Plan to drill four to six deep holes to explore for uranium on the Tusayan Ranger District. Exh. 30 at 3; Exh. 20 at 3.
- The Forest Service has also already met with Denison Mines to discuss plans concerning the Canyon Uranium Mine, also located on the Tusayan Ranger District. Exh. 20 at 3.

In fact, as early as January 2007, the Forest Service anticipated an increase in uranium exploration-related projects on the Kaibab National Forest, as uranium claims had already increased from 50 to more than 500. Exh. 19 at 3. By the end of December 2007, the Forest Service "had over 1600 mining claims located on the Tusayan Ranger District for uranium." Exh. 14.

In short, despite acknowledging an increase in uranium exploration activities by Vane and other mining companies, and the fact it was already receiving additional Plans of Operation for other drilling sites on the same Ranger District, the Forest Service entirely ignored cumulative impacts in the December 2007 Decision Memo in violation of NEPA. The multiple drilling proposals in the same Ranger District "raise substantial questions that they will result in significant environmental impacts," thereby requiring an EIS. See Blue Mountains, 161 F.3d at 1215.

Had the Forest Service conducted the required cumulative impacts analysis, it could not have relied on a categorical exclusion. For example, to complete exploration activities on just one uranium exploration site in Northern Arizona, 253 boreholes had to be drilled. Robinson Dec. ¶ 6, Exh. B at 5 (Energy Fuels has explored Arizona 1 pipe with total of 253 drill holes). This is because before mining can occur, exploration activities must ensure the uranium is of sufficient quantity and quality to demonstrate a "valuable mineral deposit" exists. Accordingly, in Northern Arizona, "50-250 exploratory boreholes" are necessary to

[10] The Vane Plan of Operations also notes that future phases are anticipated. See, e.g., Exh. 22 at 7 ("All equipment . . .will be removed at the end of initial operations and at the end of each phase of subsequent operations."); Exh 23 at 3 ("additional drilling may be required during the initial phase with subsequent drilling over 2-3 seasons").

confirm the existence of a "valuable mineral deposit." Id. at ¶ 6. Given the number of drillholes needed to explore for uranium at one site and the number of sites that are now being explored, the cumulative impacts cannot be ignored, especially considering the need for radioactive waste pits and transportation to and from the drill sites.

4. The Forest Service Violated NEPA By Relying On A Categorical Exclusion That Itself Never Underwent NEPA Review

As the Ninth Circuit recently ruled, an agency's decision to establish a category of actions that are excluded from full NEPA review is itself an action subject to NEPA. Sierra Club v. Bosworth, 510 F.3d 1016, 1027 (9th Cir. 2007) ("The Forest Service must perform this impacts analysis prior to promulgation of the CE."). Of particular importance, "the Forest Service must perform a programmatic cumulative impacts analysis for the . . . CE." Id at 1029. In Bosworth, the Ninth Circuit invalidated the Forest Service's reliance on a categorical exclusion that had not undergone full NEPA review and enjoined projects approved pursuant to that categorical exclusion. Id. at 1026-1030.

The same is true here. The Forest Service never performed a direct, indirect or cumulative impacts analysis on Category 8 -- routine, short-term mining investigations and their incidental support activities -- and the related provisions in Chapter 30 of the Forest Service Handbook regarding extraordinary circumstances.[11] As a result, impacts at the local, forest, state, and regional level from the mineral investigation activities authorized or covered by Chapter 30 and Category 8 were never evaluated. As in Bosworth, the Forest Service never reviewed the significance factors required by NEPA in assessing whether its action -- adopting a categorical exclusion and the extraordinary circumstances provision -- may have significant impacts. Accordingly, because adoption of Category 8 and Chapter 30 violated NEPA, the Forest Service's reliance on those provisions of its NEPA Handbook for the Vane Uranium Exploration Project also violates NEPA.

[11] The original version of Forest Service Handbook 1909.15, Section 31.2, including Category 8, was contained in a Federal Register Notice. 57 Fed Reg. 43180, 43209-10 (September 18, 1992). This Handbook section has been revised and reissued many times since then. In 2002, the Chapter was amended, in part, to change the criteria for the application of "extraordinary circumstances" related to categorical exclusions. 67 Fed. Reg. 54622 (August 23, 2002).The latest revision to Chapter 30 occurred pursuant to a Federal Register Notice on February 15, 2007, 72 Fed. Reg. 7391.

B. The Forest Service Violated The Appeals Reform Act By Refusing To Allow Administrative Appeals For The Vane Uranium Exploration Project

The Appeals Reform Act grants individuals the right to administratively appeal Forest Service projects that implement "land and resource management plans" ("forest plans"). 16 U.S.C. § 1612 note. For the Vane Uranium Exploration Project, the Forest Service relied on 36 C.F.R. § 215.12 to preclude anyone from filing an administrative appeal. Exh. 1 at 9. This regulation, however, has already been held to be invalid as contrary to the ARA and enjoined nationwide. As a result, the Forest Service's reliance on this regulation for the Vane Uranium Exploration Project is unlawful. Plaintiffs are likely to succeed on their ARA claim.

1. The Appeals Reform Act And Nationwide Injunction

Prior to 1992, the Forest Service provided an administrative appeal process for all Forest Service decisions that were documented in either a "decision memo" (meaning those projects "categorically excluded" from NEPA review); a "decision notice" (meaning those projects analyzed in a NEPA "environmental assessment"); or a "record of decision" (meaning those projects assessed in a NEPA "environmental impact statement"). See Heartwood v. U.S. Forest Service, 316 F.3d 694, 696-97 (7th Cir. 2003). In response to a Forest Service proposal to eliminate administrative appeals for project-level decisions, Congress enacted the ARA to provide the public with a statutory right to submit comments and administratively appeal Forest Service projects. Id. at 697; 16 U.S.C. § 1612 note.

The ARA directs the Forest Service to establish a notice and comment process "for proposed actions of the Forest Service concerning projects and activities implementing [forest plans]," and to modify the administrative appeal procedures for the decisions concerning these same projects. 16 U.S.C. § 1612(a). The ARA's notice, comment, and administrative appeal requirements, therefore, apply to all Forest Service projects and activities that implement forest plans. Id.; Wilderness Society v. Rey, 180 F. Supp. 2d 1141, 1148 (D. Mont. 2002). Here, the Vane Uranium Exploration Project implements the Forest Plan for the Kaibab National Forest. Exh. 1 at 1, 8 (noting consistency with Forest Plan); Exh. 2 at 3 (same).

In its initial ARA regulations, the Forest Service excluded from administrative appeals most types of projects that were categorically excluded from NEPA review. Heartwood, 316 F.3d at 697. A 1999 lawsuit challenging these regulations resulted in a settlement agreement whereby the Forest Service agreed to allow administrative appeals for additional types of projects, including projects relevant to the categorical exclusion the Forest Service relied upon for the Vane Uranium Exploration Project. Id. at 694; 65 Fed. Reg. 61302 (Oct. 17, 2000) (listing projects requiring administrative appeal process).

Notwithstanding the settlement agreement, in its 2003 revisions to the ARA regulations, the Forest Service again tried to preclude categorically excluded projects from administrative appeals. 68 Fed Reg. 33,581 (June 4, 2003); 36 C.F.R. § 215.12(f) (2003). In adjudicating these revisions, the Ninth Circuit held the ARA "does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decision implementing Forest Plans." Earth Island Institute v. Ruthenbeck, 490 F.3d 687, 697 (9th Cir. 2007), certiorari granted by Summers v. Earth Island Institute, 2008 U.S. LEXIS 1097 (U.S., Jan. 18, 2008). The Ninth Circuit declared the Forest Service's regulation exempting "categorically excluded" projects from administrative appeals invalid and upheld a nationwide injunction prohibiting the agency from applying the regulation. Id. at 699.

2. The Forest Service Improperly Relied On 36 C.F.R. § 215.12(f) To Deny Plaintiffs Their Right To Appeal The Vane Uranium Exploration Project

Despite the nationwide injunction issued by the Ninth Circuit, the Forest Service has inexplicably relied on that same regulation to deny Plaintiffs and the public the opportunity to administratively appeal the Vane Uranium Exploration Project. Exh. 1 at 9 (stating "[t]his decision is not subject to a higher level of administrative review or appeal pursuant to 36 CFR 215.12."). Simply put, the Forest Service's reliance on an already enjoined regulation, without explanation, is arbitrary, capricious, and in violation of the ARA, 16 U.S.C. § 1612 note. Because the Forest Service relied upon an enjoined regulation in approving the Vane Uranium Exploration Project, Plaintiffs are likely to succeed on the merits on their Second Claim.

3. The Forest Service Violated The Previously Existing ARA Regulations and Settlement Agreement By Failing To Provide For An Administrative Appeal

When a court invalidates and enjoins an agency's rule, as the Ninth Circuit has done with 36 C.F.R. § 215.12(f), the rule previously in force is reinstated. Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). Therefore, for projects that are categorically excluded from NEPA, the Forest Service must consider the Heartwood settlement agreement (65 Fed. Reg. 61302) to determine whether an administrative appeal is required. For the Vane Uranium Exploration Project, however, the Forest Service unlawfully relied on the enjoined regulation, ignoring the regulatory scheme previously in place.

Had the Forest Service considered the applicable law, the agency could not have precluded an administrative appeal for the Vane Uranium Exploration Project. The categorical exclusion the Forest Service relied upon -- FSH 1909.09.15, Section 31.2, Category 8 -- identifies the same three types of projects included in 65 Fed. Reg. 61302, namely: (1) the gathering of geophysical data using shorthole, vibroseis, or surface charge; (2) trenching to obtain evidence of mineralization; and (3) clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities. Compare Exh. 13 at 10 (FSH 1909.09.15, Section 31.2, Category 8), with 65 Fed. Reg. 61302. The Forest Service, however, entirely failed to even consider whether the Vane Uranium Exploration Project includes any of the listed activities for which an administrative appeal is required, in violation of the ARA. See Motor Vehicles, 463 U.S. at 43 (holding arbitrary agency decision that fails to consider relevant factors). Further, these three types of enjoined activities are listed as examples in Category 8, such that all Category 8 activities are properly covered by the injunction.

Moreover, based on the limited description of the Vane Uranium Exploration Project, at least one of the activities that requires an administrative appeal is present here. That is, an administrative appeal is required for projects involving "[c]learing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities." 65 Fed. Reg. 61,302. For the Vane Uranium Exploration

Project, the March 2007 Scoping Notice states that limb cutting and small-diameter tree removal will occur on as as-needed basis to clear access for roads and drill pad locations (Exh. 2 at 5-6) and the December 2007 Decision Memo states that reclamation will include reseeding or replanting with native vegetation. Exh. 1 at 3; see also Exh. 26 at 2 (Plan of Operations for CP-10) (stating some small trees may be cleared, and fallen trees removed, to allow access). Notably, prior to the December 2007 Decision Memo, the Forest Service recognized as much. In its March 2007 Scoping Notice, the Forest Service announces that the Vane Uranium Exploration Project is "Appeal Eligible," and sets forth the administrative appeal procedures. Exh. 2 at 1-2.

In sum, had the Forest Service considered the regulatory scheme previously in place, and not unlawfully relied on an already-enjoined regulation, it would have realized that an administrative appeal was required. The failure to do so was arbitrary, capricious, and in violation of the ARA and, thus, Plaintiffs are likely to succeed on their ARA claim.

## II. PLAINTIFFFS' INTERESTS AND THE PUBLIC INTEREST WILL BE IRREPARABLY HARMED ABSENT THE REQUESTED INJUNCTION

### A. Plaintiffs' Interest Will Suffer Irreparable Harm If The Project Proceeds

Environmental injury is generally irreparable and favors the issuing an injunction. Idaho Sporting Congress v. Alexander, 222 F.3d 562, 569 (9th Cir. 2000). As the Supreme Court held, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. v. Vill. of Gambell, 480 U.S. 531, 545 (1987; Sierra Club. v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007).

As explained in the Declaration of William P. Robinson,[12] the Vane Uranium Exploration Project involves "air and wet drilling." Radioactive dust, drill cuttings and waste pits are likely to result in the release of toxic heavy metals and other hazardous

[12] Mr. Robinson is the Research Director at the Southwest Research and Information Center, and is also an Environmental Policy and Technology Assessment Consultant for government, corporate, tribal, and non-governmental organizations. See Robinson Decl., Exh. A. A list of his selected publications is included with his resume. Id.

substances to the environment. Robinson Decl. ¶ 12. Wildlife and plants are most likely to be harmed by exposure to these radioactive materials. According to the Forest Plan for the Kaibab National Forest, "the principle elk calving, deer and pronghorn antelope fawning, and turkey nesting habitat in the Tusayan District are located here." Forest Plan at 36 (Chapter 4).[13] The release of radioactive materials and other potentially toxic heavy metals as well as toxic concentrations of petroleum products and hydrocarbons from heavy equipment is likely to harm these animals. Robinson Decl. ¶ 13-15. This is particularly harmful to very young animals during important calving, nesting and fawning season, when the health effects of such exposure could be significant and irreparable. Id.; see also id. ¶ 21-23 also noting harmful effects from noise, light, and increased traffic).

In addition, the radioactive waste pits are likely to be an attractive nuisance to birds and animals near the exploration sites. Drinking water is rare in the Tusayan Ranger District as there are no perennial streams. Robinson Decl. ¶ 24; Forest Plan at 36. The exposure to bentonite – a clay material often associated with exploration drilling activity -- "if of particular concern because it is a 'swelling clay' that, if ingested can cause irreparable or irreversible harm, including death, to animals or birds that ingest drilling fluids or solids containing bentonite." Robinson Decl. ¶ 25.

Further, drilling activities may also cause harm to groundwater, especially drilling sites in the northeast area of the project, and the Little Colorado River. The 2007 USGS report indicates that a 2,000-foot drillholes will pass through the C aquifer where it is "fully to partly saturated." Exh. 12 at 69. Moreover, water in the C aquifer moves laterally and downward until in reaches the Little Colorado River, where is discharges near Blue Springs. Exh. 12 at 61.

Finally, Plaintiffs' ability to recreate in the area will be significantly harmed. McCarthy Dec. ¶¶ 4-6; McKinnon Dec. ¶¶ 5-7; Babbitt Dec. ¶¶ 5-7.

[13] Available at: http://www.fs.fed.us/r3/kai/plan-revision/forestplan.shtml.

B. Plaintiffs Will Suffer Irreparable Procedural Harm

Plaintiffs will also suffer irreparable procedural harm from the Forest Service's failure to comply with NEPA procedures. "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." High Sierra Hikers, 390 F.3d at 642 (citation omitted). As the Ninth Circuit ruled, the "ultimate harm NEPA seeks to prevent" is "the risk of damage to the environment that results if the agency fails to properly and thoroughly evaluate the environmental impacts of a proposed project." Laguna Beltway v. U.S. Dept. of Transportation, 42 F.3d 517, 527 (9th Cir. 1994); Davis v. Mineta, 302 F.3d 1104, 1114-1115 (10th Cir. 2002) ("In mandating compliance with NEPA's procedural requirements as a means of safeguarding against environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment.").[14]

Here, the Vane Uranium Exploration Project should be enjoined because that is the only way for the Court to ensure NEPA's goals and procedures are achieved. See Robertson, 490 U.S. at 349. NEPA must be complied with "before any irreversible and irretrievable commitment of resources is made." Norton, 311 F.3d at 1175. NEPA requires compliance "before decisions are made and before actions are taken" (40 C.F.R. § 1500.1(b)) to ensure "the agency will not act on incomplete information, only to regret its decision after its too late to correct." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989); see also 40 C.F.R. §§ 1501.2, 1502.5. Implementing the Vane Uranium Exploration Project is a commitment of resources that cannot be undone.

That NEPA's violations are causing irreparable harm is particularly true in this case because unlawful use of a categorical exclusion prevented an evaluation and public disclosure of the environmental impacts. See West, 206 F.3d at 930 (stating plaintiff "has surely been harmed by the application of a [categorical exclusion] since it precluded the

[14] The same type of procedural harm follows violations of the ARA. The ARA appeal process provides "a means for interested participants to question the accuracy of assumptions or science relied upon in the agency decision," and "assures compliance with applicable standards, science, and sound analysis." Wilderness Society v. Rey, 180 F.Supp. 2d 1141, 1148-49 (D. Mont. 2002).

kind of public comment and participation NEPA requires"). The Forest Service never analyzed the environmental impacts before issuing its December 2007 Decision Memo. The agency's March 2007 Scoping Notice identifies the action, but never reveals the impacts. See McKinnon Dec. ¶ 8 (stating Forest Service's failure to disclose prevented Plaintiffs from being "meaningfully involved and [able to] provide comments"). Further, Plaintiffs are suffering from additional procedural harm because the Forest Service never conducted any NEPA review when it issued, amended, and revised the Forest Service Handbook categorical exclusion provisions relied upon here. As acknowledged by the Supreme Court, one of NEPA's primary purposes is to inform and involve the public in government decisions that will impact the human and natural environment. Robertson, 490 U.S. at 370 (NEPA's purpose is broad public dissemination of relevant information); see 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA"). In short, the Forest Service failed to meet both the letter and spirit of NEPA by not providing the public an opportunity to comment on the Vane Uranium Exploration Project's environmental impacts, causing irreparable injury.

C. The Public Interest Weighs In Favor Of The Requested Injunction

The public interest also warrants issuing an injunction staying implementation of the project. See Caribbean Marine Servs. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). First and foremost, uranium exploration and development threatens areas surrounding the Grand Canyon. The Grand Canyon is a historic icon and people from across the country and around the world value this geological phenomenon. Threats to the Grand Canyon compelled local, state and federal elected officials to take a stand against exploration and mining activities in the area. Exh. 4-5. Windborne dust carrying radioactive material could impact tourism. See id.; see Robinson Dec. ¶¶ 35-37 (suggesting decreased tourism due to press received on issue); Exh. 15 at 4-4 ("The economy is heavily dependent on tourism, as the nearby Grand Canyon National Park is one of the most visited national parks in the U.S.").

Moreover, "[t]he preservation of our environment, as required by NEPA … is clearly in the public interest." Sierra Club. v. Bosworth, 510 F.3d 1016, 1033 (9th Cir. 2007) (quoting Earth Island Inst. v. U.S. Forest Serv., 442 F.3d at 1177. Allowing an environmentally damaging project to proceed without NEPA compliance "runs contrary to very purpose of the statutory requirement." NPCA, 241 F.3d at 738.

Lastly, there is plenty of uranium available to satisfy the country's demand. Uranium has been stockpiled and there is a 50-year supply waiting to be used. Robinson Dec. 54-56 ("Sufficient uranium has been identified around the globe to address more than 50 years of uranium demand at current uranium consumption rates without any contribution from Vane Mineral properties in the Arizona Strip.").

## III. THE BALANCE OF HARMS WARRANTS AN INJUNCTION

Any alleged harm to the Forest Service or the mining company does not outweigh the irreparable harm to Plaintiffs and the environment. First, the Forest Service's interests would not be harmed by a suspension of their project approvals. As the Ninth Circuit has held, administrative burdens on government agencies do not outweigh the threat of irreparable environmental harm. American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966 (9th Cir. 1983) ("harm to Inyo [County]'s planning processes was not comparable to the harm enjoining the Plan would cause to the [environment] and the public interest"). Further, there is a strong interest in ensuring government compliance with environmental laws. See e.g., Earth Island, 351 F.3d at 1308-09; Kootenai Tribe v. Veneman, 313 F.3d 1094, 1125 (9th Cir. 2002).

Second, Vane would not be irreparably harmed by an injunction. A delay in exploration activities does not weigh against an injunction. See Save Our Sonoran, 227 F.Supp.2d at 1115, aff'd, 381 F.3d 905, 914 (9th Cir. 2004) (delay in project and possible financial loss did not offset environmental destruction); Alaska Center for the Environment v. West, 31 F.Supp.2d 711, 723 (D. Alaska 1998) (noting longer permit processing time was "not of consequence sufficient to outweigh irreversible harm to the environment"); Seattle Audubon, 771 F. Supp. at 1096 (unlike permanent environmental harm, "economic

effects of an injunction are temporary and can be minimized in many ways"). To the extent delay may result in some financial loss, courts have held that economic harm is not irreparable. Sampson v. Murray, 415 U.S. 61, 90 (1974); Los Angeles Memorial Coliseum Commission, 634 F.2d at 1202; National Parks, 241 F.3d at 738 ("loss of anticipated revenues ... does not outweigh the potential irreparable damage to the environment"). Accordingly, where there is a threat of irreparable environmental harm, "more than pecuniary harm must be demonstrated" to avoid a preliminary injunction. Northern Alaska, 803 F.2d at 471 (finding irreparable environmental harm outweighed competing harm to miners despite potential for "real financial hardship"); Save Our Sonoran, 408 F.3d at 1124-1125 (affirming preliminary injunction because, while developer "may suffer financial harm," without injunction, "unlawful disruption to the desert is likely irreparable"); see also Wilderness Society v. Tyrrel, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988) ("economic loss cannot be considered compelling if it is to be gained in contravention of federal law").

In addition, according to postings on Vane's website, the company is exploring and developing other uranium deposits in the region, including locations outside the Kaibab National Forest, in Lisbon Valley, Utah and the Uravan Mineral Belt in Southwest Colorado. Exh. 18 at 1. As the company's press release noted: "These [seven target sites] will be added to the current drilling schedule to be drilled in 2008." Exh. 17. Further, Vane's Technical Report notes that exploration at sites other than the seven at issue in this case have a greater likelihood to be successful. Exh. 15 at 3-1; Robinson Decl., ¶ 40 (explaining that Vane's proposed sites on the Tusayan Ranger District "have very little history of uranium exploration compared to other Vane Mineral properties.").

Moreover, there is no place to mill the uranium ore. There are only two uranium mills in the United States. Vane would have to transport the uranium to the mill site in Blanding, Utah. Exh. 15 at 18-1 ("Any potential discovery and development on Vane Properties would likely require shipment of ore to the existing White Mesa mill in

Blanding, Utah."). However, that mill has no capacity for more uranium ore. Robinson Decl. ¶ 44-48; see also Exh. 15 at 18-1 (recognizing competition at mill site).

## IV. PLAINTIFFS REQUEST THAT THE COURT WAIVE ANY BOND REQUIRMENT

If a temporary restraining order or preliminary injunction is granted, Plaintiffs respectfully request that the Court waive the bond requirements or impose a nominal bond. Under Federal Rule of Civil Procedure 65(c), courts have such discretion. Wilderness Society v. Tyrrel, 701 F.Supp. 1473, 1492 (E.D. Cal. 1988), rev'd on other grds, 918 F.2d 813 (9th Cir. 1990), quoting Natural Resources Defense Counsel v. Morton, 337 F.Supp. 167, 168 (D.D.C. 1971). In cases where plaintiffs are public interest organizations or individual citizens seeking a preliminary injunction to protect the environment, courts routinely waive the bond requirement or impose a nominal bond. See, e.g., Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999); People of the State of California v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985); Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975); League of Wilderness Defenders v. Zielinski, 187 F. Supp. 2d 1263, 1272 (D. Ore. 2002); League of Wilderness Defenders-Blue Mountains Biodiversity Proj. v. Forsgren, 184 F. Supp. 2d 1058, 1071 (D. Ore. 2002);

Congress intended that private citizens be able to enforce environmental statutes like NEPA and ensure that governmental agencies are held to account when they violate the law. Tahoe Regional Planning Agency, 766 F.2d at 1325 ("special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute"); Friends of the Earth, 518 F.2d at. 323. Requiring a substantial bond would "seriously undermine the mechanisms in NEPA [and the Appeals Reform Act] for private enforcement" of law and likely would have a chilling effect on litigation to protect the environment and the public interest. Tahoe Regional Planning Agency, 766 F.2d at 1325 (requiring no bond); Friends of the Earth, 518 F.2d at 323 (reversing district court's unreasonable bond because it would thwart citizen actions); Wilderness Society, 701 F.Supp. at 1492 ("unwilling to close the courthouse door in public interest litigation by

imposing a burdensome security requirement" even if others had "significant economic stake").

In addition, Rule 65(c) is based on the theory of unjust enrichment. As such, a plaintiff should not benefit financially from the wrongful granting of preliminary relief. Where, as here, plaintiffs gain no pecuniary interest from an injunction, there is no unjust enrichment concern and no bond should be required. See Wisconsin Heritages v. Harris, 476 F. Supp. 300, 302 (E.D. Wisc. 1979) (no bond required where plaintiff "is a nonprofit organization with no apparent financial stake in the outcome of this suit."); NRDC v. Morton, 337 F.Supp. 167, 169 (D.D.C. 1971). Finally, the likelihood of success on the merits tips in favor of a minimal bond or no bond. Friends of the Earth, 518 F.2d at 323.

## CONCLUSION

Plaintiffs respectfully request that the Court grant its motion for a temporary restraining order and preliminary injunction enjoining the Forest Service from proceeding with any further implementation of the Vane Uranium Exploration Project on the Tusayan Ranger District.

Respectfully submitted,

Dated this 24th day of March 2008

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